

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AKAMAI TECHNOLOGIES, INC.,

Plaintiff-Appellant,

and

THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY,

Plaintiff-Appellant,

v.

LIMELIGHT NETWORKS, INC.,

Defendant-Cross Appellant.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SEP -6 2011

JAN HORBALY
CLERK

Appeals from the United States District Court for the District of
Massachusetts in case nos. 06-CV-11109 and 06-CV-11585,
Judge Rya W. Zobel.

REPLY BRIEF FOR PLAINTIFF-APPELLANT
AKAMAI TECHNOLOGIES, INC. ON REHEARING EN BANC

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None

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I. INTRODUCTION

It is undisputed that a method claim is directly infringed under 35 U.S.C. §271(a) when all of the steps of a method are performed. Moreover, Limelight agrees that the conduct of one party may be attributed to another when the two parties together perform every step of a method claim. The principal dispute between the parties, however, concerns the circumstances in which another party's performance of steps of a claim may be attributed to a defendant. While Limelight advocates a narrow rule based on agency or contract principles, Akamai relies on other traditional joint or vicarious liability doctrines to advocate a fair rule that protects multi-participant inventions, prevents parties from avoiding infringement by agreeing to split up the steps of a method claim, and more naturally aligns with the statutory language of §271(a).

Limelight and others assert incorrectly that Akamai's position will result in a windfall for patentees because anything less than an agency or contract requirement will allow unrelated and unsuspecting parties' conduct to be aggregated together to create an infringement allegation where none should exist. This is simply wrong and mischaracterizes Akamai's position before this Court. Akamai has consistently argued that parties acting together could be held liable for direct infringement of a method claim where there is some relationship between the parties such that the defendant knows of all the steps being performed. This

flexible fact-based test examines the particular circumstances surrounding the nature of the parties and the infringement, consistent with the Supreme Court's guidance, the applicable precedent, and well-established principles of tort law. Just as it would be unfair to allow parties whose conduct is unrelated to be accused of patent infringement, it is equally unfair to allow parties who work together to escape liability merely because they divided steps of a method claim amongst themselves.

The purpose of a patent is to protect the patentee from exploitation of his invention by "others." A collaborative method is no less deserving of patent protection than any other form of invention. Further, there can be no doubt that Limelight has exploited Akamai's invention—an invention held to be novel and nonobvious. Limelight simply seeks to avoid infringement by having its customers complete the tagging and/or serving step. As such, this case represents the type of unjust result that *BMC* sought to avoid. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007) ("It would be unfair indeed for the mastermind in such situations to escape liability.").

II. REPLY

It is helpful to begin by considering the basic facts in this case. The invention at issue here solved a persistent problem involving Internet congestion and created a revolutionary new way to deliver web-page content by allowing

content providers and service providers to work together to serve web-page content at times of peak traffic. Akamai's '703 patent is directed to this improved method of delivering web content. Akamai was founded to commercialize this discovery, and this invention continues to serve as a basis for the company's core business.

As the jury found, Limelight provides a service in which all the steps of the asserted claims are performed. (A93-94.) Limelight itself performs most of the steps but requires its customers to perform the remaining steps. Limelight profits from its use of Akamai's invention and knows the steps that it and its customers perform. After receiving an instruction wholly consistent with the *BMC* rule, the jury entered a verdict of infringement. (*Id.*)

The facts in *Peerless Equipment Co. v. W.H. Miner, Inc.*, 93 F.2d 98 (7th Cir. 1937), are virtually identical to those here. In *Peerless*, the accused infringer performed nearly every element of the claim "with the knowledge" that its customer would perform the remaining step. *Id.* at 105-06. The court upheld a finding of infringement, reasoning that performing steps of a method with knowledge of steps one's customer performs constitutes infringement. *Id.* at 105. Although the *Peerless* court described the infringement there as "contributory," the court did not consider the traditional elements of contributory infringement, including the existence of direct infringement, knowledge of the patent, and intent

to infringe, but rather analyzed the case under direct infringement standards, just as this Court should do here.

A. §271(a) Supports Broad Attribution

Congress’s choice of the plural term “whoever” in §271(a) supports Akamai’s position that the statute on its face plainly contemplates more than one party or its agent. Limelight does not respond meaningfully to Akamai’s textual argument that the word “whoever” covers more than one party. (Akamai-7-18.) Instead, Limelight merely retorts that the word “whoever” is “irrelevant.” (Limelight-27n8.) Limelight focuses on the statute’s reference to the “use” of a method claim, which requires performance of every step of the claim. For this reason, Limelight asserts that such “use” must be *by a single entity*. (Limelight-22-23.)

