

AN ANALYSIS OF *COMMIL*: WHAT THE COURT FAILED TO CONSIDER

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INTRODUCTION

In 2015, the Supreme Court decided the case *Commil USA, LLC v. Cisco Systems*.¹ The majority held that a belief regarding a patent's validity "cannot negate the scienter required for induced infringement."² As a result, a defendant's good-faith belief in a patent's invalidity is not a defense against a claim of induced infringement.³

However, both the majority and dissenting opinions failed to fully address several key considerations in their analyses of this issue. Additionally, as Justice Scalia pointed out in his dissenting opinion, the Court's holding will increase opportunities for patent trolling.⁴ Furthermore, a party that causes another to infringe a patent that is believed invalid now faces additional liability for non-malicious acts.⁵

These reflections raise the question of whether Congress will choose to uphold, reverse, or modify the Court's ruling in future legislation. There also exists the unlikely possibility that the Supreme Court will address this issue again once United States patent litigants have experienced the consequences of the Court's decision.

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¹ 575 U.S. 632, 135 S. Ct. 1920 (2015). Author note: this case was only recently added to the U.S. Reporter; therefore, the remainder of the citations are to the Supreme Court Reporter because page numbers are not yet available online for the U.S. Reporter.

² *Id.* at 1929.

³ *Id.*

⁴ *Id.* at 1932.

⁵ *See infra* Part II.B.

This article intends to analyze and sometimes critique several arguments presented in the majority and dissenting opinions of the Court. A second intention of this article is to discuss potential future effects that this decision will have on patent litigation. Finally, this article will consider whether the Court or Congress will address this issue again, to either reverse the decision or modify it to limit the applicability of the decision's holding.

I. BACKGROUND

The following part provides a brief explanation of relevant patent law, an overview of the procedural history of the *Commil* case, and summaries of the Supreme Court's majority and dissenting opinions.

A. *The difference between direct infringement and induced infringement.*

In 35 U.S.C. § 271, Congress defined the multitude of ways that a party may infringe a patent. Section 271(a) states, "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."⁶ This provides the definition of direct patent infringement, which courts frequently describe as a strict liability tort.⁷ An infringer need not have a particular mental state to infringe as long as they make, use, offer to sell, or sell a patented invention.⁸

However, in defining induced infringement, Section 271(b) of the statute states, "[w]hoever actively induces infringement of a patent shall be liable as an infringer."⁹ Courts have repeatedly interpreted the word "actively" in the definition of induced infringement as requiring a "knowing" mental state.¹⁰ Litigants usually reserve claims of induced infringement for prosecuting competitors that are particularly bad actors, in that the competitors

⁶ 35 U.S.C. § 271(a) (2018).

⁷ See, e.g., *Commil USA*, 135 S. Ct. at 1926; *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 484 (1964); *Aristocrat Techs. Austl. Pty. v. Int'l Game Tech.*, 709 F.3d 1348, 1363 (Fed. Cir. 2013).

⁸ See *Aro Mfg. Co.*, 377 U.S. at 484.

⁹ 35 U.S.C. § 271(b).

¹⁰ E.g., *Dynamis, Inc. v. Leepoxy Plastics, Inc.*, 831 F. Supp. 651, 656 (N.D. Ind. 1993); *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988), *vacated on other grounds*, 714 F. Supp. 899, (N.D. Ill. 1989).

purposefully disregard another's patent and cause additional parties to infringe the rights of the patent-holder.¹¹

B. Factual and procedural background of Commil USA, LLC v. Cisco Systems.

Commil USA, LLC (Commil) owned a patent for “a method of implementing short-range wireless networks” (‘395 patent).¹² Cisco Systems (Cisco) made and sold networking equipment that allegedly infringed the ‘395 patent.¹³ Additionally, Commil asserted that Cisco induced numerous others to infringe the ‘395 patent by selling the infringing equipment to Cisco’s customers.¹⁴ As a result, Commil sued Cisco, claiming both direct and induced infringement of the ‘395 patent.¹⁵

