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# The Road to Hell was Paved with A Good Faith Belief: Why the Supreme Court Correctly Rejected the Good Faith Belief in the Invalidity of a Patent Defense for Dangerously Narrowing Induced Infringement Liability

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NOTES

**THE ROAD TO HELL WAS PAVED WITH A GOOD FAITH BELIEF: WHY THE SUPREME COURT CORRECTLY REJECTED THE GOOD FAITH BELIEF IN THE INVALIDITY OF A PATENT DEFENSE FOR DANGEROUSLY NARROWING INDUCED INFRINGEMENT LIABILITY**

*Sidney C. Eberhart\**

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## I. INTRODUCTION

The evil that is in this world almost always comes of ignorance,  
and good intentions may do as much harm as malevolence if they  
lack understanding.

*Albert Camus*<sup>1</sup>

A common theory about the law is that it should seek to only criminalize behavior that is motivated by malicious intent.<sup>2</sup> This theory is fettered to the core belief that inherently good people have good intentions, and therefore they should not be held accountable for mere mistakes.<sup>3</sup> While this might seem like an innocent and idealistic notion, it is exploited by those who seek to circumvent the law and rationalize their illegal behavior.<sup>4</sup>

Multiple areas of law that require a specific knowledge standard have grappled with the notion of “good faith.” The reoccurring question asked is whether good intentions negate the knowledge requirement of causes of action that require a showing of specific intent.<sup>5</sup> Patent infringement in the civil forum is no exception, and the Supreme Court has put to rest the same issue in the context of induced infringement claims.<sup>6</sup>

In an induced infringement claim, a patent owner asserts that the opposing party has facilitated or otherwise indirectly encouraged third parties to infringe upon the patent owner’s rights.<sup>7</sup> Indirect infringement commonly occurs when a manufacturer or advertiser sells a product and includes information about how to assemble that product in a way that would directly infringe a patent held by someone else.<sup>8</sup> Induced infringement claims against the manufacturer or advertiser are critical causes of action for patent owners because it would be impractical and inequitable for the patent holder to locate every purchaser of the patented product.<sup>9</sup> In this way, induced infringement claims provide a

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<sup>1</sup> ALBERT CAMUS, *THE PLAGUE* 120 (Alfred A. Knopf ed., 21st ed. 1980).

<sup>2</sup> See Adam L. Alter, Julia Kernochan & John M. Darley, *Morality Influences How People Apply the Ignorance of the Law Defense*, 41 *LAW & SOC’Y REV.* 819 (2007); see also O.W. HOLMES, JR., *THE COMMON LAW* 142 (Boston: Little, Brown & Co. eds., 1881).

<sup>3</sup> Alter, Kernochan & Darley, *supra* note 2, at 819–20.

<sup>4</sup> William H. Theis, “Good Faith” as a Defense to Suits for Police Deprivations of Individual Rights, 59 *MINN. L. REV.* 991, 992 (1974).

<sup>5</sup> William Roth, *General vs. Specific Intent: A Time for Terminological Understanding in California*, 7 *PEPP. L. REV.* 67 (1980).

<sup>6</sup> *Commil USA, LLC v. Cisco Sys. (Commil I)*, 720 F.3d 1361 (Fed. Cir. 2013), *vacated*, 135 S. Ct. 1920 (2015).

<sup>7</sup> Timothy R. Holbrook, *The Intent Element of Infringement*, 22 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 399, 400 (2005).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

means for patent holders to assert their rights and collect damages when they otherwise could not.<sup>10</sup> Recently, the Supreme Court rejected a new affirmative defense against induced infringement claims based on the defendant's good faith belief in the patent's invalidity. The Court held that this good faith belief defense could potentially narrow the scope of liability, and allow inducers to escape liability altogether.<sup>11</sup>

On June 25, 2013, the United States Court of Appeals for the Federal Circuit affirmed the grant of a partial new trial and remanded a judgment of the U.S. District Court for the Eastern District of Texas to allow the District Court to reconsider the issue of indirect infringement in *Commil USA, LLC v. Cisco Systems*.<sup>12</sup> Cisco, the alleged infringer of U.S. Patent No. 6, 430, 395, appealed the decision of the U.S. District Court for the Eastern District of Texas primarily on the basis of an erroneous jury instruction.<sup>13</sup> That instruction suggested that the jury could find Cisco liable for inducing infringement if "Cisco actually intended to cause the acts that constitute direct infringement and that Cisco knew or should have known that its actions would induce actual infringement."<sup>14</sup>

The Federal Circuit panel justified vacating the judgment of the trial court for incorrectly instructing the jury to find Cisco liable for inducement based on a "mere negligence" standard rather than the correct standard, which requires actual knowledge.<sup>15</sup> While the issue with the jury instruction was the central basis for appeal, Cisco also alleged that the District Court improperly excluded evidence, which would have shown that Cisco had a good faith belief in the patent's invalidity.<sup>16</sup>

Cisco reasoned, and the Federal Circuit ultimately held, that evidence of a good faith belief in the invalidity of a patent is relevant for determining whether a plaintiff has met the specific intent prong of an induced infringement claim.<sup>17</sup> Therefore, the jury was entitled to consider any evidence showing a good faith belief, with the understanding that the evidence would not "preclude a finding

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<sup>10</sup> *Id.*

<sup>11</sup> *Commil USA LLC v. Cisco Systems, Inc. (Commil II)*, 135 S. Ct. 1920, 1920 (2015).

<sup>12</sup> Brief for Plaintiff-Appellee at 5, *Commil USA LLC v. Cisco Systems, Inc. (Commil I)*, 720 F.3d 1361 (2014) (No. 2012-1042) (2012 WL 1864604, at \*57) [hereinafter Brief for Plaintiff-Appellee]. The Federal Circuit ruled that evidence of a good faith belief in the invalidity of the patent was relevant for determining induced infringement claims.

<sup>13</sup> *Id.* at 1365.

<sup>14</sup> *Id.* at 1366.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1367.

<sup>17</sup> *Id.*

of induced infringement.”<sup>18</sup> The Court implicitly held that inducers could raise a new affirmative defense: a good faith belief in the invalidity of a patent.<sup>19</sup>

This Note argues that the Supreme Court correctly rejected the Federal a Circuit’s holding and denied the creation of a new affirmative defense for induced infringement claims.<sup>20</sup>

Part II.A discusses patent law’s purpose and provides an overview of 35 U.S.C. §§ 271(b) and 282, both of which provide the basis for finding induced infringement. Part II.A also addresses the legal standard of an inducement claim and considers the source of contention implicated by that standard. Part II.B of this Note outlines the progression of *Commil* from the trial court level up to the Supreme Court.<sup>21</sup>

Part III.A examines the goals of the patenting process and asserts the Supreme Court’s holding in *Commil* reinforced the aims of patent law. Part III.B looks to other areas of law that have a specific intent requirement, as they provide guidance on how to interpret the specific intent requirement of inducement claims in patent law and justify the Supreme Court’s ultimate holding. Finally, part III.C considers the implications of introducing the good faith belief of invalidity of a patent as an affirmative defense, ultimately arguing that the Supreme Court correctly rejected the notion that a good faith belief in the invalidity of a patent would negate the specific intent prong of inducement.

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<sup>18</sup> *Id.* at 1369.

<sup>19</sup> See Bruce D. DeRenzi & Preetha Chakrabarti, *The Federal Circuit’s New Factor For Induced Infringement Escapes Rehearing En Banc and Creates Significant Uncertainty in Certain Patent Cases*, CROWELL MORING L. BLOG (Nov. 22, 2013), <http://www.crowell.com/Locations/New-York/news/The-Federal-Circuits-New-Factor-For-Induced-Infringement-Escapes-Rehearing-En-Banc-and-Creates-Significant-Uncertainty-In-Certain-Patent-Cases>; see also *The Increased Value of Invalidity Opinions After the Federal Circuit’s Ruling in Commil USA v. Cisco Systems*, 31 No. 8 WJCOMPI 1 (Sept. 19, 2013) (Westlaw).

<sup>20</sup> The ABA subcommittee’s position supports the Supreme Court’s position on this matter. See *Proposed Subcommittee Report on Federal Circuit En Banc Review of Good-Faith Belief in Invalidity as a Defense to Indirect Infringement*, ABA IP 106 Patent Infringement Subcommittee Report, PTO011200 (Sept. 23, 2013).

<sup>21</sup> *Commil USA, LLC v. Cisco Sys. Inc. (Commil I)*, No. 2:07-CV-341, 2011 WL 738871 (E.D. Tex., Feb. 23, 2011), *aff’d*, 410 Fed. Appx. 339 (Fed. Cir. Tex., Mar. 4, 2011), 720 F.3d 1361 (Fed. Cir. Tex., June 25, 2013), *reh’g denied*, (Oct. 25, 2013), *cert. granted in part*, 720 F.3d 1361 (Dec. 5, 2014).

