

In The
Supreme Court of the United States

—◆—
COMMIL USA, LLC,

Petitioner,

v.

CISCO SYSTEMS, INC.,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

—◆—
**BRIEF *AMICUS CURIAE* OF THE COMPUTER &
COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

The Computer & Communications Industry Association (“CCIA”) represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than \$465 billion in annual revenues.² As manufacturers and providers of goods and services utilized by hundreds of millions of people around the world, CCIA members have a considerable stake in the proper and unambiguous interpretation of secondary liability doctrines in intellectual property matters, including the theory of inducement. The adoption of the expansive new version of inducement liability urged by Commil and the government would pose serious consequences for CCIA members and the technology industry as a whole.



¹ No counsel for any party authored this brief in whole or part, and no person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief, and the letters of consent are being filed herewith.

² A list of CCIA members is available at <http://www.ccianet.org/members>.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unlike many federal causes of action, both patent and copyright law provide not only for direct liability, but also secondary liability. Under theories of indirect infringement, a business may be held responsible for the infringements of its customers, even when providing general-purpose goods and services. This risk is manageable only because theories of secondary liability invariably require some indicia of malfeasance, such as volitional conduct, material contribution to the infringement, knowledge, financial benefit, and/or the right and ability to control the infringing activity. These constraints ensure that theories of indirect infringement do not paralyze the economy with secondary liability litigation.

Commil and the government propose a version of inducement liability, however, in which a good-faith belief of non-infringement is irrelevant. Under this theory, mere knowledge of a patent is enough for a manufacturer or service provider to be held to have induced a customer to infringe the patentee's franchise. By this reasoning, a person would intentionally induce infringement when enabling others to practice a technology even though he believes it to be unpatentable.

Commil and the government's theory is, however, inconsistent with this Court's precedent. The Court's opinion in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011) clearly held that knowledge of

infringement is required to show inducement under 35 U.S.C. § 271(b). It would be a change in the law to lower the standard for proving inducement by requiring no more than knowledge of the *patent*.

Such a change in the law would be both unnecessary and harmful. It is unnecessary because patent owners still have a complete remedy for infringement of their patents under 35 U.S.C. § 271(a). It is harmful because patent assertion entities (“PAEs”) would be able to leverage such a change to do even more damage to the economy and to American businesses.

In no event should the disposition of Commil’s claims undermine the standard for intentional inducement of copyright infringement announced in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Regardless of how this case is resolved, it is imperative that the Court not overturn *Grokster*’s requirement that intent to induce copyright infringement must be proven with clear expression or affirmative steps. To erode this high standard would threaten innovation and investment in the information technology industry. Accordingly, this brief urges that the Federal Circuit be upheld to avoid creating unmanageable risks to manufacturers and service providers.



ARGUMENT**I. THE FEDERAL CIRCUIT CORRECTLY INTERPRETED AND APPLIED THIS COURT'S PRECEDENTS REGARDING INDUCEMENT TO INFRINGE A PATENT****A. The Federal Circuit Correctly Held That a Good-Faith Belief That a Patent Is Invalid Is Relevant to Determining Intent Under 35 U.S.C. § 271(b)**

Commil's question presented is as follows:

Whether a good-faith belief that a patent is invalid is a defense to inducement liability under Section § [sic] 271(b).

Pet. Br. at i. Yet this question does not accurately reflect the decision below. The Federal Circuit's decision in *Commil USA, LLC v. Cisco Systems, Inc.*, 720 F.3d 1361 (Fed. Cir. 2013), held, in relevant part, that it was a clear error to exclude evidence of a good faith belief that the patent-in-suit is invalid. *Commil* at 1368-69. The court expressly did *not* hold that such a good-faith belief, no matter how unreasonable, is invariably a full defense to liability under 35 U.S.C. § 271(b):

We now hold that evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement. This is, of course, not to say that such evidence precludes a finding of induced infringement. Rather, it is evidence that should be considered by the fact-finder in

determining whether an accused party knew “that the induced acts constitute patent infringement.”

Id. (internal citation and footnote omitted).

Evidence of a good-faith belief of invalidity is clearly relevant to an accused inducer’s intent. A party who reasonably believes in good faith that a patent is invalid did not intend to induce infringement, because, as Judge Giles Rich noted, if a claim is invalid, “there is nothing to be infringed.”³ *Richdel, Inc. v. Sunspool Corp.*, 714 F.2d 1573, 1580 (Fed. Cir. 2003).