Cisco argued that because it “had a good-faith belief that Commil’s patent was invalid,” it lacked the requisite mental state to be held liable for induced infringement.¹⁶ Without specifying a reason, the District Court for the Eastern District of Texas ruled that evidence offered to establish such a good-faith belief was inadmissible.¹⁷

On appeal, the federal circuit held that Cisco was entitled to present evidence of its belief that the patent in question was invalid.¹⁸ The federal circuit noted that “a good-faith belief of non-infringement is relevant evidence that tends to show that an accused inducer lacked the intent required to be held liable for induced infringement.”¹⁹ The federal circuit’s discussion of intent is a reference to the statutory definition previously quoted.²⁰ For a person to be liable for induced infringement, the person must *actively* induce

¹¹ See *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1326 (Fed. Cir. 2013) (Reyna, J., dissenting).

¹² *Commil USA*, 135 S. Ct. at 1924.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Commil USA, LLC v. Cisco Sys.*, 720 F.3d 1361, 1369 (Fed. Cir. 2013), *vacated*, 135 S. Ct. 1920 (2015).

¹⁹ *Id.* at 1367–68.

²⁰ See 35 U.S.C. § 271(b) (2018).

infringement of a patent.²¹ In other words, the infringer must know that he is causing another party to infringe the patent.

The federal circuit also noted that “[i]t is axiomatic that one cannot infringe an invalid patent.”²² Therefore, the court reasoned, since only valid patents can be infringed, evidence that a defendant believed the patent was invalid (and could not be infringed) is relevant to determining liability for induced infringement.²³

C. Summary of the Supreme Court’s majority opinion and Justice Scalia’s dissent.

In 2015, the Supreme Court reversed the federal circuit’s decision, holding that a good faith belief in a patent’s invalidity is not a defense to a claim of induced infringement.²⁴ The majority opinion included several arguments to support this holding, the principal one being that noninfringement and invalidity are two separate defenses that need not be considered together.²⁵ The majority further argued that affirming the federal circuit’s ruling would undermine the fact that, under the Patent Act, patents are presumed valid.²⁶

However, the majority brushed off several counterpoints without fully discussing the merits of those arguments.²⁷ For example, the opinion assumed that a defense based on a good faith belief of a patent’s invalidity would necessarily increase discovery costs.²⁸ Additionally, the majority stated that such a defense would require juries to face the “difficult task of separating a defendant’s belief regarding validity from the actual issue of validity,” despite the fact that courts regularly ask juries to distinguish parties’ beliefs from reality.²⁹

²¹ *Id.*

²² *Commil USA*, 720 F.3d at 1368.

²³ *Id.* at 1367–68.

²⁴ *Commil USA, LLC v. Cisco Sys.*, 135 S. Ct. 1920, 1928–29 (2015).

²⁵ *Id.* at 1928.

²⁶ *Id.* at 1929.

²⁷ *See id.* at 1931–32 (Scalia, J., dissenting). This assertion is discussed in further detail in Part II below.

²⁸ *Id.* at 1930 (majority opinion).

²⁹ *Id.*

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Justice Scalia wrote a terse dissent in which he listed several considerations that the majority opinion neglected to address.³⁰ The focal point of his dissent was the axiom quoted by the federal circuit: “that only valid patents can be infringed.”³¹ Justice Scalia agreed with the reasoning of the federal circuit that, if a party believed that a patent was invalid, and therefore could not be infringed, then the party lacked the requisite mental state to “actively induce” another to infringe the patent.³² Justice Scalia further noted the troubling possibility that the majority’s opinion could aid patent trolls.³³

II. A LEGAL ANALYSIS OF THE COURT’S *COMMIL* DECISION.

As previously stated, the majority’s opinion failed to address several arguments and policy considerations that favor adopting the *Commil* defendant’s defense to induced infringement based on a good faith belief of a patent’s invalidity. The following part will discuss these arguments and policy considerations in order to illustrate the cursory, and at times faulty, nature of the majority’s opinion.

A. The Court’s “mistake of law” rationale was flawed.

While the majority denounced the federal circuit for “conflat[ing] the issues of infringement and invalidity,”³⁴ the majority’s opinion itself incorrectly conflated a mistake-of-fact defense with a mistake-of-law defense.³⁵

The majority opined that a defense based on a good-faith belief in a patent’s invalidity is synonymous with a mistake-of-law defense.³⁶ The majority opinion stated:

[O]f course, “[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is

³⁰ *Id.* at 1931–32 (Scalia, J., dissenting).

