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### PATENTS

Steven J. Rizzi and Shaun R. Snader explore recent case law on so-called “divided infringement” of method claims, and the applicability of that standard to the infringing use of system claims.

### Courts Grapple With the Standard for Infringing Use of System Claims



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#### I. Introduction

Three years ago in *BMC Resources Inc. v. Paymentech L.P.*, 498 F.3d 1373, 1379, 84 USPQ2d 1545 (Fed. Cir. 2007) (74 PTCJ 644, 9/28/07), the U.S. Court of Appeals for the Federal Circuit first clarified the legal standard for infringing use of method claims where each of the steps is not performed by a single entity. Since then, the issue of so-called “divided infringement” has been front and center in many patent cases, as litigants have tested the boundaries of the doctrine,

primarily in cases involving business method, internet, and communications-related patents.

Two related developments have flowed from this case law. First, several courts have extended the concept of divided infringement to apparatus or system claims, an issue not yet squarely addressed by the Federal Circuit.

Second, some courts have more generally considered the standard for infringing use of system claims, an issue for which there is little guidance in the case law. This article explores the recent case law developments in these areas.

## II. Background

### A. Infringement of Method Claims

In general, a patent claim may be directly infringed by making, using, selling, importing, or offering to sell the claimed invention. 35 U.S.C. § 271(a). However, it is well established that method claims are treated differently from apparatus or system claims. For example, “[t]he law is unequivocal that the sale of equipment to perform a process is not a sale of the process within the meaning of section 271(a).” *Joy Technologies Inc. v. Flakt Inc.*, 6 F.3d 770, 773, 28 USPQ2d 1378 (Fed. Cir. 1993) (46 PTCJ 501, 10/14/93). And as the Federal Circuit has noted, “the concept of ‘use’ of a patented method or process is fundamentally different from the use of a patented system or device.” *NTP Inc. v. Research in Motion Ltd.*, 418 F.3d 1282, 1317, 75 USPQ2d 1763 (Fed. Cir. 2005) (70 PTCJ 433, 8/12/05) (citing *In re Kollar*, 286 F.3d 1326, 1332, 62 USPQ2d 1425 (Fed. Cir. 2002) (63 PTCJ 529, 4/19/02) (recognizing “the distinction between a claim to a product, device, or apparatus, all of which are tangible items, and a claim to a process, which consists of a series of acts or steps . . . [A process] consists of doing something, and therefore has to be carried out or performed.”).

Infringement of a method claim requires that each and every step of the claimed method be performed in the United States. *Joy Technologies*, 6 F.3d at 773; see also *BMC Resources*, 498 F.3d at 1379; *Muniauction Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329, 87 USPQ2d 1350 (Fed. Cir. 2008) (76 PTCJ 410, 7/25/08). Similarly, indirect infringement of a method claim requires that “some party amongst the accused actors has committed the entire act of direct infringement.” *BMC Resources*, 498 F.3d at 1379 (citation omitted).

However, the Federal Circuit has not had occasion to squarely address the legal standard for infringing use of a system or apparatus claim under Section 271(a), including whether the concept of divided infringement applies to these types of claims.

### B. Divided Infringement of Method Claims

As the Federal Circuit clarified in 2007, one that performs less than all steps of a claimed method is liable for direct infringement only if such entity exercises “control or direction” over the performance of the remaining steps performed by one or more additional parties. *BMC Resources*, 498 F.3d at 1380; *Muniauction*, 532 F.3d at 1329. “[T]he control or direction standard is satisfied in situations where the law would traditionally hold the accused direct infringer vicariously liable for the acts committed by another party that are required to complete performance of a claimed method.” *Muniauction*, 532 F.3d at 1330 (citing *BMC Resources*, 498 F.3d at 1379). On the other hand, “mere ‘arms-length coop-

eration’ will not give rise to direct infringement by any party.” *Muniauction*, 532 F.3d at 1329 (citing *BMC Resources*, 498 F.3d at 1371).