## II. BACKGROUND

### A. THE PURPOSE OF PATENT LAW

Patent law is derived purely from constitutional and statutory authority rather than common law.<sup>22</sup> Article I, Section 8 of the United States Constitution specifically states that “Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>23</sup> Congress has the ability to promote sciences and the arts by developing incentives for patent holders to create; patent holders develop their patents knowing that they can profit from their creations for at least a limited period of time.<sup>24</sup> The limited time provision not only incentivizes creators, but also compensates patent holders for the “enormous costs in terms of time, research and development.”<sup>25</sup>

In 1998, the Seventh Circuit held that the following are the three aims of patent law:

First, patent law seeks to foster and reward invention; second, it promotes disclosure of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent protection seek to assure that ideas in the public domain remain there for the free use of the public.<sup>26</sup>

The law fully realizes these goals by conferring to patent holders “a monopoly right to exclude others from making, using, offering for sale, or selling the patented invention.”<sup>27</sup> Further, since “[a patent] is an incentive [to] disclose,”<sup>28</sup> the Constitution allows for more than just a method of incentivizing the innovation of socially useful products. The limited time aspect of patent

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<sup>22</sup> JOHN GLADSTONE MILLS III, DONALD CRESS REILEY III, ROBERT CEARE HIGHLEY & PETER D. ROSENBERG, *Historical Note on Patents*, in 1 PATENT LAW FUNDAMENTALS § 1:25 (2d ed. 2011).

<sup>23</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>24</sup> *Id.*

<sup>25</sup> *Kewanee Oil Company v. Bicron Corporation*, 94 S. Ct. 1879, 1885 (1974).

<sup>26</sup> *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 284 (7th Cir. 1998).

<sup>27</sup> Soonbok Lee, *Induced Infringement as a Strict Liability Claim: Abolishment of the Specific Intent Requirement*, 4 HASTINGS SCI. & TECH. L.J. 381 (2012). See 35 U.S.C. § 154(a)(1) (1996).

<sup>28</sup> *Sinclair & Carroll Co. v. Interchemical Corp.*, 65 S. Ct. 1143, 1145 (1945); JOHN GLADSTONE MILLS III, DONALD CRESS REILEY III, ROBERT CEARE HIGHLEY & PETER D. ROSENBERG, *A Patent as a Grant; as a Contract*, 1 PATENT LAW FUNDAMENTALS, *supra* note 22, § 1:2.

law ensues that these products will contribute to the public domain upon the patent's expiration.<sup>29</sup>

When correctly distributed and regulated, patents serve the interests of not only the patent holder, but also the general community.<sup>30</sup> However, an ineffective patent system risks halting the wheels of innovation and industry.<sup>31</sup> Inventors may not have the incentive to create when others can easily and cheaply infringe upon patents by making copies and alternatives.<sup>32</sup> In order to efficiently regulate this area of law and to ensure patents are enforceable, Congress has enacted 35 U.S.C. § 271(a), which states, "whoever without authority makes, uses, offers to sale, or sells any patent invention" may be liable for direct infringement.<sup>33</sup> This harm differs from induced infringement, a claim Congress created in 35 U.S.C. § 271(b). Induced infringement can hold an individual liable for infringement committed by others, whereas direct infringement is limited to the defendant's own infringing acts.<sup>34</sup>

1. *Induced Infringement: 35 U.S.C. § 271(b)*. To prove induced infringement, the plaintiff must show direct infringement by "the induced party, the inducer must have knowledge of the asserted patents, the inducer must possess specific intent and not merely knowledge of the acts alleged to induce, and there must have been active inducement of the direct infringer."<sup>35</sup>

The induced infringement cause of action ensures that those who encourage or facilitate third parties to infringe are held liable even if they may have escaped liability for direct infringement.<sup>36</sup> Section 271(b) specifically relates to inducement, stating, "Whoever actively induces infringement of a patent shall be liable as an infringer."<sup>37</sup> The statute does not explicitly require "any knowledge or intent of the inducer, but lower courts nevertheless have consistently required a certain level of specific intent in the inducer."<sup>38</sup> It is this level of intent that has been the source of contention and has provoked debate

<sup>29</sup> See U.S. CONST. art. 1, § 8, cl. 8; see also *Eldred v. Ashcroft*, 123 S. Ct. 769, 791 (2003).

<sup>30</sup> 1 PATENT LAW FUNDAMENTALS, *supra* note 22, § 1:2; *Shaw v. Cooper*, 32 U.S. 292 (1833).

<sup>31</sup> 1 PATENT LAW FUNDAMENTALS, *supra* note 22, § 1:2.

<sup>32</sup> JOHN GLADSTONE MILLS III, DONALD CRESS REILEY III, ROBERT CEARE HIGHLEY & PETER D. ROSENBERG, *Need for Patents*, in 1 PATENT LAW FUNDAMENTALS, *supra* note 22, § 1:24; *Seymour v. McCormick*, 57 U.S. 480 (1853).

<sup>33</sup> *Lee*, *supra* note 27, at 381; 35 U.S.C. § 271(a); *Richards v. British Petroleum*, 869 F. Supp. 2d 730, 737 (E.D. La. 2012) (quoting 35 U.S.C. § 271(a)).

<sup>34</sup> See *Lee*, *supra* note 27, at 381–82.

<sup>35</sup> *Bel Fuse Inc. v. Molex Inc.*, 27 F. Supp. 3d 557 (D. N.J. 2014).

<sup>36</sup> See, e.g., Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575, 1578 (2011).

<sup>37</sup> 35 U.S.C. § 271(b) (2012).

<sup>38</sup> *Lee*, *supra* note 27, at 383 (referencing DONALD S. CHISUM, CHISUM ON PATENTS § 17.04[2] (2010)).



about whether actual knowledge is required or whether willful blindness will suffice.<sup>39</sup>

In *Global-Tech Appliances, Inc. v. SEB S.A.*,<sup>40</sup> the Supreme Court acknowledged this specific intent requirement by stating, “[a]lthough the text of § 271(b) makes no mention of intent, we infer that at least some intent is required.”<sup>41</sup> The Court also noted the statute’s text was ambiguous and wrestled with the definition of inducement, examining how to adequately capture the culpable intent required under the statute.<sup>42</sup> Ultimately, the Court determined that “induced infringement requires under § 271(b) knowledge that the induced acts constitute patent infringement.”<sup>43</sup>

Further, the Court acknowledged that “willful blindness” would also satisfy the knowledge requirement under an inducement claim.<sup>44</sup> A showing of willful blindness requires that the alleged inducer “(1) . . . subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”<sup>45</sup> By finding that willful blindness satisfies the intent requirement, the Court held that an inducer cannot bury his head in the sand and assert ignorance as a defense. Therefore, in order to successfully assert an inducement claim, the plaintiff must show “evidence of culpable conduct, directed to encouraging another’s infringement [and] not merely that the inducer had knowledge of the direct infringer’s activities.”<sup>46</sup> Once these elements have been met, the inducer may not use intentional ignorance to relieve himself of liability.<sup>47</sup>

2. *The Previous Dispute About Inducement Claims.* The main area of contention regarding inducement claims concerned the interpretation of the specific intent prong.<sup>48</sup> To be liable for induced infringement, the alleged inducer must not only engage in the act of selling, marketing, or creating a patented product without authority. He must also have actual knowledge that his actions

<sup>39</sup> *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). See Richard J. Stark & Andrei Harasymiak, *Inducement of Patent Infringement: The Intent Standard and Circumstantial Evidence of Intent*, 2011 WL 601766 (Feb. 2011).

<sup>40</sup> 131 S. Ct. at 2065.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2068.

<sup>44</sup> *Id.* at 2069 (the Court stated, “Given the long history of willful blindness . . . we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).”).

<sup>45</sup> *Id.* at 2070.

<sup>46</sup> *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (citing *Metro-Goldwyn-Mayer Studios Inc., et al v. Grokster, LTD. et al.*, 125 S. Ct. 2764, 2780 (2005), *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990)).

<sup>47</sup> See *id.*

<sup>48</sup> *Commil I*, 720 F.3d at 1373.

constitute inducement, not merely knowledge sufficient to complete the act itself.<sup>49</sup> The concept of inducement is primarily derived from tort law and the concept of joint tortfeasors.<sup>50</sup> This history suggests that in order for a plaintiff to be made fully whole, all those involved in the collaborative infringement must be held liable no matter how big or how small their role in the wrongdoing. The same principle exists in patent law as the source of inducement claims.

By including an intent requirement within any statute, a legislature imparts liability not only for the action but also the culpable state of mind.<sup>51</sup> This goal relates to the generally accepted idea that the law should only seek to criminalize those with malicious or deviant motives.<sup>52</sup> The induced infringement cause of action provides a means through which those who may not directly engage in infringement, but who encourage or facilitate the infringement by others may still be held accountable for their actions.<sup>53</sup> To be liable, the inducer must have actively and knowingly encouraged a third party to infringe.<sup>54</sup> Knowing this is an essential element to an inducement claim, Cisco attacked the specific intent prong as the basis of its defense.<sup>55</sup>

In *Commil*, the alleged inducer Cisco argued that Commil's patent was invalid.<sup>56</sup> Because one cannot infringe an invalid patent, Cisco further argued that there could never have been any specific intent to infringe. Therefore, a good faith belief of the patent's invalidity would negate the culpable state of mind required under the statute.<sup>57</sup> Commil, on the other hand, argued that the would-be third party infringer acted with the knowledge that there was a patent for the product and that his or her actions would infringe the existing patent.<sup>58</sup>

Moreover, Commil argued it would undermine the patent process and statutorily required presumption of validity to allow inducers to circumvent liability by claiming they were simply mistaken in their belief in the invalidity of a patent.<sup>59</sup> This new affirmative defense of a good faith belief in the invalidity of a patent would have given inducers the license to assume invalidity of patents

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<sup>49</sup> *DSU Med. Corp.*, 471 F.3d at 1306.