³¹ *Id.* at 1931.

³² *Id.*

³³ *Id.* at 1932. The term “patent trolls” refers generally to “entities that own and enforce patents without practicing or making the underlying patented inventions.” *See infra* note 83.

³⁴ *Commil USA*, 135 S. Ct. at 1928.

³⁵ *See id.* at 1930.

³⁶ *Id.*

deeply rooted in the American legal system.” In the usual case, “I thought it was legal” is no defense. That concept mirrors this Court’s holding that belief in invalidity will not negate the scienter required under [Section] 271(b).³⁷

While the majority correctly noted that mistake of the law is almost never a proper defense, the opinion failed to comment on the applicability of the well-established mistake-of-fact defense.³⁸ A belief in a patent’s invalidity as a defense is more synonymous with a mistake-of-fact defense.³⁹ The rule, generally, is that a mistake of fact is a defense when it negates the mental state necessary for the commission of the offense.⁴⁰

For instance, imagine a man who was once married but has since been divorced. The man has not seen his ex-wife in decades, and he has held himself out to be a single man in a variety of contexts. However, unbeknownst to the man, the divorce was never finalized.⁴¹ When the man marries a second wife and is accused of bigamy, does he have a valid defense?

In the majority’s view, the man would be guilty of bigamy since the man’s marital status is a legal characteristic and “mistake of the law is no defense.”⁴² However, determining the man’s status as “married” also presents a question of fact.⁴³ Similarly, the validity of a patent is both a legal and factual characteristic of the patent.⁴⁴ As such, if the Court truly intended to support its *Commil* ruling with a synonymous criminal defense, it should have held

³⁷ *Id.* (citation omitted).

³⁸ *See id.*

³⁹ *See, e.g., Heller & Son, Inc. v. Lassner Co.*, 212 N.Y.S. 175, 178 (App. Div. 1925); *Crew v. Flanagan*, 242 Minn. 549, 562–63 (1954).

⁴⁰ *See State v. Poole*, 568 A.2d 830, 831–32 (Me. 1990); *see also State v. Nagi*, 2017-1257, 2018 WL 1704253 at *22–23 (La. App. Apr. 9, 2018, pet. denied).

⁴¹ Hypothetical based on cases such as *United States v. Bateman*, 8 C.M.A. 88 (1957) and *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001).

⁴² *See Commil USA*, 135 S. Ct. at 1930.

⁴³ *O’Neil v. Stratton*, 64 F.2d 911, 911 (8th Cir. 1933); *Finrow v. West*, No. 97-1605, 1998 U.S. Vet. App. LEXIS 1492, at *4 (Vet. App. 1998).

⁴⁴ The Federal Circuit has stated that validity is a question of law, but that satisfaction of the various requirements for a patent to be deemed valid are questions of fact. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 481 F.3d 1371, 1377 (Fed. Cir. 2007) (“Anticipation is a question of fact, but validity is a question of law.”); *see also Agilent Techs., Inc. v. Affymetrix, Inc.*, 567 F.3d 1366, 1379 (Fed. Cir. 2009) (“Satisfaction of the written description requirement is a question of fact.”).

that a good-faith belief in a patent's invalidity is a viable defense since it is akin to an allowable mistake-of-fact defense.

B. Treating induced infringement as a strict liability tort is against public policy and will unnecessarily punish accidental inducers.

With respect to direct patent infringement, patentees do not carry any burden of proving that the defendant possessed a culpable mental state while committing the infringing acts.⁴⁵ Because of this, direct infringement of a patent is often characterized as a strict liability offense.⁴⁶

There are several policy rationales behind strict liability offenses.⁴⁷ One rationale is that, although the defendant may have had no intent to commit the offense, society has determined that defendants, not plaintiffs, should shoulder the cost of damages.⁴⁸ When both parties are equally "innocent," we prefer that the victim's rights be protected first and foremost.⁴⁹

In the case of direct infringement, the patent-holder is the victim and is simply protecting the rights granted by the patent.⁵⁰ Because a patent's value is derived from the patent-holder's ability to exclude others,⁵¹ Congress structured the patent system to protect the interests of the patent-holder above those of any infringer, regardless of the party's innocence.