The Federal Circuit recognized that “the standard requiring control or direction for a finding of joint infringement may in some circumstances allow parties to enter into arms-length agreements to avoid infringement.” *BMC Resources*, 498 F.3d at 1381. Yet this standard is mandated by precedent and the statutory scheme that draws a clear distinction between direct infringement, a strict liability tort, and indirect infringement, which requires scienter. *Id.*

In the last several years, several district court decisions have helped to further develop the “control or direction” standard for divided infringement in various contexts. See, e.g., *PrivaSys Inc. v. Visa International*, No. C 07-03257, 2007 WL 3461761, \*2 (N.D. Cal. Nov. 14, 2007) (alleged contractual relationship between Visa and banks and specific instructions provided by Visa to banks sufficient to plead divided infringement); *Rowe International Corp. v. Ecast Inc.*, 586 F. Supp. 2d 924, 932-33 (N.D. Ill. 2008) (denying motion for summary judgment of non-infringement based on sufficient evidence of direction or control); *Emtel Inc. v. Lipidlabs Inc.*, 583 F. Supp. 2d 811, 839 (S.D. Tex. 2008) (granting motion for summary judgment of non-infringement); *epicRealm Licensing LLC v. Autoflex Leasing Inc.*, 492 F. Supp. 2d 608 (E.D. Tex. 2007) (discussed below); *Golden Hour Data Systems Inc. v. ems-Charts Inc.*, No. 2:06 CV 381, 2009 WL 943273, \*4 (E.D. Tex. Apr. 3, 2009) (77 PTCJ 642, 4/10/09) (overturning jury verdict of infringement based on lack of sufficient evidence of direction or control); *Global Patent Holdings LLC v. Panthers BRHC LLC*, 586 F. Supp. 2d 1331, 1335-36 (S.D. Fla. 2008) (granting motion to dismiss complaint based on failure to allege facts sufficient to show “direction or control”).

Generally, district courts have imposed a substantial burden on patentees in these cases to establish divided infringement. For example, merely prompting other parties to perform required elements and/or facilitating performance of additional elements have been found not to satisfy the “control or direction” standard. See, e.g., *Emtel*, 583 F. Supp. 2d at 838-39 (requiring actual agency relationship with other actors); *Golden Hour*, 2009 WL 943273, at \*4. The case law on the issue of divided infringement continues to develop, but the Federal Circuit’s decisions have also prompted parties to test the boundaries of infringing use of system claims.

## III. NTP: A Different Standard for Infringing Use of System Claims?

Both *BMS* and *Muniauction* involved only method claims, and thus did not provide the Federal Circuit the opportunity to consider: (1) the standard for infringing use of apparatus or system claims; or (2) whether the concepts of divided infringement, or “control or direction,” applied to claims other than method claims. Prior to these decisions, in *NTP*, the Federal Circuit did touch upon the standard for infringing use of system claims in considering the territorial scope of U.S. patent law.

The issue in *NTP* was whether an accused system with a component located outside the United States could infringe system and method claims. Importantly, *Research in Motion Ltd.* did not contest that its customers “used” the claimed system, but challenged only whether the use was within the United States as re-

quired by Section 271(a). The court held that the location of use of the system is “the place at which the system as a whole is put into service, i.e., the place where control of the system is exercised and beneficial use of the system is obtained.” *NTP*, 418 F.3d at 1317.

The *NTP* court did not address the issue of the legal standard for infringing use of a system or apparatus claim, as this issue was not squarely before it. For example, the court did not explicitly consider the question of whether infringing use of system claims encompasses “indirect” use by an entity that does not itself have control over the allegedly infringing system. In particular, the court did not decide whether a BlackBerry subscriber, who enjoys the benefits provided by the various system elements that allow the sending and receipt of e-mails from a handheld device, met the statutory standard of an infringing user of the asserted patent claims.

In reaching its conclusion concerning the situs of use of a claimed system, however, the *NTP* court did review historical precedent more generally considering the meaning of “use” in the context of infringement of system claims. For example, the court cited Supreme Court precedent from 1913 for the proposition that “use,” as used in Section 271(a), is a “comprehensive term and embraces within its meaning the right to put into service any given invention.” *NTP*, 418 F.3d at 1317 (quoting *Bauer & Cie. v. O'Donnell*, 229 U.S. 1 (1913)). *NTP* also found “instructive” a Court of Claims decision, *Decca Ltd. v. United States*, 544 F.2d 1070, 1074 (Ct. Cl. 1976). *Id.* at 1315-16. *Decca* addressed infringement of a system claim covering the receipt and use of signals. *Decca*, 544 F.2d at 1083. The *Decca* court noted that someone who receives and uses signals from a transmitter station was “using” that station within the meaning of the Patent Law. *Id.*

The *NTP* court also noted that “[t]he few court decisions that address the meaning of ‘use’ have consistently followed the Supreme Court’s lead in giving the term a broad interpretation.” *NTP*, 418 F.3d at 1317 (citations omitted). *NTP* thus affirmed the finding of infringement of the system claims.