³ The government’s brief uses two out-of-context quotes from earlier opinions by Judge Rich in order to argue the opposite, namely that an invalid claim can still be infringed. First, the government quotes a dissent from Judge Rich in *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558 (Fed. Cir. 1991). See Brief for the United States as *Amicus Curiae* (SG Br.) at 24. The paragraph containing the quote makes his intended meaning clear, which is that parties could not constrain the court’s claim construction by stipulation. *Id.* at 1561. He was *not* saying anything about whether an invalid patent can be infringed.

The second quote from Judge Rich is from *Spectra-Physics, Inc. v. Coherent, Inc.*, 827 F.2d 1524 (Fed. Cir. 1987). See SG Br. at 25 (“[A]s Judge Giles Rich – another of the principal architects of the Patent Act of 1952 – put it, the assertion that ‘invalid claims cannot be infringed’ is ‘a nonsense statement.’”). In *Spectra-Physics*, the statement was nonsense *in that context*. Judge Rich was referring to the fact that infringement and invalidity are two separate issues, and that it was improper to infer anything about the jury’s conclusions with respect to the best mode requirement based on its finding of infringement. *Spectra-Physics*, 827 F.2d at 1535.

Commil and the government appear to argue that a potential inducer should be expected to focus on a technical legal issue (*i.e.*, whether patent claims read on the conduct to be induced) rather than whether the induced conduct would lead to liability. *See* SG Br. at 22 (“[A] finding of invalidity does not negate the *fact* of infringement, but instead precludes *liability* for that infringement.” (emphases in original)). The government also misstates the law of inducement, claiming that “[t]he inducee’s unauthorized performance of all steps of a patented method constitutes direct ‘infringement,’ even if the patent is ultimately found to be invalid.” *Id.* at 21. The government’s argument rests on the fact that invalidity must be pled as an affirmative defense. *Id.* at 22-23. This is a distinction without a difference.

As the government’s brief acknowledges, *see id.* at 10, Section 271(b) creates a type of “secondary liability.” By definition, secondary liability requires primary liability. *See* Black’s Law Dictionary 925-27 (7th Ed. 1999). Section 271(b) is intended to deter a party from inducing conduct that would give rise to primary liability for patent infringement. If the induced party would not be liable under Section 271(a), there is no reason to deter such inducement.

Moreover, if a patent is actually invalid there can be no liability under Section 271(b). *Prima Tek II, L.L.C. v. Polypap S.A.R.L.*, 412 F.3d 1284, 1291 (Fed. Cir. 2005) (observing that “there can be no contributory or induced infringement of invalid patent claims”). Similarly, if a patent is not infringed, there

is no liability under Section 271(b). As the opinion below recognized, there is no reason to treat the two differently with respect to intent. *See Commil*, 720 F.3d at 1367-68. A belief of non-infringement is a belief of no liability under Section 271(b), as is a belief of invalidity. There is no basis for admitting evidence of one while excluding evidence of the other.

In light of the purpose of Section 271(b), evidence of a good-faith belief of invalidity is certainly relevant to intent. Accordingly, the Federal Circuit correctly held that the jury should be allowed to hear such evidence.

B. *Global-Tech* Held That Knowledge of Patent Infringement Liability Is Required to Show Inducement to Infringe

Commil and the government do not accurately characterize this Court's opinion in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). The issue in *Global-Tech* was whether deliberate indifference to a known risk of inducement could lead to liability under Section 271(b). The Court held that it could. *Id.* at 2069.

In order to reach that conclusion, the Court first interpreted the language of Section 271(b). As the Court observed:

In referring to a party that “induces infringement,” this provision may require merely that the inducer lead another to

engage in conduct that happens to amount to infringement, i.e., the making, using, offering to sell, selling, or importing of a patented invention. *See* § 271(a). On the other hand, the reference to a party that “induces infringement” may also be read to mean that the inducer must persuade another to engage in conduct that the inducer knows is infringement. Both readings are possible.

Id. at 2065 (footnote omitted). The Court held that the second meaning is the correct reading of Section 271(b):

Accordingly, we now hold that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.

Id. at 2068.

The government’s description of this holding as a “suggestion” cannot be correct, as Justice Kennedy’s dissent in *Global-Tech* makes clear:

The Court is correct, in my view, to conclude that 35 U.S.C. § 271(b) must be read in tandem with § 271(c), and therefore that to induce infringement a defendant must know “the induced acts constitute patent infringement.”

....

... One can believe that there is a “high probability” that acts might infringe a patent but nonetheless conclude they do not

infringe. The alleged inducer who believes a device is noninfringing cannot be said to know otherwise.