But this rationale cannot similarly apply to induced infringement claims. By its statutory definition, induced infringement requires a culpable mental state. Thus, if the elements of induced infringement are established, the defendant can no longer possibly be said to be "innocent."⁵² The societal preference to aid plaintiffs does not extend to induced infringement, as evidenced by the requirement that the plaintiff prove the defendant's "active" inducement.⁵³

⁴⁵ *Commil USA*, 135 S. Ct. at 1926.

⁴⁶ *See, e.g., id.*; *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 484 (1964); *Aristocrat Techs. Austl. Pty. v. Int'l Game Tech.*, 709 F.3d 1348, 1363 (Fed. Cir. 2013).

⁴⁷ *Morissette v. United States*, 342 U.S. 246, 256 (1952).

⁴⁸ *State v. Buehler Food Mkts., Inc.*, 552 N.E.2d 680, 682–83 (Ohio Ct. App. 1989).

⁴⁹ *See id.*

⁵⁰ *See* 35 U.S.C. § 271 (2018).

⁵¹ *See id.*

⁵² *Id.* § 271(b).

⁵³ *See id.*

Furthermore, in general, the punishments for strict liability offenses are considerably less harsh than those for intentional torts or crimes.⁵⁴ More severe punishments are reserved for the latter offenses because such acts are more offensive and harmful to society.⁵⁵ A claim of direct infringement allows the patent-holder to recover his loss as a result of the infringement (or at least a “reasonable royalty”) and nothing more.⁵⁶

Additionally, where one defendant unknowingly causes a third party to infringe the patent, the patent-holder may recover direct-infringement damages from the third party as well as the initial defendant.⁵⁷ Except in the most egregious cases of infringement, direct infringement damages are considered sufficient to restore the plaintiff.⁵⁸ But, by treating induced infringement as a strict liability tort, the *Commil* ruling allows plaintiffs to recover further damages on top of the damages caused by the direct infringement regardless of the underlying factual scenario.

Plaintiffs usually file claims of induced infringement against competitors that are particularly bad actors, as opposed to mere inadvertent infringers.⁵⁹ When accidental inducers are punished in the same manner as malicious inducers, induced infringement claims act to impute punishment equally on both good and bad actors. In doing so, the Court’s ruling essentially eliminates the additional deterrent function that claims of induced infringement may have toward malicious inducers.

The *Commil* holding effectively provides plaintiffs with an additional strict-liability cause of action for infringement purposes, allowing courts to shift the liability for damages caused by third-party direct infringers onto a single, non-malicious defendant.⁶⁰ As a result, the amount awarded to

⁵⁴ *Morissette v. United States*, 342 U.S. 246, 256 (1952).

⁵⁵ *See id.* at 255–56.

⁵⁶ *See* 35 U.S.C. § 284. Unless the infringement is found to have been “willful,” or the case has been found to have been in some way “exceptional.” *See* 35 U.S.C. § 285.

⁵⁷ *Id.* § 271.

⁵⁸ *See id.* § 284.

⁵⁹ *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1326 (Fed. Cir. 2013).11

⁶⁰ *See* Charles Koole, *Navigating Patent Damages Part II: How Infringement Allegations Can Impact or Limit Potential Damages*, GLASER WEIL (Feb. 4, 2015), <https://www.glaserweil.com/news-resources/insights/ip-file/navigating-patent-damages-part-ii-how-infringement-allegations-can-impact-o>.

plaintiffs for an induced infringement claim will act as punitive damages even against non-malicious infringers who caused others to infringe.⁶¹

C. Statutory construction of 35 U.S.C. § 271 suggests that validity is a relevant part of the infringement analysis.

The differences between Sections 271(b) and 271(e)(2) introduce statutory construction questions that were neither raised by counsel nor addressed by the Court in *Commil*.

