

CLOUDOFCHANGE, LLC, v. NCR CORPORATION, Appeal No. 2023-1111 (Fed. Cir. December 18, 2024). Before Dyk, Reyna, and Stoll. Appealed from W.D. Tex. (Judge Albright).

Background:

CloudofChange sued NCR for alleged infringement of two patents ("Asserted Patents") directed to an online web-based point-of-sale-builder system. The claims require two entities: a vendor and a subscriber. They require the vendor's remote servers to host the web server software while subscribers possess the POS terminals that access the web server software. NCR's accused product ("NCR Silver") allows merchants to edit POS menus, perform transactions, and build their own POS systems. As stated by the Federal Circuit, it "is undisputed that NCR does not provide all the necessary components of the accused system. Specifically, (1) NCR contractually makes users responsible for supplying and maintaining an Internet connection, which is necessary to use NCR Silver; and (2) most users supply their own POS hardware."

CloudofChange pursued a single theory of infringement at the district court, namely that NCR directly used the claimed system by putting it into beneficial use under the Federal Circuit's *Centillion* precedent. As part of this contention, CloudofChange asserted that NCR controls and benefits from each component recited in the claimed system, including the Internet connection contractually required to be supplied by NCR's customers, and thus uses the system. The jury ultimately found that NCR directly infringed all claims of the Asserted Patents and awarded damages totaling \$13.2 million. NCR subsequently renewed a motion for JMOL, but the district court held that substantial evidence supported the jury's infringement findings. Here the district court first concluded that NCR's customers—not NCR—are the actual infringers, but it then also held that these customers' use could be attributed to NCR because NCR "directs its customers to perform" by requiring them to obtain and maintain internet access. NCR appealed.

Issue/Holding:

Did the District Court err in denying JMOL of noninfringement? Yes, reversed and vacated.

Discussion:

The Federal Circuit agreed with the district court's finding that NCR's customers use the claimed system. NCR's customers "put the system into service because they initiate at the POS terminal a demand for service (for example, building or editing a POS) and benefit from the back end providing that service." Citing *Centillion*, the Federal Circuit concluded that NCR's customers "control the system as a whole and obtain benefit from it" by making the system parts "work for their patented purpose."

But the Federal Circuit disagreed with the district court's determination that NCR is vicariously liable for that use. "NCR does not direct or control its merchants to subscribe to the NCR Silver system, download the NCR Silver app on their POS terminals, or put the NCR Silver system into use by initiating action at the POS terminals to cause the NCR Silver software to modify its POS terminals," the Federal Circuit opined. By focusing its direction and control analysis on only one element of the claimed system—Internet access—the district court erred in holding that NCR directed or controlled its users who put the entire claimed service to use.