Id. at 2072 (Kennedy, J., dissenting) (internal citations omitted). The *Global-Tech* dissent would make no sense if the government’s reading of *Global-Tech* were correct.⁴

This Court has in the past criticized the Federal Circuit for failing to follow its instructions and for using overly rigid tests.⁵ In this case, however, the Federal Circuit did precisely what this Court instructed. It correctly applied *Global-Tech* and issued a reasonable decision. It did not create an absolute rule; rather, the Federal Circuit held merely that a jury should be allowed to consider evidence of a good-faith belief of invalidity in its deliberations. Accordingly, its decision should be affirmed.

⁴ Neither Commil nor the government address Justice Kennedy’s dissent in *Global-Tech*.

⁵ See, e.g., *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007) (“We begin by rejecting the rigid approach of the Court of Appeals.”); *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010) (rejecting Federal Circuit’s reasoning as failing to follow the Court’s precedents); *eBay, Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 393 (2006) (rejecting Federal Circuit’s “categorical” granting of injunctive relief).

C. Including a Broader Class of Conduct Under 35 U.S.C. § 271(b) Is Unnecessary Because Patent Owners Have a Remedy Under 35 U.S.C. § 271(a)

Commil argues that affirming the Federal Circuit would “deprive patentees of their statutory remedy for infringement of valid patents,” Pet. Br. at 36, and “dramatically weaken patentees’ rights under 35 U.S.C. § 271(b),” Pet. Br. at 37. Neither claim is true.

In order for there to be indirect infringement under either 35 U.S.C. § 271(b) or (c), there must be direct infringement under 35 U.S.C. § 271(a). It is Section 271(a) that provides a “statutory remedy for infringement of valid patents.” Section 271(b) addresses much narrower conduct, specifically when a party knowingly induces another to directly infringe a valid patent.

Thus, there is no “weakening of patentees’ rights,” because the patent owner has its remedy against the direct infringer through Section 271(a). The fact that it might be cheaper or easier to seek compensation from an alleged inducer rather than the direct infringer does not justify expanding the definition of actionable conduct under Section 271(b). Regardless of the disposition of this case, all patent owners will continue to have a remedy under 35 U.S.C. § 271(a) against the direct infringer of a valid patent. Section 271(b) provides a supplemental remedy in the limited situation where a party intentionally induces direct infringement. But by

definition, in order for there to be liability under Section 271(b), there must be a direct infringer. If Commil cannot establish the existence of a direct infringer under 35 U.S.C. § 271(a), then no harm can result from preventing it from dragging third parties into court.

D. Expanding Liability Under 35 U.S.C. § 271(b) Would Embolden Patent Assertion Entities

This case is important to the thousands of businesses that are the targets of patent assertion entities (“PAEs”), also called patent monetization entities (“PMEs”). PAEs are companies whose business is licensing and enforcing patents, typically using purchased patents. PAEs cost the U.S. economy billions of dollars per year, targeting businesses of all sizes and in a wide variety of industries.

The PAE business model relies on the difficulty of proving patents invalid. PAEs are profitable because accused infringers have a strong incentive to settle. It is extremely expensive to defend against a patent infringement claim, in large part because there are few ways to dismiss even a weak claim on the pleadings. Accordingly, nearly every such case will require discovery, which costs hundreds of thousands, or even millions of dollars. In 2012, the mean cost through the end of discovery for cases filed by PAEs worth less than \$1 million was \$516,000; for such cases with \$1 to \$10 million at risk, that figure was \$998,000; and

for cases with \$10 to \$25 million at risk, the mean cost through the end of discovery was over \$1.7 million.⁶

Inducement requires proving that the alleged inducer knew that the induced conduct would be patent infringement. Commil asks this Court to provide an easier path to imposing these staggering litigation expenses, namely that a simple notice letter would satisfy the intent prong of proving inducement.

Such notice letters would be ripe for abuse by PAEs. With the burden of proving intent essentially removed, PAEs will be free to target the deepest pockets in the supply chain irrespective of what the patent-in-suit actually covers.

In the current litigation system, PAEs already have enormous leverage to demand settlement. Giving them still more would make a bad situation much worse.