In 35 U.S.C. § 271(b), Congress defined liability for induced infringement by stating, “[w]hoever actively induces infringement of a patent shall be liable as an infringer.”⁶² 35 U.S.C. § 271(e)(2), on the other hand, is directed towards infringement of patents on drugs regulated by the Federal Food, Drug, and Cosmetic Act.⁶³ Notably, Section 271(b) uses the term “a patent,” whereas Section 271(e)(2) describes products “claimed in a patent.”⁶⁴

A canon of construction is that, if the legislature chooses to use different words in different sections of the same statute, courts should view that difference as intentional.⁶⁵ Therefore, the terms “patent” and “product claimed in a patent” should be interpreted differently when analyzing claims of infringement.

The term “patent” within the statute can only logically mean “a valid patent” since only valid patents can be infringed. On the other hand, an unenforceable or invalid patent may still include inventions “claimed in [the] patent.” This is because the claims included in a patent exist in applications,

⁶¹ See *id.* A damage calculation for patent infringement is inherently speculative on some level due to its dependence on a jury determination of “reasonable royalties.” As such, it is impossible to determine whether the treatment of induced infringement as a strict liability tort would unjustly enrich plaintiffs. However, the plaintiff almost certainly minimizes litigation expenses by suing only one defendant for both direct and induced infringement, even though the defendant might have lacked the mental state required by the statute. As a result, the plaintiff saves money while the defendant may be forced to shoulder the liability of third-party infringers.

⁶² 35 U.S.C. § 271(b).

⁶³ *Id.* § 271(e)(2).

⁶⁴ *Id.* § 271.

⁶⁵ *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

active patents, and expired patents, despite the fact that those patents may no longer be valid or were never valid to begin with.

Additionally, the canon of construction against surplusage demands that, if possible, every word and every provision is to be given effect.⁶⁶ Courts should not interpret a statute as to make any words in the statute superfluous.⁶⁷ As a result of *Commil*, however, the word “actively” in Section 271(b) loses its significance in the situation where a defendant believes in good faith that the plaintiff’s patent is invalid.

Relying on *Commil*, several district courts have stated that “actively” means “knowledge of the patent and specific intent that another party infringe the patent.”⁶⁸ But dependence on this definition relies on circular reasoning in that it necessarily presumes that a belief in a patent’s invalidity is irrelevant for determining whether a defendant intended to cause infringement. In other words, this definition does not consider the full scope of a defendant’s actual intent and ignores the fact that only valid patents can be infringed.

The Court chose to alter the definition of “actively” to achieve a desired outcome. But, as a result, induced infringement is now effectively a strict liability tort because “actively” is ultimately rendered superfluous in this situation.

D. While the Commil Court refused to acknowledge a new defense, there are still several conduits for parties wishing to invalidate an existing patent.

One purpose behind the United States patent system is that granting temporary monopolies to inventors promotes free enterprise.⁶⁹ Society and the economy benefit from the dissemination of technology.⁷⁰ However,

⁶⁶Navajo Nation v. Dalley, 896 F.3d 1196, 1215 (10th Cir. 2018) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 3 (2012)).

⁶⁷*Id.*

⁶⁸*See, e.g.*, Copan Italia S.P.A. v. Puritan Med. Prods. Co., No. 1:18-cv-00218-JDL, 2018 U.S. Dist. LEXIS 191927, at *6 (D. Me. Nov. 19, 2018); WAG Acquisition, LLC v. Multi-Media, LLC, Civil Action No. 14-2340, 2015 U.S. Dist. LEXIS 121028, at *23–24 (D.N.J. Sept. 10, 2015); Panduit Corp. v. Corning Inc., No. 5:18-CV-229-FL, 2019 U.S. Dist. LEXIS 5960, at *15 (E.D.N.C. Jan. 14, 2019).

⁶⁹FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1 (2003), <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf>.