<sup>50</sup> *Commil I*, 720 F.3d at 1373.

<sup>51</sup> See HOLMES, *supra* note 2.

<sup>52</sup> E.g., Alter, Kernochan & Darley, *supra* note 2.

<sup>53</sup> *Grokster*, 125 S. Ct. at 2780.

<sup>54</sup> See *id.*

<sup>55</sup> Def.-Appellant Br. Appeal at 41–42, *Commil USA LLC v. Cisco Systems, Inc. (Commil I)*, 720 F.3d 1361 (2014) (No. 2012-1042) (2012 WL 830381).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Brief for Plaintiff-Appellee, *supra* note 12, at 39–40.

<sup>59</sup> *Id.* at 47. See also ABA IP 106 Patent Infringement Subcommittee Report, *supra* note 20, at 2.

in contradiction to Congress's expressed preference.<sup>60</sup> Additionally, the infringer knew that a patent existed for that product and knew his actions would likely or potentially constitute infringement.<sup>61</sup> Therefore, Commil suggested this awareness would suffice to hold Cisco liable under the statute.<sup>62</sup> The Supreme Court ultimately agreed.<sup>63</sup>

3. *The Presumption of Validity*: 35 U.S.C. § 282(a). Thirty-five U.S.C. § 282(a) addresses general defenses to patent infringement and states that, "In general a patent shall be presumed valid."<sup>64</sup> The statute also states, "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity."<sup>65</sup> A party must prove invalidity by clear and convincing evidence.<sup>66</sup> The Federal Circuit has previously acknowledged that this standard is not easy to overcome.<sup>67</sup> The court stated, "in assailing the validity of plaintiff's patent regularly issued by the Patent Office, [the challenger has] a heavy burden of proof . . . [such] presumption is not an idle gesture but is a positive factor which must be overcome by the one asserting invalidity."<sup>68</sup> The rationale for presuming the validity of patents is "the basic proposition that a government agency such as the [the United States Patent and Trademark Office (PTO)] was presumed to do its job."<sup>69</sup>

#### B. PROCEDURAL POSTURE AND AN OVERVIEW OF *COMMIL USA V. CISCO SYS.*

*Commil USA v. Cisco System* began with a patent infringement claim by Commil against Cisco.<sup>70</sup> Both Cisco and Commil are suppliers of wireless access communications systems.<sup>71</sup> Commil originally produced patent '395, a patent for a product that allowed users within a mobile network to move more

<sup>60</sup> Brief for Plaintiff-Appellee, *supra* note 12.

<sup>61</sup> *Id.* at 1.

<sup>62</sup> *Id.* at 40.

<sup>63</sup> *Commil USA, LLC v. Cisco Systems Inc. (Commil II)*, 135 S. Ct. 1920, 1920 (2015).

<sup>64</sup> 35 U.S.C. § 282(a) (2012). *See also* ABA IP 106 Patent Infringement Subcommittee Report, *supra* note 20, at 13 (the committee notes that "Commil's recognition of a good faith belief of invalidity as a Defense cannot be reconciled with the presumption of Validity (§ 282)").

<sup>65</sup> 35 U.S.C. § 282(a) (2012).

<sup>66</sup> *Id.*; *OSRAM Sylvania, Inc. v. American Induction Technologies, Inc.*, 701 F.3d 698 (Fed. Cir. 2012).

<sup>67</sup> *Anderson Co. v. Sears, Roebuck & Co.*, 265 F.2d 755, 761 (7th Cir. 1959).

<sup>68</sup> *Id.*

<sup>69</sup> ABA IP 106 Patent Infringement Subcommittee Report, *supra* note 20, at 13 (citing *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350 (C.A. Fed 1984)); *see also* *Microsoft Corp. v. 141 LTD. Partnership*, 131 S. Ct. 2238, 2243 (2011).

<sup>70</sup> *Federal Circuit Vacates \$63 Million Patent Verdict, Orders Another Trial* *Commil USA v. Cisco Sys.*, 31 No. 4 WJCOMPI 2 (July, 25, 2013).

<sup>71</sup> *Commil I*, 720 F.3d at 1364.

readily within the network without losing their connection.<sup>72</sup> Commil alleged that Cisco developed Wi-Fi access points and controllers that infringed three claims of patent '395.<sup>73</sup> The jury trial began in May 2010, and the main issue concerned whether Cisco could be liable for both direct infringement and induced infringement.<sup>74</sup> Cisco defended its actions and software by arguing that Commil's patent was invalid.<sup>75</sup>

The jury rejected Cisco's assertion that the patent was invalid and found Cisco liable for direct infringement but not induced infringement.<sup>76</sup> The jury awarded Commil \$3.7 million in damages for its direct infringement claim.<sup>77</sup> Yet despite winning on this claim, Commil filed a motion for a new trial to reconsider its induced infringement claim and to reassess damages for the direct infringement claim.<sup>78</sup>

1. *A Second Trial.* The district court granted Commil's motion for a new trial,<sup>79</sup> and the second trial began in April 2011 to determine the viability of an inducement claim and to reassess the damages.<sup>80</sup> At the close of this proceeding, the jury found Cisco liable for inducement and increased the damages to \$63.7 million.<sup>81</sup> After the jury's determination, the judge further increased damages to account for prejudgment interest and costs, ultimately requiring Cisco to pay Commil a total of \$74 million.<sup>82</sup> Cisco appealed this judgment to the Federal Circuit, which issued the contentious June 25, 2013 ruling.<sup>83</sup>

2. *On Appeal to the Federal Circuit.* Cisco asserted six different claims on appeal to the Federal Circuit.<sup>84</sup> Cisco primarily took issue with the erroneous jury instruction that allowed the jury to hold Cisco liable for induced infringement on the grounds of mere negligence, rather than the required knowledge standard.<sup>85</sup> Cisco also alleged that the "District Court erroneously precluded Cisco from presenting evidence of its good-faith belief of invalidity

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<sup>72</sup> *Federal Circuit Vacates \$63 Million Patent Verdict*, *supra* note 70, at 2.

<sup>73</sup> *Commil I*, 720 F.3d at 1364.

<sup>74</sup> *Id.* at 1365.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Reply Br. For Def.-Appellant at 9-12, *Commil USA LLC v. Cisco Systems, Inc. (Commil I)*, 720 F.3d 1361 (2014) (No. 2012-1042) (2012 WL 2375037). Cisco contested this on appeal, arguing that Commil was unable to show any direct infringement by any third party actor.

<sup>78</sup> *Commil I*, 720 F.3d at 1365.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1365-66.

to show that it lacked the requisite intent to induce infringement of the asserted claims.”<sup>86</sup>

The Federal Circuit reasoned that it had established “knew or should have known” as the standard for inducement claims in 1990 and reaffirmed it in 2006.<sup>87</sup> However, the court also acknowledged that the Supreme Court’s 2011 *Global-Tech Appliances, Inc. v. SEB S.A.*<sup>88</sup> decision, which held that a finding of inducement requires actual knowledge that the “induced acts constitute infringement.” There, the Court rejected the negligence standard for induced infringement claims.<sup>89</sup> Because the district court had instructed the jury to determine fault under an erroneous standard, the Federal Circuit panel in *Commil* found that the instruction was prejudicial.<sup>90</sup> Thus, in a 2–1 ruling with a concurring opinion, the court vacated the judgment, remanded the induced infringement claim, and ordered the reassessment of damages for a new trial.<sup>91</sup>

The Federal Circuit also discussed whether the district court erred in omitting evidence that allegedly would have supported Cisco’s asserted good faith belief of invalidity, rebutting the specific intent prong of the induced infringement claim.<sup>92</sup> Cisco based this argument on *Global-Tech*, which held that a person may only be held liable for induced infringement he had “knowledge that the induced acts constitute patent infringement.”<sup>93</sup> Cisco’s argument suggests that although one may have intentionally committed the acts constituting infringement, if he truly believes the patent invalid, then he could not have met the specific intent element of an inducement claim.<sup>94</sup>

The Federal Circuit panel noted that it was not perfectly clear from the trial record why the trial court precluded Cisco from presenting its good faith belief evidence at trial.<sup>95</sup> Evidence in the pre-trial record revealed that the district court likely precluded this evidence because it was a novel issue.<sup>96</sup> Although a good faith belief of non-infringement has always been relevant for inducement claims, such evidence had never been permitted to determine the good faith belief in a patent’s invalidity.<sup>97</sup> These two iterations of a good faith belief differ

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<sup>86</sup> *Id.* at 1365.