Notably, *NTP* reached a different conclusion with respect to the asserted method claims: “[T]he use of a ‘process’ necessarily involves doing or performing each of the steps recited.” *NTP*, 418 F.3d at 1318. Performing a process, therefore, differs from “use of a system as a whole, in which the components are used collectively, not individually.” *Id.* Thus, unlike for systems, *NTP* held that “a process cannot be used ‘within’ the United States as required by Section 271(a) unless each of the steps is performed within this country.” *Id.*

#### IV. Recent District Court Treatment of Infringing Use of System Claims

The Federal Circuit’s discussion of “use” in the context of system claims in *NTP*, coupled with its pronouncements on the standard for divided infringement in *BMS* and *Muniauction*, have led to varying treatment of these issues by district courts.

*EpicRealm Licensing LLC v. Autoflex Leasing Inc.*, which predated the *BMS* and *Muniauction* decisions, considered joint infringement of system claims and method claims in connection with patents asserted against systems and methods to “dynamically generate web pages.” 492 F. Supp. 2d 608, 612 (E.D. Tex. 2007). An accused infringer in that action, the Macerich Co.,

moved for summary judgment of non-infringement on the basis that “it does not own, operate, control, or direct the operation or control of the web servers” required by the claimed methods and systems. *Id.* at 617. In response, *epicRealm* argued that it was improper to focus only on whether Macerich directed or controlled its web hosting service, rather than whether Macerich “used” the accused systems. *Id.* at 613.

The court ruled on summary judgment that Macerich did not “use” the accused systems because “the Accused Systems are owned, operated, managed, and controlled by” a third party. *Id.* at 613. The court noted that “the issue of control is central to determining whether a party is liable for ‘using’ a claimed invention,” and that “Macerich cannot control [the software] to manage incoming web page requests.” *Id.* at 614-15.

Thus, the district court seemingly equated “use” with “control” of the apparatus central to plaintiff’s infringement allegations. The district court similarly concluded that there was no joint infringement because Macerich did not control the web servers. *Id.* at 614-15, 629-30.

In a later, related decision that postdated the Federal Circuit’s decision in *BMC, epicRealm Licensing LP v. Franklin Covey Co.* (“*epicRealm II*”), the court reached the same result with respect to a different defendant and affirmed the reasoning of its earlier opinion. 644 F. Supp. 2d 806, 809 (E.D. Tex. 2008). The court held that courts must “determine which party exercises control and derived beneficial use of the allegedly infringing aspects of the accused system.” *Id.* (emphasis supplied) (citation omitted).

In a very recent decision, *Nuance Communications Inc. v. Tellme Networks Inc.*, the U.S. District Court for the District of Delaware reached a different conclusion. No. 06-105-SLR, 2010 U.S. LEXIS 39388 (D. Del. Apr. 10, 2010). The patent at issue in *Nuance* related to telephonic directory assistance services, and more specifically, “a two path approach in which the speech recognition system will attempt to recognize spoken information through an automated process and, if not reliably recognized, seek assistance from a human attendant.” *Id.* at \*2, \*8 (citation omitted). The accused infringer, Tellme, provides directory services to its wireless carrier customers, and was accused of directly and indirectly infringing both system and method claims.

The court explicitly considered the standard for infringing use of a system claim, relying on *NTP*, and specifically whether consumers who used the directory assistance services could be infringing users of the system claims of the patent. In particular, the court rejected the defendant’s arguments that consumers cannot use several elements of the claimed system, finding these arguments “inconsistent with the Federal Circuit’s emphasis that an infringing use must engage the system as a whole.” *Id.* at \*23 (citing *NTP*, 418 F.3d at 1317).

Thus, the court denied summary judgment of non-infringement, and held that “a reasonable jury could conclude that a consumer exerts control over the system.” *Id.* at \*24-25. Unlike the website visitors in *epicRealm*, Tellme’s users could be infringers because “calling the accused services may constitute an infringing use.” *Id.* at \*26.

*Nuance* also considered whether Tellme’s customers directly infringed the patent at issue by controlling Tellme through a variety of contracts. *Id.* at \*27. The court reasoned that *BMC*’s “direction or control” standard applied to the system claims at issue, and that “a

reasonable jury could conclude that, due to the level of contractual control present, Tellme's actions should be attributable to its customers." *Id.* at \*28.

