

## How to Prove Infringement and Appeal It

***CommScope Techs. LLC v. Dali Wireless Inc.*, 2021 WL 3731854 (Fed. Cir. 2021)**

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The Federal Circuit’s (“CAFC”) recent decision in *CommScope Techs.* provides an important reminder regarding proving literal infringement, as well as some tips on preserving an issue for appeal. At trial, both CommScope and Dali alleged infringement of multiple patents. Following trial, both parties appealed several decisions. The CAFC, however, focused on just two: the denial of CommScope’s motions for judgment as a matter of law of no infringement and invalidity of Dali’s U.S. Patent No. 9,031,521 (“the ’521 patent”).

The ’521 Patent claims a system and method for resolving wireless signal amplification issues through a training mode where a feedback loop updates a lookup table to calculate digital adjustments to the output signal. Significantly, the ’521 Patent includes a limitation requiring “switching a controller off.” In the district court, Dali asserted that the phrase “switching a controller off,” did not require construction, while CommScope argued—and the district court agreed—that it should be construed to mean placed in a nonoperating state. Ultimately, the jury found the ’521 patent infringed and not invalid.

On appeal, CommScope challenged infringement and validity, relying on the district court’s claim construction of “switching a controller off,” arguing that its controller was never placed in a nonoperating state.

Dali tried to defend the infringement finding by asserting the district court’s claim construction was wrong. The CAFC rejected Dali’s challenge, highlighting three missteps. First, Dali only raised the claim construction issue in a footnote in its appeal brief, and any such argument is forfeited. Second, Dali’s appeal of the construction was a single sentence, and thus insufficiently developed. Third, Dali presented inconsistent positions, attacking the district court’s claim construction to uphold infringement, while defending it for validity. The CAFC adopted the district court’s construction finding there was no apparent dispute because Dali’s challenge was ineffectual.

Scrutinizing the evidence in light of the district court’s claim construction, the CAFC reversed the denial of no infringement, rejecting the testimony of Dali’s expert who failed to use the district court’s claim construction and therefore, per the CAFC, effectively offered no evidence to support the infringement verdict on that limitation. Dali argued that the distinction between the construction used by its expert and the district court was “hairsplitting.” But the CAFC emphasized that literal infringement ascribes significant meaning to construed claims, which must read “on the accused device exactly,” noting a party cannot argue construction one way for infringement and another for invalidity. *CommScope Techs. LLC v. Dali Wireless Inc.*, 2021 WL 3731854, at \*6 (Fed. Cir. Aug. 24, 2021).

In sum, *CommScope Techs.* provides a nice reminder regarding the necessary rigor to preserve issues for appeal, and the importance, when seeking to prove literal infringement, of addressing each and every limitation.