<sup>87</sup> *Id.* at 1366 (citing *Manville*, 917 F.2d at 553; *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1306 (Fed. Cir. 2006)).

<sup>88</sup> *Id.* (citing *Global-Tech*, 131 S. Ct. at 2068).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1367.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1366 (citing *Global-Tech*, 131 S. Ct. 2068).

<sup>94</sup> *Id.* at 1367.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

in that the good faith belief in non-infringement suggests that the defendant truly did not know or believe he or she was infringing a patent.<sup>98</sup> An example of this kind of belief is if an inventor or seller created a product or sold it without knowing or believing that the technology was already patented.<sup>99</sup> Conversely, a good faith belief in the invalidity of a patent suggests that a would-be infringer knew the patent existed and knew his acts could constitute infringement, but thought that the technology or product was not properly patented or should not have been patented in the first place.<sup>100</sup> In this situation, the inducer made a judgment call that the patent was invalid that turned out to be wrong.<sup>101</sup>

The Federal Circuit panel in *Commil* held that evidence of a good faith belief in a patent's invalidity may negate the specific intent prong of inducement because the panel saw "no principled distinction between a good-faith belief of invalidity and a good faith belief of non-infringement for the purpose of whether a defendant possessed the specific intent to induce infringement of a patent."<sup>102</sup> The Federal Circuit panel considered decisions from several district courts that grappled with the same issue and came to the same conclusion.<sup>103</sup> However, the court found that although this evidence of a good faith belief in invalidity is relevant to determine the intent prong of an induced infringement claim, the existence of such evidence is not the end of the matter, and the evidence does not "preclude a finding of induced infringement."<sup>104</sup> Instead, the evidence of a good faith belief in patent invalidity should be admitted for a jury to consider when it is determining whether a party had the requisite culpable intent to be found liable for an induced infringement claim.<sup>105</sup>

3. *Judge Newman's Concurrence and Dissent.* Judge Newman concluded that the "change in the law" proposed by the majority would set a dangerous precedent because a defendant could wrongfully use good faith belief of patent invalidity as a defense to willful infringement.<sup>106</sup> Further, she reasoned that the majority's

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<sup>98</sup> See *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1307 (Fed. Cir. 2006).

<sup>99</sup> See *id.*

<sup>100</sup> *Commil I*, 720 F.3d at 1368.

<sup>101</sup> Brief for Plaintiff-Appellee, *supra* note 12, at 42–43.

<sup>102</sup> *Commil I*, 720 F.3d at 1368.

<sup>103</sup> *Id.* See *VNUS Med. Techs., Inc. v. Diomed Holdings, Inc.*, 2007 WL 2900532, at \*1 (N.D. Cal. Oct. 2, 2007); *Kolmes v. World Elastic Corp.*, 1995 WL 918081, at \*10 (M.D.N.C. Sept. 18, 1995); *DataQuill Ltd. v. High Tech Computer Corp.*, 887 F. Supp. 2d 888, 1012–13 (S.D. Cal. 2011); see also Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225, 243 (2005). But see *Applera Corp. v. MJ Research Inc.*, 2004 WL 367616, at \*1 (D. Conn. Feb. 24, 2004); *LadaTech, LLC v. Illumina, Inc.*, 2012 WL 1188266, at \*2 (D. Del. Feb. 14, 2012).

<sup>104</sup> *Commil I*, 720 F.3d at 1369.

<sup>105</sup> *Id.* The request for a rehearing en banc was later denied, leading to the petition for certiorari.

<sup>106</sup> *Id.*

argument that good faith “belief in invalidity can negate infringement is contrary to the principles of tort liability, codified in the inducement statute”<sup>107</sup> and that the majority’s holding also contradicted the basic notion that a mistake of law cannot discharge liability.<sup>108</sup>

Judge Newman also suggested that defendants still had available the defenses of patent invalidity and unenforceability to combat a claim of induced infringement, so any additional defense would be unwarranted.<sup>109</sup> She further noted that good faith belief in the invalidity of the patent does not “negate [the] infringement of a valid and enforceable patent,”<sup>110</sup> and such a finding is consistent with the Supreme Court’s holding in *Global-Tech*.<sup>111</sup> Although 35 U.S.C. § 271(b) “requires knowledge that the induced acts constitute patent infringement,” the district court in *Commil* did not hold that belief of invalidity was an element or component of induced infringement.<sup>112</sup>

Judge Newman also asserted in her dissent that the majority misinterpreted the Supreme Court’s holding in *Global-Tech* by blurring the distinction between the knowledge requirement for infringement and the knowledge of validity, which “are distinct issues, bearing different burdens, different presumptions, and different evidence.”<sup>113</sup>

4. *Judge O’Malley’s Concurrence and Dissent.* The firm belief that patent cases can only truly be tried “after considering the totality of the circumstances” is the primary basis of Judge O’Malley’s dissent.<sup>114</sup> Unlike Judge Newman, Judge O’Malley agreed with the majority’s decision that the induced infringement judgment must be vacated because the jury was instructed using the wrong legal standard, and because a good faith belief in invalidity is relevant to defeat the specific intent prong of an inducement claim.<sup>115</sup> However, Judge O’Malley diverged from the majority’s opinion for two reasons.<sup>116</sup> First, she believed that the claim of inducement must fail as a matter of law because *Commil* was unable to show “any third-party practices” that would constitute infringement.<sup>117</sup> Second, a partial retrial would wrongfully deprive Cisco of its Seventh Amendment right to a trial by jury.<sup>118</sup>

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<sup>107</sup> *Id.* at 1373.

<sup>108</sup> *Id.* at 1373–74.

<sup>109</sup> *Id.* at 1374.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing *Global-Tech*, 131 S. Ct. at 2069).

<sup>113</sup> *Id.* at 1374–75. See also 35 U.S.C. § 271(b) (2012).

<sup>114</sup> *Commil I*, 720 F.3d at 1380.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1376.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Judge O'Malley suggested that the trial court's evidentiary rulings during the partial retrial "reflect[ed] the awkward posture in which [the trial judge] had placed the case,"<sup>119</sup> which resulted in the exclusion of evidence that could have shown Cisco's good faith belief in the invalidity of patent '395.<sup>120</sup> Judge O'Malley also reminded the majority of Commil's argument that it would be unnecessarily confusing for the jury to consider such evidence without also considering the issue of validity.<sup>121</sup> Ultimately, Judge O'Malley reasoned that the good faith defense and the validity claims were so "interwoven" that the jury must decide both of these issues together.<sup>122</sup> A better solution, she reasoned, would require both issues, defense and validity claims, to be retried together by a third jury in order to not violate Cisco's right to "pursue a valid defense."<sup>123</sup>

Judge O'Malley cautioned that on remand, the trial court should carefully craft the jury instructions and should take measures to ensure that the jury understands that Cisco was wrong to assume patent '395's invalidity.<sup>124</sup> However, she acknowledged that this warning is problematic because it would taint the jury's perception of Cisco and its beliefs from the start.<sup>125</sup>

5. *The Supreme Court's Decision.* Ultimately, Commil petitioned the Supreme Court for certiorari on January 23, 2014, and on December 5, 2014, the Supreme Court granted the petition on the question of whether the Federal Circuit erred in holding that the good faith belief of invalidity of a patent defense was viable against an induced infringement claim.<sup>126</sup> After hearing oral arguments on March 31, 2015, the Supreme Court came down with a final ruling on May 26, 2015.<sup>127</sup> A 6–2 Court vacated the judgment and remanded the proceedings.<sup>128</sup>

Justice Kennedy wrote the opinion for the court and remarked that this was an issue of first impression.<sup>129</sup> The Court unsurprisingly held that the defendant's belief regarding the invalidity of the patent was irrelevant when interpreting the scienter requirement for an induced infringement claim.<sup>130</sup> The

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<sup>119</sup> *Id.* at 1379.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Commil USA, LLC v. Cisco Systems, Inc.*, SCOTUS Blog, <http://www.scotusblog.com/cas-e-files/cases/commil-usa-llc-v-cisco-systems-inc/>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Commil USA LLC v. Cisco Systems, Inc. (Commil II)*, 135 S. Ct. 1920, 1923 (2015).

<sup>130</sup> *Id.* (Justice Breyer is noted however as taking no part in the decision of this case).



Court grounded its reasoning in the notion that the specific intent element of an induced infringement concern is wholly separate from the issue of validity.<sup>131</sup> Because of this distinction, the Court held that belief of validity may not negate the scienter requirement.<sup>132</sup>

Further, the fact that infringement and invalidity are considered completely separate matters under patent law supports this holding. They bear different burdens, different presumptions, and different evidence.<sup>133</sup> Additionally, non-infringement and invalidity are listed as two separate defenses in patent law.<sup>134</sup> Allowing the defense of a good faith belief of invalidity would inappropriately “conflate” the two issues.<sup>135</sup> The Court also acknowledged that an individual has several avenues to obtain a ruling of invalidity.<sup>136</sup> These include filing a declaratory judgment action to declare the patent invalid, seeking inter parte review at the Patent Trial and Appeal Board, which may deliver a decision in as little as twelve months, or seeking ex parte reexamination of the patent by the PTO.<sup>137</sup>

The Court clarified, though, that such measures do not preclude the alleged infringer from raising the invalidity defense.<sup>138</sup> If the court acknowledges that the patent is indeed invalid, the alleged infringer will be absolved from all liability as is the case in a tortious interference with a contract claim.<sup>139</sup> The Supreme Court’s holding merely precluded the good faith belief of invalidity when the patent was deemed valid and enforceable.<sup>140</sup> Such a determination is based on critical timing and the orderly administration of the patent system.<sup>141</sup> The Court rationalized this holding as consistent with other areas of civil law where an actor who lacked actual knowledge that his conduct violated the law, he may still be found liable, as is the case with trespass.<sup>142</sup>

The Court reasoned that any other finding would risk undermining the long-held presumption that a patent is valid and would allow defendants to “circumvent” the “high bar-the clear and convincing standard” defendants have

<sup>131</sup> *Id.* at 1928.