⁷⁰*See id.*

inventors need incentive to create the technology.⁷¹ Patent protection provides this incentive because inventors are assured that they can defend the rights to their invention in court.⁷²

It is possible to argue that the patent system intends for people to be able to create the inventions claimed in patents that they believe are invalid. This argument comes from the fact that, despite the protections that patents afford, the public good is paramount.⁷³ The patent system does not intend to protect people who receive unenforceable patents, so the public should be able to reclaim and use what is rightfully part of the public domain.⁷⁴

On the other hand, several methods are available to have a patent deemed invalid. For instance, in addition to successfully arguing an invalidity defense in a district court patent infringement case, a party may petition for inter partes review by the United States Patent and Trademark Office (USPTO).⁷⁵ Inter partes review is an administrative trial proceeding in front of the USPTO's Patent Trial and Appeal Board (PTAB).⁷⁶ Two other ways to invalidate a patent are to file a post-grant review or request ex parte re-examination.⁷⁷

Because there are numerous ways to invalidate a patent, the Court was understandably hesitant to present a holding that might encourage infringers to “ask for forgiveness” as opposed to “asking for permission” through the usual legal routes. As one professor put it: just because someone claims that they own your house, the law does not presume the truth of that statement and kick you out of your house.⁷⁸ There are hoops that claimants must jump through to prove their assertion before we will strip another person of his rights.⁷⁹

⁷¹ See *id.* at 3.

⁷² See *id.* at 6; Roger E. Schechter & John R. Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademark* § 13.4.1 (2003).

⁷³ *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 203 (2014).

⁷⁴ See Lee Petherbridge, Jason Rantanen & R. Polk Wagner, *Unenforceability*, 70 WASH. & LEE L. REV. 1751, 1752–53 (2013).

⁷⁵ *Inter Partes Review*, UNITED STATES PATENT AND TRADEMARK OFFICE (May 9, 2017 10:15 AM EDT), <https://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review>.

⁷⁶ *Id.*

⁷⁷ See MPEP § 1400.01 (9th ed. Rev. 10 2019).

⁷⁸ Conversation with David Henry, Esq., Professor at Baylor Law School (Sept. 2019).

⁷⁹ *Id.*

However, besides making the conclusory statement that the proposed defense would “render litigation more burdensome for everyone involved,” the *Commil* Court did not explain why allowing a new alternative method to invalidate a patent is inexcusable.⁸⁰ Indeed, many areas of the law allow for numerous pathways to obtain the same result.⁸¹ The existing multiplicity of ways to obtain a result should not automatically nullify new alternative means for achieving that result.

Furthermore, in support of its assertion that litigation will become more burdensome, the majority opinion states that “[e]very accused inducer would have an incentive to put forth a theory of invalidity and could likely come up with myriad arguments.”⁸² But that is exactly what lawyers are trained to accomplish. In cases that appear hopeless in light of known caselaw, lawyers must rely on novel arguments. To say that novel defenses are burdensome is to say that creative legal arguments and inimitable representation of a client are a burden on the justice system. Surely this cannot be the case.

III. POTENTIAL IMPACTS OF THE COURT’S *COMMIL* DECISION.

The Court did not go into depth about the possible repercussions of its decision in *Commil*. Despite the relatively little effort by the majority to defend its holding with policy considerations, the decision will likely remain in effect for the foreseeable future.

A. *Patent trolls benefit from the Supreme Court’s decision in Commil.*

The term “patent trolls” refers generally to “entities that own and enforce patents without practicing or making the underlying patented inventions.”⁸³ More commonly, patent trolls are viewed as persons that file as many lawsuits as they can afford and then wait to see which defendants will settle

⁸⁰ *Commil USA, LLC v. Cisco Sys.*, 135 S. Ct. 1920, 1929 (2015).

⁸¹ For example, a case may be heard in federal court because the plaintiff filed in federal court or because the defendant removed the case to federal court; plaintiffs’ ability to sue less than all possible defendants while allowing defendants to join other responsible parties; allowing potential defendants to request declaratory judgment instead of waiting for a plaintiff to file suit.

⁸² *Commil USA*, 135 S. Ct. at 1929–30.

