Patent infringement results from making, using, selling, or offering for sale within the United States, or importing into the United States, during the term of a patent, the invention defined by one or more of the claims of the patent without the authority of the patent owner. 35 U.S.C. § 271(a)-(c). The issue to be resolved in a case in which patent infringement is alleged is whether the accused product or process falls within the scope of any claim of the patent. *Sensonic, Inc. v. Aerosonic Corp.*, 81 F.3d 1566 (Fed. Cir. 1996). Patent infringement may be direct or indirect. One type of indirect patent infringement is referred to as “inducement” to infringe. The Patent Act specifically provides that whoever actively induces infringement of a patent shall be liable as an infringer. 35 U.S.C. § 271(b). That is, one party may not be directly making, using, offering for sale, selling, importing or otherwise practicing the claimed invention in the United States, but it is engaged in some level of activity that aids, abets, encourages, or otherwise induces another party to infringe the patent. In order to find a party liable for induced infringement, a court must first make a finding of direct infringement (via literal infringement or the Doctrine of Equivalents) by another party or parties.

Under 35 U.S.C. § 271(b), to establish liability under section 271(b), a patent holder must prove that once the defendants knew of the patent, they “actively and knowingly aided and abetted another’s direct infringement.” *DSU Medical Corp. v. Medisystems Corp.*, 471 F.3d 1293 (Fed. Cir. 2006) (quoting *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988)). However, knowledge of the acts alleged to constitute infringement is not enough. *DSU Medical*, 471 F.3d at 1305 (quoting *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348 (Fed. Cir. 2003)). The “mere knowledge of possible infringement by others does not amount to inducement; specific intent and action to induce infringement must be proven.” *Warner-Lambert*, 315 F.3d at 1364 (citing *Manville Sales Corp. v. Paramount Systems, Inc.*, 917 F.2d 544 (Fed. Cir. 1990). It must be established that the defendant possessed specific intent to encourage another’s infringement and not merely that the defendant had knowledge of the acts alleged to constitute inducement. The plaintiff has the burden of showing that the alleged infringer’s actions induced infringing acts and that he knew or should have known his actions would induce actual infringements. *DSU Medical*, 471 F.3d at 1306.

When a company seeks to launch a new product, or wishes to starting using a new method or process in connection with its business, it is prudent to seek an opinion from qualified patent counsel that its proposed business activities will not infringe upon any issued U.S. patents. The Supreme Court has recognized that a reasoned opinion of qualified patent counsel that a company’s proposed activity does not infringe patent rights is a defense to a claim of induced infringement. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. _____ (2011). The theory is that one cannot infringe an issued U.S. patent if it has a good-faith belief that the patent is not directly infringed.

The question presented in a recent appeal to the Supreme Court of the United States is whether knowledge of, or belief in, a patent’s validity is required for induced infringement under section 271(b). The Supreme Court held a defendant’s subjective belief regarding patent validity is not a defense to a claim of induced infringement. *Commil USA, LLC v. Cisco Systems, Inc.*, 575 U.S. ____ (2015).

Chief Justice Roberts joined Justice Scalia in a dissent to the majority’s holding in Commil. In the dissenting opinion, Justice Scalia noted, “[B]ecause only valid patents can be infringed, anyone with a good-faith belief in a patent’s invalidity necessarily believes the patent cannot be infringed. And it is impossible for anyone who believes that a patent cannot be infringed to induce actions that he knows will infringe it. A good-faith belief that a patent is invalid is therefore a defense to the induced infringement of that patent.” *Commil USA, Inc. v. Cisco Systems, Inc.*, 575 U.S. ____ (2015) (Scalia, J., dissenting). While a good-faith belief that an issued U.S. patent is invalid is not a defense.

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