<sup>132</sup> *Id.* at 1931.

<sup>133</sup> *Id.* at 1929.

<sup>134</sup> *Id.* *But see* 35 U.S.C. § 282(b)(1), (2).

<sup>135</sup> *Commil II*, 135 S. Ct. at 1928.

<sup>136</sup> *Id.* at 1929.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* The Court noted that a month before the second trial, Cisco attempted to obtain a ruling from the PTO that the patent was actually invalid. Much to their dismay, the PTO determined that patent was indeed valid and enforceable.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1930.

been previously required to meet in order to rebut.<sup>143</sup> With a final flourish, the Court seemingly admonished the lower courts for allowing such a frivolous claim.<sup>144</sup> Although no allegation of frivolity or Federal Rule of Civil Procedure 11 sanctions had been asserted, the Court alluded that this may have been such a case.<sup>145</sup>

6. *Justice Scalia's Dissent.* Justice Scalia was joined by Chief Justice Roberts in dissenting. Both would have permitted the defendants to raise a good faith belief in a patent's invalidity as a defense to induced infringement.<sup>146</sup> Justice Scalia began his argument by reasoning that it was "nonsense" that someone could infringe an invalid patent.<sup>147</sup> He reasoned that because only valid patents could be infringed and one could only be guilty of inducement if they intended to induce infringement, then it follows that someone may not be guilty of induced infringement unless he knows he is in fact infringing.<sup>148</sup>

He further found the majority's reasoning unconvincing.<sup>149</sup> He admonished that although the law treats infringement and validity as distinct, the good faith belief of invalidity conflates the two no more than "saying that water cannot exist without oxygen 'conflates' water and oxygen."<sup>150</sup> Thus, the fact that infringement requires validity maintains those concepts' separateness under the law.<sup>151</sup> Justice Scalia also expresses doubt that merely recognizing the good faith defense would undermine the strong presumption of validity.<sup>152</sup> He maintained that even if an alleged induced infringer succeeds in this context, he merely escapes liability for a third party's infringement.<sup>153</sup> That does not mean that the patent itself wasn't valid to begin with.<sup>154</sup>

Finally, Justice Scalia rationalized that an invalid patent does not confer a right to exclusivity.<sup>155</sup> Therefore, an individual asserting the good faith belief of invalidity defense has not intentionally violated the patent holder's right, which the induced infringement causes of action targets. Justice Scalia ended his opinion by suggesting that he has not proposed creating a defense to statutory

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1931.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1932.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

liability.<sup>156</sup> Rather, he has merely attempted to reconcile the Patent Act with the proposed defense to determine whether such a defense could undermine the specific intent prong of induced infringement claims.<sup>157</sup> He ultimately found that it does.

After several years of litigation, it seems there is finally an answer. The Supreme Court has rejected the good faith of the invalidity of a patent defense for inducement and rightfully so. To hold otherwise would have dangerously narrowed the scope of liability for induced infringement claims. In reaching this conclusion, the Court alluded to other areas of the law that have similarly rejected a “good faith” defense. Upon closer examination of these other bodies of law, it seems that the Court’s conclusion was inevitable.

### III. ANALYSIS

#### A. THE AIMS OF PATENT LAW AND THE PRESUMPTION OF VALIDITY

As the Supreme Court articulated, patents are presumed valid, and the party challenging validity bears the burden of rebutting it.<sup>158</sup> In order to remain consistent with the presumption and reinforce the aims of patent law, the Supreme Court had to reject the good faith belief defense. One of the primary issues the lower courts faced in determining whether the good faith belief in a patent’s invalidity could defeat an induced infringement claim was the fact that this defense was a novel issue in patent law.<sup>159</sup> In order to adequately justify the Supreme Court’s holding, one must consider the premise of the good faith belief of invalidity defense in the context of other areas of law. Part III.B considers other bodies of law including tort, contract, and criminal law, which have also addressed the issue of whether a good faith belief negates the specific intent prong of various causes of action.<sup>160</sup> Ultimately, all of these areas of law show that the good faith belief of invalidity defense is inconsistent with generally accepted norms and American jurisprudence. Further, Part III.C concludes by arguing that introducing such a defense would have negative implications. Therefore, the Supreme Court was right not to allow such a defense in the area of patent law.

Although Commil correctly argued that one cannot infringe upon an invalid patent, there is a crucial difference between knowing that acts would constitute

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1929; 35 U.S.C. § 282.

<sup>159</sup> *Commil I*, 720 F.3d at 1367.

<sup>160</sup> This Note agrees with the Supreme Court and the ABA subcommittee on this issue. See ABA IP 106 Patent Infringement Subcommittee Report, *supra* note 20, at 2.

infringement and deciding to infringe or induce infringement anyway.<sup>161</sup> In the second scenario, the would-be infringer (here, Cisco) has taken his chances at facing liability for infringement or inducement and lost. The latter inducer therefore has a far more culpable state of mind than the individual who has a good faith belief in non-infringement or the individual wrongly accused of infringement.<sup>162</sup>

Further, Congress clearly expressed its preference for the presumption of validity in 35 U.S.C. § 282 by stating, “a patent shall be presumed valid.”<sup>163</sup> Within the same statute, Congress has afforded the defense of invalidity to defeat this presumption.<sup>164</sup> However, once an actual or induced infringer has failed to overcome the presumption of validity, he may be held liable.<sup>165</sup>

Section 282 is silent regarding the infringer or inducer’s state of mind when asserting the invalidity defense.<sup>166</sup> The statute provides that patents are presumed valid unless a showing of invalidity or another applicable defense under the statute can defeat the presumption.<sup>167</sup> Arguably, Congress’s total silence on intent suggests it never intended the infringer’s subjective motivations be taken into account when attempting to defeat the presumption of validity.<sup>168</sup> Congress intended for actual invalidity, not merely an infringer’s good faith belief, to defeat liability.<sup>169</sup>

#### B. A COMPARATIVE ANALYSIS OF THE GOOD FAITH BELIEF DEFENSE

The area of intellectual property law is rapidly evolving.<sup>170</sup> With increases in technology and innovation, the law has been forced to adapt in order to meet society’s constantly changing needs.<sup>171</sup> Congress has attempted to bridge the gap and enforce legislation with regulatory agencies such as the PTO, which attends to the particular needs of patent holders and creators.<sup>172</sup> However,

<sup>161</sup> *Commil I*, 720 F.3d at 1368.

<sup>162</sup> See Brief for Plaintiff-Appellee, *supra* note 12, at 42–43.

<sup>163</sup> 35 U.S.C. § 282 (2012).

<sup>164</sup> *Id.* § 282(b)(2).

<sup>165</sup> See *id.*

<sup>166</sup> See Vivian Lei, *Is the Doctrine of Inducement Dead?*, 50 IDEA 875 (2010).

<sup>167</sup> 35 U.S.C. § 282(b)(2) (2012). (Other defenses under 35 U.S.C. § 282(b) include non-infringement or invalidity for the failure to comply with the filing requirements under the statute.)

<sup>168</sup> See Brief for Plaintiff-Appellee, *supra* note 12, at 47 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989)).

<sup>169</sup> See *id.*; see also 35 U.S.C. § 282(b).

<sup>170</sup> See S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69; see also Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187 (2000).

<sup>171</sup> Plager, *supra* note 170; Merges, *supra* note 170.

<sup>172</sup> See Lee, *supra* note 27, at 381–82.

where Congress is silent, the courts may turn to the common law to bridge the gap.<sup>173</sup> Thus, in order to reconcile the good faith belief of invalidity defense, the Supreme Court considered other areas of law confronting this same issue of a knowledge standard and whether a good faith belief may negate that knowledge requirement in other contexts.<sup>174</sup>

1. *In the Context of Tort Law.* To start, the Supreme Court relied upon principles from tort law.<sup>175</sup> Tort law is publicly made law that is privately enforced by individual plaintiffs.<sup>176</sup> Similarly, patent law is public made law and privately enforced by the patent holder.<sup>177</sup> Since the concept of induced infringement is primarily based on the notion of joint tortfeasors,<sup>178</sup> patent law is arguably most analogous to tort law. This made tort law a logical place for the Court to start when considering how other areas of law treat the good faith belief defense.

