

Source Code For Future Products Is Discoverable (Farnan, J.)

In *Bigband Networks, Inc. v. Imagine Communications, Inc.*, 2010 US Dist Lexis 72740 (D. Del. July 20, 2010), the Court ordered production of source code for future products that have not yet been commercially sold. According to the Court, the source code of future products is discoverable because it is reasonably likely to lead to evidence relevant to the plaintiffs' patent infringement claims.

In so ruling, the Court rejected defendant's arguments that the plaintiff is not entitled to damages from future products and source code should not be discoverable because of the likelihood of product changes. The Court stated that products which have not yet been released for sale to consumers may still be found to infringe under 35 U.S.C. 271(a) on the grounds that it covers “making” as well as “using” an infringing product.