*Renhcol Inc. v. Don Best Sports* considered a motion for summary judgment of non-infringement of claims directed to an "electronic marketplace for prediction information over a communications network." 548 F. Supp. 2d 356, 358, 89 USPQ2d 1458 (E.D. Tex. 2008) (76 PTCJ 54, 5/9/08). Specifically, prediction suppliers provide predictions on the outcome of future events, the system tracks the accuracy of predictions, and prediction consumers can review the accuracy records and obtain predictions. *Id.* The claims were directed to a computer storage medium that contains code to perform the necessary functions, a computer programmed to perform the necessary functions, and a corresponding method. *Id.* at 361-362. The defendants were companies "that conduct hosting, content development, and financial operations to two accused websites" and make payments to handicappers, i.e., prediction suppliers. *Id.* at 358.

The court expanded upon *epicRealm's* articulation concerning the standard for "use" of a claimed invention by making clear that both "control" and "beneficial use" are required.<sup>1</sup> According to *Renhcol*, "[t]he situs of use of a claimed system is 'the place at which the system as a whole is put into service, i.e., the place where control of the system is exercised and beneficial use of the system is obtained.'" *Id.* at 360 (quoting *NTP*, 418 F.3d at 1317). In other words, "the situs of use and the person who uses a device that allegedly infringes a claimed invention depends on who controls the allegedly infringing characteristics of the accused device and location of that person." *Id.* at 363 (citations omitted).

Based on this standard of "use," *Renhcol* found that the accused system was used in the United States even though the necessary computers and infringing code were located outside the United States. *Id.* at 363-65. In so doing, *Renhcol* distinguished *epicRealm* on the facts, noting that *NTP* and *epicRealm* merely required courts "to determine which party exercises control and derives beneficial use of the allegedly infringing aspects of the accused system." *Id.* at 363; see also *epicRealm II*, 644 F. Supp. 2d at 809 ("The court in *Renhcol*, however, found its facts to be distinguishable from the facts set out in *epicRealm*"). Thus, the court denied the defendants' motion for summary judgment that there was no "use" within the United States of the asserted claims directed to a computer storage medium and a computer used to carry out the claimed functionality.<sup>2</sup> *Id.* at 358. According to the court, the handicappers and consumers control the execution of the code by uploading and downloading predictions, and even the defendants may "use" the code by putting it to use in the United States. *Renhcol*, 548 F. Supp. 2d at 364-65.

<sup>1</sup> The district court acknowledged that the claims at issue were not system claims, but stated that "there is no reason to differentiate between the legal definition of 'use' when a system allegedly infringes a claimed 'system' and the definition of 'use' when a device with components used collectively as a whole allegedly infringes a claimed apparatus, device, computer, or computer storage medium." *Renhcol*, 548 F. Supp. 2d at 360, n3.

<sup>2</sup> The court granted the defendants' motion that it did not make, sell, or offer for sale the accused system in the United States. *Renhcol*, 548 F. Supp. 2d at 358.

*Rowe International Corp. v. EEcast Inc.* held that the defendants could directly infringe the asserted system claims in a post-*BMC* and *Muniauction* decision. 586 F. Supp. 2d 924 (N.D. Ill. 2008). The patents-in-suit cover computer jukeboxes and computer jukebox networks. *Id.* at 929-30. Defendants "Rock-Ola and View make jukebox components and [] EEcast contributes memory 'that makes the system work' as well as a network," and "[t]he operators of the individual jukeboxes put all of these things together 'to create a working system.'" *Id.* at 930-31. The district court held that EEcast supplied an entire system based largely on statements made in its marketing materials and documents. *Id.* at 931. But "even if EEcast did not provide its customers with a complete system that integrates jukebox hardware, there is evidence from which a jury reasonably could find that the other defendants' manufacturing of jukebox hardware was subject to EEcast's direction and control," thereby making EEcast liable under a joint infringement theory. *Id.* at 933.