II. THE COURT SHOULD NOT UNDERMINE THE STANDARD FOR INTENTIONAL INDUCEMENT OF COPYRIGHT INFRINGEMENT ANNOUNCED IN *GROKSTER*

Regardless of how this Court resolves the question of the level of scienter required for active

⁶ AIPLA, *Report of the Economic Survey 2013*, at I-145 (July 2013), available at <http://www.aipla.org/members/Documents/AIPLA%202011%20Report-%20Summary%20102411.pdf>.

inducement of *patent* infringement under 35 U.S.C. § 271(b), it should ensure that nothing in its decision lowers the level of scienter required for intentional inducement of *copyright* infringement. Unlike the Patent Act, which establishes a framework for secondary liability, the Copyright Act does not directly address secondary liability. Instead, secondary liability doctrines in the copyright context have been developed by the courts, often by importing concepts from the Patent Act. Most recently, this Court in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005), viewed active inducement in 35 U.S.C. § 271(b) as a model for an inducement rule in copyright. Once the Court imported the basic concept of inducement from the Patent Act, it explored in great detail how the concept should apply in the copyright context. It also reconciled the inducement rule with its earlier decision concerning secondary copyright infringement, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The scienter standard articulated by the Federal Circuit in this case corresponds to the scienter standard in *Grokster*. As discussed below, *Grokster* required a showing of culpable intent to induce infringement of copyright before imposing liability for third party actions. The Federal Circuit's treatment of a good-faith belief of patent invalidity as a potential defense to inducement liability matches this culpable intent requirement.

Nevertheless, even if this Court concludes that *Grokster*'s culpable intent requirement should not

inform its interpretation of 35 U.S.C. § 271(b), and that mere notice of a patent's existence is sufficient scienter for purposes of Section 271(b), this Court should make clear that its ruling in this case in no way weakens the culpable intent requirement found by *Grokster* for inducement liability in the copyright context. The *Grokster* Court carefully calibrated the intentional inducement doctrine in copyright law to ensure that it “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Grokster*, 545 U.S. at 937. This Court should not allow that calibration to be undone.

A. *Grokster* Held That Intent to Induce Infringement Is Necessary for Contributory Copyright Infringement Liability

This Court held in *Grokster* that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.” *Grokster*, 545 U.S. at 930. The Court clarified that mere knowledge that a person's actions would contribute to infringement was not sufficient to lead to contributory liability; the person had to intend for his actions to contribute to infringement. This clarification was necessary to resolve the growing tension in the lower courts between the traditional formulation of contributory copyright infringement and this Court's ruling in *Sony* that a device manufacturer was not liable for contributory infringement so long as his device was capable of substantial noninfringing uses.

Before *Grokster*, a contributory infringer was “one who, with *knowledge* of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis supplied). The *Gershwin* formulation appeared to impose liability on a person who engaged in an activity that he knew contributed to infringement, even if that was not his intent. This is precisely the situation this Court addressed in *Sony*. Sony continued to distribute the Betamax device even though it knew that some users were likely to employ it to infringe. To avoid imposing liability on Sony, the Court imported the staple article of commerce doctrine from Section 271(c) of the Patent Act, and declared that the sale of copying equipment did not constitute contributory copyright infringement so long as the equipment was “merely . . . capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 442.

Lower courts viewed *Sony* as an exception to contributory infringement as formulated in *Gershwin*, but had difficulty applying *Sony* and *Gershwin* in a consistent manner to Internet-related products and services. Compare, e.g., *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001) with *MGM Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *rev'd*, 545 U.S. 913 (2005). In particular, courts struggled with how to apply the *Sony* rule when there was

evidence that the manufacturer or service provider intended to encourage infringement.⁷

This Court in *Grokster* resolved the confusion by clarifying that contributory copyright infringement requires a showing of intent to encourage infringement, rather than mere knowledge of the infringing activity. The *Grokster* Court explained how *Sony* fit into this formulation of contributory infringement: “*Sony* barred secondarily liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.” *Grokster*, 545 U.S. at 933. Thus, although *Sony* knew that the Betamax could be used for infringing purposes, the *Sony* rule “limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product.” *Id.* at 934. Since “[t]here was no evidence that *Sony* had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping,” *id.* at 931, and since such an unlawful objective could not

⁷ This tension does not exist in the Patent Act because active inducement and contributory infringement (with its staple article of commerce doctrine) are separate causes of action codified separately at 35 U.S.C. §§ 271(b) and 271(c). As the Court explained in *Grokster*, “the Patent Act’s exemption from liability for those who distribute a staple article of commerce, 35 U.S.C. § 271(c), [does not] extend to those who induce patent infringement, § 271(b).” *Grokster*, 545 U.S. at 935 n.10.

be presumed, Sony was not liable for contributory infringement.