The notion of holding co-conspirators liable for harms, even if the defendant is not the direct actor, is an established concept in tort law.<sup>179</sup> One author suggests “[t]he common law of torts has long punished not only tortfeasors but also those who aid and abet the commission of a tort.”<sup>180</sup> Originally, this “doctrine was initially applied in patent law in cases involving what we think of today as contributory infringement.”<sup>181</sup> Contributory infringement is similar to induced infringement in that a person is held liable for providing a means through which another individual may infringe.<sup>182</sup> However, contributory infringement differs from inducement because inducement requires a higher showing of intent.<sup>183</sup> Not only must one facilitate the means by which to aid another’s infringement (perhaps through supplying component parts that in themselves may not infringe but when combined constitute infringement), but one must also knowingly intend to aid the infringement and recognize they are completing acts that would constitute infringement.<sup>184</sup>

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<sup>173</sup> Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

<sup>174</sup> *Commil II*, 135 S. Ct. at 1930.

<sup>175</sup> *Id.*

<sup>176</sup> Christian Turner, *Law’s Public/Private Structure*, 39 FLA. ST. U. L. REV. 1003, 1012–13 (2012).

<sup>177</sup> See 35 U.S.C. § 154(d) (2012).

<sup>178</sup> Charles E. Miller, *Some Views on the Law of Patent Infringement by Inducement*, 53 J. PAT. OFF. SOC’Y 86, 90 (1971).

<sup>179</sup> Lemley, *supra* note 103, at 227; W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 499–532 (5th ed. 1984).

<sup>180</sup> KEETON ET AL., *supra* note 179, at 499–522.

<sup>181</sup> *Id.*

<sup>182</sup> See Miller, *supra* note 178, at 90.

<sup>183</sup> See generally *id.* at 99–102.

<sup>184</sup> Lemley, *supra* note 103, at 232.

In addition to its basis on the joint tortfeasors doctrine, the notion of inducement closely relates to and derives from the concepts of respondeat superior and vicarious liability.<sup>185</sup> Absent the direction of the inducer, the infringer would not have participated in the acts that constitute infringement.<sup>186</sup> Because the principal inducer benefitted financially from the direct infringers' actions, the inducer should be held liable for their torts.<sup>187</sup>

Further, one commentator suggests that the imposition of liability in tort law at times turns on whether the tortious conduct was a mistake or an accident.<sup>188</sup> "The legal idea of accident [negates] intention and negligence" because the actor never intended the action to occur, nor for the effects of the tortious action to take place.<sup>189</sup> Additionally, in the context of an accident, it is not probable that the conduct would result in the consequences that in fact occurred.<sup>190</sup> However, in cases where a "mistake" occurs in the tort context, "the error is intended and the error consists in thinking that such an effect is not tortious."<sup>191</sup> For example, "[i]f the hunter shoots at a thing which he reasonably supposes to be a bear, but which turns out to be a shepherd's dog, he has committed a trespass to personal under mistake."<sup>192</sup> This example is akin to the good faith belief of invalidity of a patent defense because "the contact was intended under a mistaken idea that it was injury to no one."<sup>193</sup>

Thus, in cases where "the effect is intended," the error does not negate the intent element of the tort.<sup>194</sup> As the Supreme Court noted, intention to commit the act at all—rather than intent to act wrongfully—satisfies the intent prong.<sup>195</sup> Here, a mistake about the invalidity of a patent cannot absolve inducers from liability because they intended the actions that constitute infringement, and it was probable that the infringement would occur because of the knowledge of the patent.<sup>196</sup>

Despite the fact that Cisco's conduct in *Commil* may be characterized as a mistake, rather than an accident, if Cisco could establish that it made the mistake non-negligently, then arguably Cisco's actions could constitute an

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<sup>185</sup> *Id.* at 228–29.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Clarke Butler Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335, 336 (1902).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 336–37.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 337.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Commil USA LLC v. Cisco Systems, Inc. (Commil II)*, 135 S. Ct. 1920, 1930 (2015).

<sup>196</sup> *See* Brief for Plaintiff-Appellee, *supra* note 12, at 37.

accident.<sup>197</sup> Thus, characterizing a good faith belief in patent invalidity as an accident would excuse the liability.<sup>198</sup> A “negligent mistake may be defined as one which a prudent man under the circumstances would not make.”<sup>199</sup> However, as the Court noted, Cisco was, at best “careless in entertaining the belief” the patent was invalid and acting on it without first inquiring to the patent office or seeking a declaratory judgment on the invalidity of the patent.<sup>200</sup> It is well settled that “in the case of mistake the defendant is usually held to act at his peril.”<sup>201</sup> Even assuming Cisco acted under a good faith belief in the invalidity of a patent, it acted with knowledge of the patent’s existence, and thus acted at its own peril.<sup>202</sup> As such, the Supreme Court correctly found that liability under a traditional tort theory would attach.<sup>203</sup>

2. *In the Context of the Social Contract Theory and Traditional Contract Law.* The Supreme Court acknowledged that if the patent is truly invalid, induced infringers would not be held liable, just as those accused of tortious interference with a contract may not be held liable if a contract is in fact invalid.<sup>204</sup> What makes the traditional contract analysis in this context so difficult is that in an induced infringement claim, the one at fault is arguably not a party to the contract, but rather, a third party actor.<sup>205</sup> Therefore, Cisco’s actions, at first glance, seem most analogous to a tortious interference with a contract, which is actually a blend of both tort and contract law causes of action.<sup>206</sup> From a broader perspective, however, society is actually a party to the patent, represented by the government and the patent holder.

Congress has conferred authority to the patent office to enter into private contracts with patent holders in order to ensure that society continues to benefit from the creations of inventors and producers.<sup>207</sup> In this regard, the

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<sup>197</sup> Whittier, *supra* note 188, at 339.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 337 (stating that if there was no negligence in making the mistake, the case was one of accident and would prevent recovery); *Commil USA LLC v. Cisco Systems, Inc. (Commil II)*, 135 S. Ct. 1920, 1929 (2015).

<sup>201</sup> Whittier, *supra* note 188, at 352.

<sup>202</sup> See Brief for Plaintiff-Appellee, *supra* note 12, at 34.

<sup>203</sup> *Commil II*, 135 S. Ct. at 1929.

<sup>204</sup> *Id.* at 1920, 1930.

<sup>205</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 9 (1981).

<sup>206</sup> See Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982).

<sup>207</sup> U.S. CONST. art. I, § 8, cl. 8; see also *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003) (quoting *Brenner v. Manson*, 383 U.S. 519, 534 (1966) (“The basic quid pro quo for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility.”) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of

American people have consented to respect the patents issued by the patent office and the rights of patent holders.<sup>208</sup> The infringer and inducer, as citizens of the United States, have also consented to follow the laws of the nation and to respect the wishes of Congress by respecting the patent process.<sup>209</sup> Infringing or inducing others to infringe a patent materially breaches the social contract entered into by society's agents, Congress and the PTO.<sup>210</sup>

Although the Court did not delve into this method of reasoning, this social contract theory applies to *Commil*. By doing business in the American market and being an American company, Cisco has consented to the laws enacted by Congress and the social contract entered into by society's agents. When Cisco infringed and induced infringement on Commil's wireless communications systems, it breached the social contract and cannot assert that the breach was justified simply because it presumed the contract was invalid or unenforceable.<sup>211</sup>

Further, patent law can readily be analogized to contract law because "the weight of authority is that a patent is very much a contract between the inventor and the United States."<sup>212</sup> The Court correctly acknowledged that a patent confers the right of the inventor to "practice his invention and the right to allow another to practice such invention under terms agreed to between the parties."<sup>213</sup> Unlike copyright, which requires the author to disclose his idea or concept to the audience upon publication, patents protect the patent holder's ideas and technology for the terms of the patent.<sup>214</sup> This "exchange" between the patent holder and the government is commonly referred to as a "quid pro quo" between the patent holder and the government.<sup>215</sup> In *Eldred v. Ashcroft*, the Supreme Court noted that "complete disclosure as a precondition of a patent is part of the quid pro quo that justifies the limited monopoly for the inventor as consideration for full and immediate access by the public when the time

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individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with services rendered."))))).

<sup>208</sup> See Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2 (1999).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> U.S. CONST. art. I, § 8, cl. 8. See RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981); see also *id.* §§ 153–154.

<sup>212</sup> JOHN GLADSTONE MILLS III, DONALD CRESS REILEY III, ROBERT CEARE HIGHLEY & PETER D. ROSENBERG, 1 PATENT LAW FUNDAMENTALS § 1:2 (2d ed. 2014); *Commil II*, 135 S. Ct. at 1929.

<sup>213</sup> 1 PATENT LAW FUNDAMENTALS, *supra* note 212, § 1:3.

<sup>214</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003).