In a decision shortly after *NTP* but before the Federal Circuit's decision in *BMC Resources*, the court in *CIVIX-DDI LLC v. Cellco Partnership* denied a motion for summary judgment of non-infringement of the asserted system claims. 387 F. Supp. 2d 869, 884 (N.D. Ill. 2005). The court found *NTP* "highly instructive" and held that "an alleged infringer uses a claimed system when the alleged infringer exercises control over the system and obtains beneficial use of the system." *Id.* at 84. Similar to the Delaware court in *Nuance*, the court noted that "[t]he Federal Circuit implicitly rejected [in *NTP*] the proposition set forth by Expedia that in order to 'use' a claimed system it must directly use each element of the claim." *Id.* at 884, n13. Because the record contained genuine disputes of material fact as to whether the accused infringer "exercise[d] control over the system" and "obtain[ed] beneficial use of the system," the motion for summary judgment was denied. *Id.* at 886.

In *Centillion Data Systems LLC v. Qwest Communications Corp.*, Centillion sued Qwest alleging infringement of certain system claims for presenting billing information to a user. No. 1:04-cv-0073-LJM-DML (S.D. Ind. Oct. 29, 2009).<sup>3</sup> Qwest moved for summary judgment of noninfringement, and Centillion moved for summary judgment of infringement. *Id.*, slip op. at 2, 5-7. The district court distilled the legal dispute with respect to infringement as to "whether Qwest can be liable for the 'use' of the '270 patent if it did not, by itself, practice each and every element of the '270 patent's system claims." *Id.* at 18. Centillion, relying on *NTP*, argued that Qwest was liable if it "put the '270 patent as a whole into service, i.e. exercised control and benefited from its use as a whole," and Qwest argued that it "cannot be held liable for direct infringement of a system claim if a third party is responsible for practicing some elements of a claim." *Id.* at 18-19.

The district court agreed with Centillion "that an infringer 'uses' a system under Section 271(a) when it puts the system into service or action, i.e., when it exercises control over, and benefits from, the system's application." *Id.* at 23. The district court also explicitly extended *BMC Resources* to system claims, and held that a defendant can be liable for infringing use of a system claim "if it, by itself or in combination with a third party

<sup>3</sup> No. 1:04-cv-2076 was consolidated with this case.

directed by it, put each and every element of the system claim into service, i.e. exercised control over, and benefited from, the application of each and every element of the system claim.” *Id.* at 24.

The claims in *Centillion* required manipulation of a customer’s computer, and the court found that the customer controlled that manipulation, as the customer must download and execute the necessary applications. *Id.* at 33. Thus, the court determined that Qwest can infringe only if it “directs” customers to perform the required manipulation. *Id.* However, “Qwest’s customers are not obligated or contractually bound to perform additional processing on individual transaction records provided by Qwest.” *Id.* Moreover, “Qwest does not control whether its customers load the [necessary] applications on their personal computers.” *Id.* Because the requisite direction and control by Qwest over the customer was lacking, the court granted Qwest’s motion for summary judgment of non-infringement. *Id.* at 33-34.<sup>4</sup>

*Phoenix Solutions Inc. v. DirecTV Group Inc.* is another recent case considering alleged infringement of system claims. No. CV 08-984 MRP (SSx) (C.D. Cal Nov. 23, 2009)<sup>5</sup> Phoenix sued DirecTV alleging, inter alia, infringement of system claims by the interactive voice recognition system that handled DirecTV customer inquiries. *Id.* When a DirecTV customer calls DirecTV’s toll-free number, the call is routed to a DirecTV independent contractor, West Interactive Corporation. *Id.* at UF ¶ 17.<sup>6</sup> West and its vendors choose, configure, and operate the architecture, hardware, and speech recognition software relating to the accused system. *Id.* at UF ¶ 18. DirecTV provides no guidance to West relating to the accused system other than business objectives, such as DirecTV’s desire to allow customers to order movies by telephone. *Id.* at UF ¶¶ 18, 27, 28.

Phoenix Solutions originally based its claim on joint infringement, but later alleged that DirecTV was an infringing user of the claimed system. However, the district court rejected Phoenix’s argument that the broad definition of “use” articulated in *NTP* required a finding of infringement whenever “a party ‘put[s] into service any given invention.’” *Id.* at COL ¶ 21. The court reasoned that “*NTP*’s holding was limited to the issue of whether a party ‘uses’ a claimed invention or method within the United States when one element of the claimed system or method is abroad.” *Id.* (citing *NTP*, 418 F.3d at 1316-18). Moreover, the court noted that “[a]lthough the definition of ‘use’ set forth in *NTP* . . . is broad, a defendant’s use must be correlated to the claim elements.” *Id.* at COL ¶ 22 (citations omitted). Because West and its vendors “control[] the allegedly infringing elements,” the court held that DirecTV cannot directly

infringe absent a viable joint infringement theory. *Id.* at COL ¶ 24.