But the “use” language focuses on “what” constitutes infringement, not “who” infringes. It is the term “whoever” that answers the question of “who” can infringe a patent. And given §271(a)’s use of the term “whoever”—which covers both the singular and plural—a method claim has been “used” regardless of whether one party alone or multiple parties together perform every step of the claim.

B. There Is No Basis for Limiting Conduct Attribution Under §271(a) to Agency or Contract

As this Court recognized in *BMC*, a party's performance of claim steps may be attributed to another to establish liability under §271(a). 498 F.3d at 1379. But there are additional bases beyond the narrow agency or contract theories advanced by Limelight and recognized by the Panel. Indeed, in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008), the court noted a "spectrum" of relationships.

Akamai has proposed three such relationships. The first applies where one party directs or controls another's performance of certain steps in a method. Another applies where parties act in concert, with each performing some steps of the method. The third applies when a party knowingly combines its performance of claim steps with that of another so that together they perform all steps of the claim. In each circumstance, another party's conduct will not be attributed to a defendant if the defendant did not know the steps the other party performed. There is no reasoned basis in the statute, legislative history, case law, or policy for rejecting these other liability grounds.

Limelight and the amici supporting Limelight nonetheless present five technical¹ arguments against the grounds urged by Akamai. First, Limelight

¹ Responses to Limelight's and its amici's policy arguments appear in §§II.C,D,E&F, *infra*.

contends that because direct infringement is a strict liability tort, “pure vicarious liability” (which it equates to agency) forms the only basis for attribution. Second, Limelight argues that the conduct-attribution rules advocated by Akamai are inapplicable because §271(a) cannot include a knowledge or scienter requirement. Third, Limelight argues that broader attribution rules would cause liability under §271(a) to subsume liability under §§271(b) and (c). Fourth, Limelight argues that the prior caselaw on joint infringement relies on agency principles, contract, or indirect infringement, and thus provides no support to Akamai. Finally, Limelight argues that the Restatement sections cited by Akamai are limited to scenarios in which each party engaged in a tort.

1. Strict Liability Torts Are Not Limited to Pure Vicarious Liability

Limelight’s first argument—that because direct infringement is a strict liability tort, “pure” vicarious liability forms the only basis for attribution (Limelight-30-36)—lacks support.

In support of its argument, for example, Limelight cites *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349, 356 (1929), *Laperriere v. Vesta Insurance Group, Inc.*, 526 F.3d 715, 722 (11th Cir. 2008), *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1431 (3d Cir. 1994), and *Hunnicutt v. Wright*, 986 F.2d 119, 123 (5th Cir. 1993). (Limelight-31-32.) But none of these cases suggests (let alone holds) that, for strict liability torts, conduct of one party may only be

attributed to another if they have an agency relationship. In *Laperriere*, the court distinguished a liability that included a scienter requirement and was created by statute in a securities case from “pure vicarious liability, such as respondeat superior liability.” 526 F.3d at 722. But nothing in this or the other cases discusses whether theories other than agency apply to strict liability torts. Indeed, not one of these cases involves a strict liability tort.

Limelight also cites *Meyer v. Holley*, 537 U.S. 280 (2003), which states that a statutory tort must be evaluated in light of ordinary vicarious liability-related principles. (Limelight-31.) As noted in Akamai’s opening brief, “[r]espondeat superior is not the only kind of vicarious liability . . . those who act in concert, partners, and joint enterprisers are all vicariously liable for the acts of each other committed as part of their expressly or tacitly agreed-upon activity.” (Akamai-23 citing Dan B. Dobbs, *The Law of Torts*, (West Group 2000)); see also W. Page Keeton et al., *Prosser & Keeton on Torts*, §52 (5th ed. 1984). To the extent Limelight and amici feel that the joint liability doctrines proposed by Akamai are not forms of general vicarious liability, they are mistaken.

2. Limelight’s Contention That §271(a) Cannot Include a Knowledge or Scienter Requirement Misunderstands Akamai’s Position, Which Advocates Knowledge of the Steps Performed, Not the Patent

Limelight’s second argument is that §271(a) cannot include a knowledge or scienter requirement, and thus Akamai’s proposed standards cannot apply.

(Limelight-39-44.) Limelight’s argument, however, misunderstands Akamai’s position. Limelight argues: “Akamai apparently means that the defendant must have knowledge that the conduct embodies a step of a patented method” for joint liability to apply. (Limelight-40.) Likewise, Limelight incorrectly characterizes Akamai’s proposed test as a “quasi-inducement” theory. (Limelight-42.) But Akamai does not advocate such a standard. The knowledge Akamai would require is simply the same knowledge that a single actor has when that actor performs all the steps of a method claim.