<sup>215</sup> *Id.* (referencing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966)); see, e.g., *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 142 (2001) ("The disclosure required by the Patent Act is 'the quid pro quo of the right to exclude.'" (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974))).



expires.”<sup>216</sup> Also, the *Eldred* court cited language in which the patent system was described as a “contract” between the patent holder and the government.<sup>217</sup> This quid pro quo language also bolsters the notion that the rights between contracting parties in traditional contract law are similar to the rights of the patent holder.<sup>218</sup>

Further, like patents, contracts are generally presumed valid and enforceable.<sup>219</sup> It is the burden of the party asserting invalidity to prove that the contract is unenforceable or void as a matter of public policy.<sup>220</sup>

Moreover, contract law also has a similar concept to patent law’s willful blindness doctrine called “conscious ignorance.”<sup>221</sup> Under § 154 of the *Second Restatement of Contracts*, the party who acts knowing that he has limited knowledge of the terms of the contract under the circumstances, “bears the risk of the mistake.”<sup>222</sup> Applying this principle to *Commil*, the Court acted wisely when finding that good faith belief of invalidity of a patent is not a viable defense under a contract theory because Cisco acted based on its knowledge that a patent was in place, but failed to reconcile the validity of the patent at the outset.<sup>223</sup>

3. *Tortious Interference with Contract.* The Supreme Court in *Commil* did reference, however, the similar nature of a tortious interference with a contract claim and an induced infringement claim.<sup>224</sup> Tortious interference with a contract blends tort and contract law.<sup>225</sup> This cause of action is recognized under the common law to give “a party to a contract . . . a right of action against a third-party who intentionally and unjustifiably induces a breach of the

<sup>216</sup> *Eldred*, 537 U.S. at 225; see *Graham*, 383 U.S. at 5.

<sup>217</sup> *Eldred*, 537 U.S. at 225 (quoting “Attorney General Wirt made this precise point in his argument in *Gibbons v. Ogden*, 9 Wheat., at 175, 6 L. Ed. 23: ‘It [a patent] is virtually a contract between each patentee and the people of the United States, by which the time of exclusive and secure enjoyment is limited, and then the benefit of the discovery results to the public.’”).

<sup>218</sup> See Henry Winthrop Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 134 (1914) (“[Q]uid pro quo (*i. e.*, present value actually received on each side in the making of the contract).”).

<sup>219</sup> *Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258 (1877) (“Where such a contract is not, on its face, necessarily beyond the scope of the powers of the corporation, it will, in the absence of proof to the contrary, be presumed to be valid.”).

<sup>220</sup> See generally *Meunier v. Northwestern Mut. Life Ins. Co.*, No. 3:12-cv-01005-JE, 2014 WL 4792935 (Dis. Or. Sept. 24, 2014); *In re Walker*, 515 B.R. 725 (Banker W.D. Mo. 2014); *Mansfield v. Vanderbilt Mortg. and Finance, Inc.*, No. 7:13-CV-257-FL, 2014 WL 2712327 (E.D. N.C. June 16, 2014); *Brondyke v. Bridgepoint Educ., Inc.*, 985 F. Supp. 2d 1079 (S.D. Iowa 2013).

<sup>221</sup> RESTATEMENT (SECOND) OF CONTRACTS § 154, cmt. (c) (1981).

<sup>222</sup> *Id.*

<sup>223</sup> *Commil II*, 135 S. Ct. 1929.

<sup>224</sup> *Id.* at 1930.

<sup>225</sup> See Perlman, *supra* note 206, at 61.

contract with the other party to the contract.”<sup>226</sup> The inducer has caused the buyers of its product to directly infringe, and has interfered with the business relationship between the patent holder and the government.<sup>227</sup> Further, the underlying principles of both tortious interference with a contract and the induced infringement causes of action are similar. A tortious interference with a contract claim seeks to hold those who “intentionally intermeddle with the business affairs of another” liable.<sup>228</sup> Like the inducement statute,<sup>229</sup> the tortious interference with a contract cause of action targets the actual breach of the contract, but the inducer’s state of mind.<sup>230</sup>

The *Restatement (Second) of Torts* § 766 recognizes the claim of tortious interference with a contract and states:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.<sup>231</sup>

The common elements for tortious interference with a contract mirror inducement in several respects. Those include the existence of a contract or business relationship between the plaintiff and a third party, the defendant’s knowledge of the existence of the contract, the defendant acts in an unjustifiable manner in causing either the third party to breach or make the performance of the contract impossible, and damages.<sup>232</sup>

Considering Cisco’s actions in light of the elements of tortious interference with a contract, liability naturally follows. The district court rejected the notion that the patent was invalid or unenforceable, and a finding to the contrary would prevent a finding of direct infringement.<sup>233</sup> Although Cisco argued that it acted in justifiable reliance on the invalidity of the patent, as the Supreme Court noted, they had no justifiable belief or reason to think that the patent was

<sup>226</sup> Mark S. Dennison, *Tortious Interference with Contractual Relationship Involving Sale of Real Estate*, 64 AM. JUR. PROOF OF FACTS 3D 273, 284 (2001).

<sup>227</sup> See Allen, *supra* note 208, at 2; see also 35 U.S.C. § 271 (2010); U.S. CONST., art. I, § 8, cl. 8.

<sup>228</sup> See Dennison, *supra* note 226.

<sup>229</sup> 35 U.S.C. § 271(b).

<sup>230</sup> See Perlman, *supra* note 206, at 61.

<sup>231</sup> RESTATEMENT (SECOND) OF TORTS § 766 (1979).

<sup>232</sup> *Id.*; see also Donathan v. McDill, 800 S.W.2d 433, 434 (1990); Second Continental, Inc. v. Atlanta E-Z Builders, Inc., 514 S.E.2d 846, 849 (Ga. Ct. App. 1999), *cert. dismissed*, 1999 Ga. LEXIS 747 (1999); Baldwin Properties, Inc. v. Sharp, 949 S.W.2d 952, 956 (Mo. Ct. App. 1997).

<sup>233</sup> *Commil I*, 720 F.3d at 1365. See also 35 U.S.C. § 271 (2010).

invalid.<sup>234</sup> At the very least, Cisco acted in a manner of “willful blindness” by not seeking a declaratory judgment on the validity of the patent before knowingly producing and selling the patented product unlawfully.<sup>235</sup>

Further, Cisco’s actions made the full performance of the contract between Commil and the patent office impossible because the patent allowed Commil the ability to gain the full economic benefits from their creation for twenty years.<sup>236</sup> Because of Cisco’s actions, Commil lost the full benefits of exclusivity afforded under the terms of the patent.<sup>237</sup> Finally, Commil can show damages by offering evidence of Cisco’s profits from the patented product.<sup>238</sup>

Since the concept of tortious interference with a contract is a blend of tort and contract law, the same principle that mistake is generally not a defense still applies.<sup>239</sup> Cisco acted intentionally, knowing that there was a business and contractual relationship between the general public and the patent holder.<sup>240</sup> However, rather than presuming the enforceability of this contract and seeking the judicial remedies available to them through a declaratory judgment, Cisco acted at its peril by selling the patented product to the general public.<sup>241</sup> Therefore, the Court correctly imposed liability because neither the areas of tort law, contract law, or the blended concept of tortious interference with a contract recognize that a good faith belief can negate the specific intent prong of these causes of action.<sup>242</sup>

4. *In the Context of Criminal Law.* The Supreme Court further found that the good faith belief in the invalidity of a patent defense is analogous to the mistake of law defense in the criminal context.<sup>243</sup> Criminal law is publicly made and publicly prosecuted, and therefore differs from patent law, which is publicly made and privately prosecuted.<sup>244</sup> However, principles of the mistake of law defense have previously offered the Court guidance on how to treat defendants

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<sup>234</sup> See *Commil II*, 135 S. Ct. at 1929; see also *Dennison*, *supra* note 226, at 341–42 (stating, “The concept of ‘good faith’ is not measured by a subjective standard so that a misunderstanding or misinterpretation of the law excuses no one and provides no legal justification for unauthorized interference. Subjective good faith, standing alone, is not an absolute defense to a claim of tortious interference with business relations, just as malice within the meaning of such a claim need not be prompted by bad faith or personal dislike.”).

<sup>235</sup> See *Global-Tech*, 131 S. Ct. 2071–72.

<sup>236</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>237</sup> *Id.*

<sup>238</sup> Pl.[’s].—Appellee Br. Appeal at 23–24.

<sup>239</sup> See *Dennison*, *supra* note 226, at 341.

<sup>240</sup> Pl.[’s].—Appellee Br. Appeal at 32. See also *Global-Tech*, 131 S. Ct. at 2068.

<sup>241</sup> Pl.[’s].—Appellee Br. Appeal at 37.

<sup>242</sup> See *Whittier*, *supra* note 188, at 335–36; *Dennison*, *supra* note 226, at 341; RESTATEMENT (SECOND) OF CONTRACTS § 154, cmt. (c) (1981).

<sup>243</sup> *Commil II*, 135 S. Ct. at 1930.