In contrast, it appears that Grokster did intend for users to employ its software to infringe. And the *Grokster* Court explained that “nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence,” *id.* at 934, even if a product is capable of substantial noninfringing uses.

B. *Grokster* Required That Intent to Induce Infringement of Copyright Must Be Shown by Clear Expression or Affirmative Steps

This Court stated unambiguously in *Grokster* that knowledge of infringement was insufficient grounds for imputing intent to induce copyright infringement. Rather, intent to induce must be “shown by clear expression or other affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 919. The Court stressed that the clear expression or affirmative steps must be blatant: “[i]f liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was.” *Id.* at 941. Similarly, the Court insisted on “unequivocal indications of unlawful purpose.” *Id.* at 938. The Court emphasized that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor

would ordinary acts incident to product distribution, such as offering technical support or product updates, support liability in themselves.” *Id.* at 937.⁸

The Court also refused to presume intent from a company’s failure to take affirmative steps, such as filtering, to prevent infringement. The Court said, “[o]f course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device was otherwise capable of substantial noninfringing uses. Such a holding would tread too

⁸ The language of the *Grokster* opinion suggests that liability should attach only if the defendant had the specific intent to cause infringement: “the object of promoting its use to infringe,” *Grokster*, 545 U.S. at 919, “their principal object was use of their software to download copyrighted works,” *id.* at 926, “an actual purpose to cause infringing use,” *id.* at 934, “statements or actions directed to promoting infringement,” *id.* at 935, “active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe,” *id.* at 936, “purposeful, culpable expression and conduct,” *id.* at 937, “active steps were taken with the purpose of bringing about infringing acts,” *id.* at 938, “acted with a purpose to cause copyright violations,” *id.*, “unequivocal indications of unlawful purpose,” *id.*, “a principal, if not exclusive, intent on the part of each to bring about infringement,” *id.* at 939, “intentional facilitation of their users’ infringement,” *id.*, “unlawful objective,” *id.*, “the distributor intended and encouraged the product to be used to infringe,” *id.* at 940 n.13, “a purpose to cause and profit from third-party acts of copyright infringement,” *id.* at 941, and “patently illegal objective.” *Id.*

closely to the *Sony* safe harbor.” *Grokster*, 545 U.S. at 939 n.12.

Similarly, the Court did not presume intent based solely on a company’s adoption of an advertising-based business model that could benefit from traffic stimulated by infringing material. The Court stated that “[t]his evidence alone would not justify an inference of unlawful intent. . . .” *Id.* at 940.

In sum, the *Grokster* Court stated that the inducement rule “premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.* at 937.

C. Erosion of *Grokster* Would Threaten the Information Technology Industry

Application in the copyright context of the scienter standard advocated by Commil would harm the entire information technology industry. Digital technology has made copying ubiquitous. The digital video recorders on which we record television programs, the personal computers from which we upload content to and download content from the Internet, the mobile devices with which we take and send photographs – these result in the average American consumer making hundreds, if not thousands, of copies every day. The majority of these copies are noninfringing under theories such as fair use, 17 U.S.C. § 107, or implied license. But many of these

copies may infringe copyright owners' exclusive rights under 17 U.S.C. § 106. Many manufacturers of digital devices and providers of Internet services can expect that at some point at least one customer is likely to employ their devices or services to infringe copyright. What protects these manufacturers and service providers from ruinous secondary liability for infringing third party activities is this Court's rule in *Grokster* that intent to induce infringement must be shown by clear expression or affirmative steps, and would not be presumed from mere knowledge that the device or service was being used to infringe.

The *Grokster* Court acknowledged that when a device "is good for nothing else but infringement, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe." *Grokster*, 545 U.S. at 932-33 (internal citations and quotation marks omitted). At the same time, the *Grokster* inducement rule "absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused." *Id.* In this manner, the rule "leaves breathing room for innovation and a vigorous commerce." *Id.*

Virtually all digital technologies have both lawful and unlawful uses. For this reason, imposing liability on device manufacturers and service providers based on the mere understanding that some of their products and services can be misused to infringe copyright

threatens the continuation of the Information Revolution. Yet this is exactly the standard Commil demands in the patent context. Regardless of what standard governs 35 U.S.C. § 271(b), the Court should make clear that this determination has absolutely no impact on the culpable intent standard articulated in *Grokster* for contributory copyright infringement liability. Failure to do so would upset the “sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies.” *Grokster*, 545 U.S. at 928.



CONCLUSION

For the foregoing reasons, the Court should affirm the Federal Circuit.

Respectfully submitted,

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