

FINDING VICARIOUS LIABILITY IN U.S. PATENT LAW: THE "CONTROL OR DIRECTION" STANDARD FOR JOINT INFRINGEMENT

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The Patent Act is designed to address infringement claims that are primarily based on the actions of a single actor. The traditional rule in patent law has been that one must practice every limitation of a method or a process claim to infringe it.¹ For example, if a patent claims a method of performing multiple steps and no single party performs each step of the patented invention (even though multiple parties, collectively, might perform all of the steps), then the patent statutes provide no clear guidance as to whether any or all of the actors can be found liable. These patents, where infringement can only be found by combining the conduct of more than one actor, commonly called "joint" or "divided"² infringement, create significant problems for courts. Rather than referring to liability of more than one infringer, the term "joint infringement" refers to situations where one party is liable for infringement of a multiple step claim that is infringed upon by multiple parties, each performing different steps. The viability and scope of that theory of liability has been the subject of considerable debate.³ In the field of computer networking and e-commerce, where a patented process may involve several parties interacting by operating

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1. 35 U.S.C. § 271 (2006). § 271 requires an accused infringer to perform each and every element of the patent claim to be liable under § 271(a).

2. Mark A. Lemley et al., *Divided Infringement Claims*, 33 AIPLA Q.J. 255 (2005).

3. See Kristin E. Gerdeman, *Subsequent Performance of Process Steps by Different Entities: Time to Close Another Loophole in U.S. Patent Law*, 53 EMORY L.J. 1987 (2004); Lemley, *supra* note 2; Long Truong, *After BMC Resources, Inc. v. Paymentech, L.P.: Conspiratorial Infringement as a Means of Holding Joint Infringers Liable*, 103 NW. U. L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121947 (last visited Feb. 1, 2009); Sriranga Veeraraghavan, *Joint Infringement of Patent Claims: Advice for Patentees*, 23 SANTA CLARA COMPUTER & HIGH TECH L.J. 211 (2006); Harold C. Wegner, *E-Business Patent Infringement: Quest for a Direct Infringement Claim Model* (Nov. 21, 2001), available at http://www.softic.or.jp/symposium/open_materials/10th/en/wegner-en.pdf (prepared for the SOFTIC 2001 Symposium).