<sup>244</sup> *Turner*, *supra* note 176, at 1012.

who assert that they mistakenly violated the law through a subjective good faith belief.<sup>245</sup>

Like the mistake of law defense, those who assert that they had a good faith belief in the invalidity of a patent do not assert that they are necessarily innocent or not culpable.<sup>246</sup> Induced infringers admit that their actions technically infringed upon the patent and perhaps facilitated the means by which others were able to infringe.<sup>247</sup> However, they also claim that they did not have the culpable state of mind to be held liable for this infringement.<sup>248</sup>

In *Manville Sales Corp. v. Paramount Systems, Inc.*, the Federal Circuit court “concluded that the alleged inducer did not possess the specific intent to encourage another’s infringement.”<sup>249</sup> The Federal Circuit found that induced infringement claims should be treated like specific intent standards within the common law.<sup>250</sup> For example, murder, “requires not only the general intent to engage in the acts constituting the offense, but an ‘additional deliberate and conscious purpose or design of accomplishing a very specific and remote result.’”<sup>251</sup> Similarly, a patent holder in an infringement case must show not only that the inducer engaged in the acts that caused infringement, but also that the inducer had knowledge that infringement was likely to occur.<sup>252</sup> As previously held by the Federal Circuit, knowledge of the patent’s existence can serve as evidence of the infringer or inducer’s intent.<sup>253</sup>

In the criminal context, mistake of law is not a viable defense.<sup>254</sup> Several reasons make the mistake of law defense problematic:

[M]any justifications have been proffered for denying ignorance of the law defense: the difficulty of disproving a claim of ignorance, the goal of encouraging citizens to know and obey the

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<sup>245</sup> *Global-Tech*, 131 S. Ct. at 2062–63. The Supreme Court looked to criminal law and applied it to the induced infringement context when establishing the notion of willful blindness.

<sup>246</sup> See Holbrook, *supra* note 7, at 404–07.

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

<sup>249</sup> 917 F.2d at 553–54; Lei, *supra* note 166, at 879.

<sup>250</sup> 917 F.2d at 553–54.

<sup>251</sup> Lei, *supra* note 166, at 879. See also Brief for Plaintiff-Appellee, *supra* note 12.

<sup>252</sup> See Brief for Plaintiff-Appellee, *supra* note 12.

<sup>253</sup> *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. at 2067–68.

<sup>254</sup> See *United States v. Rampton*, 762 F.3d 1152 (10th Cir. 2014) (stating “[t]he general rule that ignorance of the law or a mistake of law is no offense to criminal prosecution is deeply rooted in the American legal system.” *Cheek v. United States*, 498 U.S. 192, 199 (1991)); see also *United States v. Lain*, 640 F.3d 1134, 1139 (10th Cir. 2011).

law, and the need to prevent an accused person's idiosyncratic interpretation from attaining the status of a legal rule.<sup>255</sup>

The same concerns prevail in the patent context.

As the Court recognized, proving a good faith belief of invalidity of a patent would mirror the same difficulties as proving ignorance of the law defense.<sup>256</sup> In general, the better policy is to assume that the general public knows the law.<sup>257</sup> Like in the criminal context, where defendants argue that although they broke the law, this law should not be a law in the first place, the alleged inducer may argue that this product is not patentable.<sup>258</sup>

In the present dispute, Cisco argued that the patent was invalid for similar reasons.<sup>259</sup> The jury and the Supreme Court expressly rejected this assertion.<sup>260</sup> Thus, just as criminals may not assert that they knew there was a law, but thought it meant something else or that it was not a good law to begin with, Cisco cannot assert that it operated under a good faith belief the patent was invalid and escape liability. As the Court realized, to hold otherwise would undermine the credibility of the Patent Office and Congress's general authority.<sup>261</sup>

#### C. IMPLICATIONS OF THE FEDERAL CIRCUIT'S HOLDING AND SOLUTION HAD THE SUPREME COURT DENIED CERT OR RECOGNIZED THE DEFENSE

As the Court suggested, allowing the defense of good faith belief of the invalidity of a patent would remove any incentive to take preventive measures or to act cautiously.<sup>262</sup> Just as willful blindness and ignorance are not valid defenses, a good faith belief that a patent is invalid may not be a defense either.<sup>263</sup> The rationale is that in general, the law exists to discourage self-help remedies.<sup>264</sup>

The Court proposed that the inducer has access to judicial resources to determine the validity of the patent at the outset, such as petitioning the PTO

<sup>255</sup> Alter, Kernochan & Darley, *supra* note 2, at 820.

<sup>256</sup> *Commil II*, 135 S. Ct. at 1930.

<sup>257</sup> *See generally id.*

<sup>258</sup> 35 U.S.C. § 282(b)(2)(3) (2012).

<sup>259</sup> *Commil I*, 720 F.3d at 1365; *Commil II*, 135 S. Ct. at 1930.

<sup>260</sup> *See Commil II*, 135 S. Ct. at 1930.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 1930–31.

<sup>263</sup> *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. at 2063. *See Stark & Harasymiak, supra* note 39.

<sup>264</sup> Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 YALE J. ON REG. 1, 1 (2012) (“Many areas of law . . . completely forbid the use of self-help.”).

for post grant review or a declaratory judgment.<sup>265</sup> Not utilizing this tool, which the courts provide when the inducer knows that there has been a patent granted, defeats the argument that the inducer acted in good faith. One who truly acts in good faith would arguably confer with the patent holder, the Patent Office, or the courts from the start.<sup>266</sup> Good faith does not condone the “better to ask forgiveness than permission” approach that occurred here, and the Supreme Court rightfully rejected any notion of good faith in this situation.

Further, the Court recognized that the potential for fraud and deceit is great because a good faith belief defense is merely subjective and impossible to ascertain.<sup>267</sup> Any time a party is accused of induced infringement, the inducer will merely argue that he did not believe the patent was truly valid, which would defeat liability.<sup>268</sup> This creates a confusing and impossibly subjective inquiry for jurors.<sup>269</sup> As the Court further articulated, allowing the defense would also undermine the integrity of the patent process and rob patent holders of the security their patents provide.<sup>270</sup> Allowing such a defense contradicts not only the aims of the patent process but also Congress’s expressed preference to presume the validity of patents,<sup>271</sup> which demands the rejection of the good faith belief of invalidity of a patent defense.<sup>272</sup>

The inducer unquestionably is in the best position to assert invalidity at the outset with a declaratory judgment or through petitioning for reconsideration through the PTO, for litigation is a costly matter.<sup>273</sup> In the present dispute, the parties went through two trials at the district court level, an appeal to the Federal Circuit, and a Supreme Court hearing four years later.<sup>274</sup> In reality, had Cisco sought a declaratory judgment at the outset to determine the validity of the patent, this entire dispute could have been resolved without tying up as

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<sup>265</sup> *Commil II*, 135 S. Ct. at 1930; 35 U.S.C. § 321 (2012).

<sup>266</sup> Such a notion is not uncommon within the common law and relates back to the standard of the reasonable man we see in the tort context. Just as tortfeasors may be liable for acts and omissions that fall below the standard of care, so too should inducers in the above situation. *See* *Baltimore & P.R. Co. v. Jones*, 95 U.S. 439 (1877).

<sup>267</sup> *Commil II*, 135 S. Ct. at 1931; *see also* *Alter, Kernochan & Darley*, *supra* note 2, at 820.

<sup>268</sup> *Commil II*, 135 S. Ct. at 1930.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 1929; ABA IP 106 Patent Infringement Subcommittee Report, *supra* note 20, at 2; Pl.[’s].—Appellee Br. Appeal at 47.

<sup>271</sup> 35 U.S.C. § 282.

<sup>272</sup> ABA IP 106 Patent Infringement Subcommittee Report, *supra* note 20, at 13.

<sup>273</sup> *See* *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 18 (1966) (“To await litigation is for all practical purposes—to debilitate the patent system.”).

<sup>274</sup> *Commil USA, LLC v. Cisco Sys., Inc. (Commil I)*, 2011 WL 738871 (E.D. Tex., Feb. 23, 2011), *aff’d*, 410 Fed. Appx. 339 (Fed. Cir. Tex. Mar. 4, 2011), 720 F.3d 1361 (Fed. Cir. Tex., June 25, 2010), *rehearing denied* (October 25, 2013), *cert. granted in part*, 720 F.3d 1361 (Dec. 5, 2014).

much judicial time and resources and without the massive cost to both the inducer and the patent holder.

To allow a good faith belief of invalidity defense when the inducer has failed to go through the judicial remedies afforded to them at the outset would have condoned this wasteful behavior. By allowing this to occur, the Supreme Court would have contravened of Congress's intent and disincentived creators and producers because they could not rely on the security of their patents, and they would have been forced to defend their patents rights through costly and lengthy litigation.<sup>275</sup>

#### IV. CONCLUSION

Ultimately, the Supreme Court wisely rejected the defense of a good faith belief of invalidity of patents. Acknowledging such an exception would have been akin to allowing the inducer to assert that he was mistaken about the validity of a patent and escape liability for inducement. Mistake has never been recognized as a valid defense in the fundamental areas of common law, including tort, contract, and criminal law.

By rejecting the newly proffered affirmative defense, the Court upheld Congress's expressed wishes by reinforcing the presumption of the validity of patents. Especially in this context, Cisco had no legitimate defense because it failed to exhaust the judicial remedies afforded through a declaratory judgment or through petitioning the patent office. As the old saying goes, "the road to hell is paved with good intentions." Thankfully, the Supreme Court decided not to take that route here.

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<sup>275</sup> See *Commil II*, 135 S. Ct. at 1929; Pl.[s].—Appellee Br. Appeal at 47.