

Federal Circuit Clarifies Vicarious Liability Standard for System Claim Infringement

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When can a customer's use of a system claim be vicariously attributed to the system component manufacturer? In *CloudofChange v. NCR Corp.*, No. [2023-111](#), the Federal Circuit held that the manufacturer must direct or control the customer's use of the *entire* claimed system under *Centillion*, which is "fundamentally different" from the concept of use of a patent method or process under *Akamai*.

The patents at issue are directed to a system for a merchant to build its own point-of-sale (POS) system. The asserted system claims specifically require "an internet connection" and two separate entities: (1) a vendor providing a remote server; and (2) a subscriber (i.e., merchant) possessing POS terminals. CloudofChange asserted infringement by NCR's web-based POS building solution, which allows NCR's merchant-customers to build their own POS screens/menus. NCR provides the accused back-end server, but the merchant-customers are responsible for their own Internet connections and most supply their own POS terminals. Notably, NCR's Merchant Agreement makes the merchant-customers responsible for obtaining and maintaining the required Internet connection.

At trial, ChangeofCloud had abandoned all indirect infringement theories and direct infringement theories based on importing, making, and selling the claimed system, and pursued direct infringement based solely on "use," i.e., that NCR directly infringed by putting the accused system into beneficial use. NCR moved for JMOL of non-infringement following the jury verdict of infringement, arguing that NCR did not control or benefit from the accused

system by putting it into service. Despite agreeing that it was NCR's merchant-customers — not NCR — which put the accused system into service, the district court denied NCR's motion based on vicarious liability on the part of NCR for its customers' use. Specifically, Judge Albright found that NCR "directed or controlled its merchant-customers' use of the claimed system" because NCR imposed the contractual obligation for obtaining/maintaining Internet access on its merchant-customers.

Reasoning that the district court "erred by focusing its direction or control analysis on one element of the system — Internet access," rather than "whether NCR directed or controlled its merchant-customers actions in putting the entire claimed system to service," the Federal Circuit reversed. Since NCR's merchant-customers put the accused system into service "of their own accord" by subscribing to the accused system, downloading the accused app, and initiating actions at the POS terminals, the Federal Circuit concluded that NCR did not exercise direction or control over the entirety of the claimed system to support vicarious liability.

That NCR's Merchant Agreement makes merchants responsible for obtaining and maintaining Internet access does not equate to contractually obligating merchants put the entire accused NCR Silver system into use ... As the contractual obligation to supply an Internet connection does not amount to direction or control of a merchant's use of the claimed system to build POS systems, we hold that NCR is not vicariously liable for that infringing use.

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