With respect to joint infringement, the district court held based on *BMC* and *Muniauction* that “the law allows for direct infringement liability if the accused infringer ‘direct or controls’ a third party’s performance of infringing steps.” *Id.* at COL ¶ 12. The district court noted that this holding stems from *BMC*, a case concerning method claims, but that “its general holding applies to apparatus claims as well.” *Id.* at COL ¶ 13. The district court also noted that other district courts have applied the “direction or control” standard to system claims. *Id.* at COL ¶ 15 (citing *Golden Hour*, 2009 WL 943273; *Level 3 Communications v. Limelight Networks*, 630 F. Supp. 2d 654, 658-60 (E.D. Va. 2009)). Nevertheless, the district court held that DirecTV cannot infringe under a joint infringement theory because it lacks control over the accused system.

Most recently, the Federal Circuit had occasion to revisit the issue of joint infringement in *Golden Hour Data Systems Inc. v. EmsCharts Inc.*, No. 2009-1306 (Fed. Cir., Aug. 9, 2010) (80 PTCJ 506, 8/13/10). The patent at issue is directed to computerized systems and methods for information management services in connection with emergency medical transport. In particular, the patent is directed to the integration of dispatch, clinical services, and billing data.

The jury found joint infringement of both system and method claims, but the district court granted judgment of noninfringement as a matter of law on the grounds that there was insufficient evidence of the requisite control or direction by *emsCharts* or co-defendant *Softtech LLC*, notwithstanding that there was an agreement in place between the two that allowed *emsCharts* to distribute *Softtech*’s software as part of a “strategic partnership” between the two. *Golden Hour Data Systems Inc. v. emsCharts Inc.*, No. 2:06 CV 381, 91 USPQ2d 1565 (E.D. Tex. April 3, 2009) (77 PTCJ 642, 4/10/09). The plaintiff, however, appeared to concede that its only viable claim was based on joint infringement—the verdict form grouped system and method claims together and asked the general question whether the co-defendants “jointly infringe the following asserted claims.”

On appeal, the Federal Circuit affirmed the grant of JMOL on the method claims with minimal discussion. *Golden Hour*, No. 2009-1306, slip op. at 27. With regard to the system claims, the court also affirmed the JMOL of noninfringement.

Of interest is that the court suggested that there may well have been a basis for infringement by *emsCharts* alone because *emsCharts* sold its software together with *Softtech*’s software, which combined were alleged to include all the elements of the claimed systems. “Such a sale might well create liability on the part of *emsCharts* for the sale of the patented system, whether or not *emsCharts* controlled *Softtech*.” *Id.* at 27-28. However, the court noted that the system claims at issue were submitted to the jury only on a joint infringement theory, which required “control or direction of *Softtech* by *emsCharts*.” *Id.*

*Golden Hour* further underscores that system and method claims are not treated equally in the infringement analysis, and that litigants should take care to consider these distinctions in assessing the various potential acts of infringement under 35 U.S.C. § 271.

<sup>4</sup> An appeal is currently pending at the Federal Circuit as docket No. 2010-1110, and docket No. 2010-1131 was consolidated with this appeal. Briefing appears to have been completed in June 2010, but no date for oral argument has been set.

<sup>5</sup> The Federal Circuit affirmed the district court’s judgment per curiam on Aug. 4, 2010.

<sup>6</sup> The court issued a document on Nov. 23, 2009, styled “Statement of Uncontroverted Facts and Conclusions of Law.” The document is available from the court’s website through PACER. Citations to this document specify whether they refer to the Uncontroverted Facts (“UF”) or Conclusions of Law (“COL”).

## V. Conclusion

Until recently, few cases considered the legal standard for infringing use of system or apparatus claims, and the issue was rarely litigated in patent cases. The Federal Circuit's recent decisions in *BMS* and *Muniauction* have caused litigants to scrutinize system claims, as well as method claims, for possible defenses based

on divided infringement, and more broadly, absence of an infringing user. Like the court's decisions in *BMS* and *Muniauction*, further guidance from the Federal Circuit on these issues, when provided, will likely impact a significant number of patent litigations and patents, as well as claim drafting strategy.