⁸³ Edward Lee, *Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform*, 19 STAN. TECH. L. REV. 113, 115 (2015).

to avoid costly litigation.⁸⁴ As a result, patent trolls receive a monetary benefit through what amounts to blackmail, instead of from the actual economic value of the patented invention as determined through licensing negotiations or a judgment on the merits.⁸⁵

The *Commil* holding benefits patent trolls by providing plaintiffs with an additional claim to file against relatively innocent infringers. Some direct infringement claims may not be worth pursuing normally because the actual damages incurred are minimal. But the added penalties that accompany an induced infringement claim may provide patent trolls with additional incentive to bring suit against even the seemingly least-profitable cases.

Furthermore, despite the Court's suggestion that sanctioning attorneys for filing such lawsuits will be sufficient to deter trolls,⁸⁶ the elimination of a valid defense will encourage the filing of frivolous lawsuits.⁸⁷ Because the *Commil* decision treats induced infringement as a strict liability offense, patent trolls will likely view the additional potential benefits of the Court's holding as outweighing the risks of court sanctions.

Notably, district courts in the second, third, fourth, fifth, seventh, eighth, and ninth circuits have already relied upon the *Commil* holding regarding this defense.⁸⁸ This seems to suggest that patent owners, including patent trolls, are seizing the opportunity to file induced infringement claims against defendants that genuinely believed the plaintiff's patent was invalid.

⁸⁴ *See id.*

⁸⁵ Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1583, 1588 (2009).

⁸⁶ *Commil USA*, 135 S. Ct. at 1930–31.

⁸⁷ *See id.* at 1932 (Scalia, J., dissenting).

⁸⁸ *E.g.*, In re Actos End Payor Antitrust Litig., No. 13-CV-9244, 2015 U.S. Dist. LEXIS 127748, at *74 (S.D.N.Y. Sept. 22, 2015) (vacated in part, affirmed with respect to its reliance on *Commil*); Wasica Fin. GmbH v. Schrader Int'l, Inc., No. 13-1353-LPS, 2020 U.S. Dist. LEXIS 17391, at *3 (D. Del. Jan. 31, 2020) (mem. op.); Panduit Corp. v. Corning Inc., No. 5:18-CV-229-FL, 2019 U.S. Dist. LEXIS 5960, at *15 (E.D.N.C. Jan. 14, 2019); Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc., No. Civil Action 2:14-CV-00911-JRG Lead Case, 2018 U.S. Dist. LEXIS 222064, at *20–21 (E.D. Tex. Sept. 27, 2018) (mem. op.); Robertson Transformer Co. v. Gen. Elec. Co., 191 F. Supp. 3d 826, 841–42 (N.D. Ill. 2015) (mem. op.); Luminara Worldwide, LLC v. Liown Elecs. Co., No. 14-cv-03103, 2017 U.S. Dist. LEXIS 71619, at *30 (D. Minn. Mar. 29, 2017) (mem. op.); Cap Exp., LLC v. Zinus, Inc., No. 2:16-cv-00371-SVW-MRW, 2019 U.S. Dist. LEXIS 150170, at *6 (C.D. Cal. Mar. 7, 2019).

B. How the Supreme Court or Congress might address this issue in the future.

Congress has the power to codify or modify the common law.⁸⁹ Additionally, Congress frequently accommodates requests from lobbyists, a great number of which are large companies that own patents.⁹⁰ As a result, it seems inevitable that Congress will modify disfavored patent laws to meet the desires of these patent-holder lobbyists.

Moreover, in the recent past, Congress has not hesitated to supplant the Supreme Court's decisions with its own, particularly in the field of patent law.⁹¹ Should the consequences discussed above occur, the legislature will have great incentive to modify or abrogate the Court's ruling.

The Court itself may decide to address this issue again; however, this is unlikely. The Supreme Court has very rarely reversed or modified patent-related rulings, even when there is significant backlash from the patent-litigation community.⁹² When the Court has changed its opinion, the alteration came decades later, and sometimes without any apparent explanation.⁹³

⁸⁹U.S. CONST. art. I, § 8.

⁹⁰Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/>.

⁹¹See, e.g., Paulina Firozi, *The Health 202: The Supreme Court banned patenting genes. But Congress might change that.*, THE WASH. POST (June 3, 2019, 6:50 AM CDT), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/06/03/the-health-202-the-supreme-court-banned-patenting-genes-but-congress-might-change-that/5cf1987f1ad2e52231e8e91b/>; Gene Quinn, *Congress is Trying to Fix 101: To Do So, They Must Overrule Mayo*, IP WATCHDOG (Mar. 7, 2019), <https://www.ipwatchdog.com/2019/03/07/congress-trying-fix-101-must-overrule-mayo/id=107117/>.

⁹²See, e.g., Michael Borella, *Section 101 and the Growing Alice Backlash*, PATENT DOCS: PATENT L. WEBLOG (May 15, 2016), <https://www.patentdocs.org/2016/05/section-101-and-the-growing-alice-backlash.html> (discussing the increasingly hostile view towards the Supreme Court's 2014 decision in *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014)).

⁹³Sam Hananel, *Supreme Court weighs Spider-Man toy patent fight*, FED. NEWS NETWORK (Mar. 31, 2015, 3:18 PM), <https://federalnewsnetwork.com/government-news/2015/03/supreme-court-weighs-spider-man-toy-patent-fight/>; Gene Quinn, *Arbitrary and Capricious: Exploring Judge Lourie's flip-flop in Ultramercial*, IP WATCHDOG (Feb. 12, 2015), <https://www.ipwatchdog.com/2015/02/12/arbitrary-capricious-judge-lourie-flip-flop-in-ultramercial/id=52865/>.

Notably, the Court is currently right-leaning, and recent appointments demonstrate a likelihood that the Court will continue trending towards supporting conservative views.⁹⁴ Additionally, people frequently associate the strong adherence to stare decisis with conservatism.⁹⁵ Indeed, the Court has already shown once that it intends to stand by its decision.⁹⁶ Less than a year after the *Commil* decision, the Court remanded a case to the Court of Appeals for the Federal Circuit “for further consideration in light of [*Commil*].”⁹⁷

Conservative values also tend to favor policies that encourage the flow of commerce and bolster the economy.⁹⁸ The *Commil* decision could help accomplish this goal by increasing the protection offered by patents. Additional patent protections are thought to incentivize inventors to share their inventions with the public and, in turn, stimulate the economy. For these reasons, the current conservative Court is unlikely to reverse the *Commil* holding.

It appears that, for the time being, the safest way for would-be defendants to avoid liability for induced infringement is for those parties to attempt to invalidate patents through the traditional means available.

IV. CONCLUSION

The Supreme Court’s majority opinion in *Commil* makes clear that the decision to eliminate a new potential defense to induced infringement was results-oriented. The Court’s holding arose out of imagined complications that the new defense could impose on litigants and was haphazardly held

⁹⁴Richard Wolf, *Supreme Court’s actions on transgender troops, gun rights, public prayer signal conservative trend*, USA TODAY (Jan. 23, 2019, 12:06 PM ET), <https://www.usatoday.com/story/news/politics/2019/01/23/supreme-court-signals-conservative-trend-series-actions/2647122002/>; Lawrence Hurley, *With liberal bloc again, Trump may get more Supreme Court appointments*, THOMSON REUTERS (Oct. 1, 2019, 6:12 PM), <https://www.reuters.com/article/us-usa-court-justices/with-liberal-bloc-aging-trump-may-get-more-supreme-court-appointments-idUSKBN1WG3PB>.

⁹⁵Michael Kinsley, *What is a Conservative Judge?*, THE ATLANTIC (Apr. 12, 2010), <https://www.theatlantic.com/politics/archive/2010/04/what-is-a-conservative-judge/38786/>.

⁹⁶See *Medtronic Sofamor Danek USA, Inc. v. NuVasive, Inc.*, 136 S. Ct. 893 (2016).

⁹⁷*Id.*

⁹⁸See Sean McElwee, *How to Tap Latent Conservative Support for Climate-Change Policy*, THE ATLANTIC (Apr. 18, 2014), <https://www.theatlantic.com/politics/archive/2014/04/republicans-framing-climate-change/360911/>.

together with well-intentioned but superficial legal arguments. Despite the concerns posed by Justice Scalia and the Federal Circuit, the Supreme Court chose to eliminate a defense that had the potential to prevent patent trolls from freely tacking on additional claims to their frivolous lawsuits.