Put differently, when two or more parties perform all the steps of a process claim, each knowing what the other is doing, it is the same knowledge requirement as where one person performs all of the steps, i.e., simply knowing that those steps are being performed. This standard is entirely consistent with §271(a) and provides protection to parties who perform steps of a method unaware of the performance of other steps by others.

Citing *Shields v. Halliburton Co.*, 493 F. Supp. 1376 (W.D. La. 1980) and *E.I. DuPont de Nemours & Co. v. Monsanto Co.*, 903 F. Supp. 680 (D. Del. 1995), discussed *infra*, *New Jersey Patent Co. v. Schaeffer*, 159 F. 171 (E.D. Pa. 1908), discussed in Akamai’s opening brief (Akamai-13), and two additional cases, *Mobil Oil Corp. v. W.R. Grace & Co.*, 367 F. Supp. 207, 253 (D. Conn. 1973) and *Cordis Corp. v. Medtronic AVE, Inc.*, 194 F. Supp. 2d 323, 351 (D. Del. 2002), amicus

San Diego IP Law Association (“SDIPLA”) asserts that knowledge of the patent is required for liability under Akamai’s proposed tests because the defendants in these cases knew the method they were performing was patented. (SDIPLA-12-17.) But all of these cases strongly support Akamai’s position since, in each case, it was the knowledge of the other party’s actions, not the patent, that was significant.

For example, in *Mobil Oil*, 367 F. Supp. at 253, the court found that the defendant infringed a process claim because it had “knowledge of what would be done by its customers.” For this reason, the court held that the “defendant, *in effect*, made each of its customers its agent in completing the infringement step, knowing full well that the infringement step would in fact be promptly and fully completed by those customers.” *Id.* (emphasis added). The court did not require knowledge of the patent, nor a formal agency relationship, to find direct infringement. Indeed, the facts of this case are very similar to those here and those in *Peerless*, providing further support that *Peerless* is not merely a contributory infringement case.

Further, in *Cordis*, 194 F. Supp. 2d at 349-50, the court found that the defendants and the physician customers directly infringed a method claim based on the “close relationship” between them. Citing *Faroudja Laboratories, Inc. v. Dwin Electronics, Inc.*, No. 97-20010 SW, 1999 WL 111788, at *5 (N.D. Cal. 1999), the

court held that “[t]o constitute a predicate act of direct infringement of a process claim, either a single entity must perform every step of the method or, if two or more entities perform different steps of the method, those entities must have some connection to each other.” *Cordis*, 194 F. Supp. 2d at 349. Knowledge of the patent was not even discussed in this analysis of direct infringement.

Finally, Limelight’s own proposed “agency” test includes a knowledge requirement, undermining its argument. Limelight asserts that “[v]icarious liability for the acts of a third party attaches only if the defendant ‘direct[s], command[s], or *knowingly* authorize[s]’” the acts in question. (Limelight-33 (emphasis added).) There is no doubt that Limelight knowingly authorizes content providers to tag and serve.

3. Akamai’s Interpretation of §271(a) to Include Attribution Beyond Agency Doesn’t Render Superfluous §§271(b) and (c)

Limelight argues that, if §271(a) allows Akamai’s formulations, the remaining provisions of §271 would be rendered superfluous. (Limelight-41.) But this argument ignores that Akamai’s grounds for liability are for direct infringement—i.e., where the party accused under this theory performed at least some steps of the claim and the performance of the remaining steps are attributed to him *as if he performed those steps himself*. Such conduct would not, however, occur in the vast majority of induced infringement (where the inducer often

performs none of the claimed steps) and contributory infringement (where the contributory infringer offers to sell or sells a material or apparatus, rather than practicing a claimed step²) cases. Section 271(a) would not, therefore, subsume §§271(b) and (c) under Akamai's interpretation.

Furthermore, the idea that applying §271(a) to the conduct of multiple actors would somehow undermine the separate remedy under §§271(b) and (c) fails to recognize that direct infringement is currently a legal predicate for liability under those sections. (AIPPLA-12.) By virtually limiting liability for direct infringement where two or more parties jointly infringe a patented method, the Panel makes it legally impossible to assert infringement under §§271(b) or (c) in a whole host of circumstances. (*See* §II.D, *infra*.) Limelight does not dispute this critical point. (Limelight-17-18.)

Finally, contrary to the suggestion by various amici, nothing in the legislative history indicates that Congress, by passing §§271(b) and (c), “enacted a *narrow* direct infringement provision that codified existing law, imposing liability only where the defendant practiced each claim step.” (*See* Apple-4 (emphasis added).) To the contrary, the Senate Report accompanying the Patent Act of 1952 observed that the purpose of adding §§271(b) and (c) was to “codify in statutory

² With respect to method claims, 35 U.S.C. §271(c) states: “Whoever offers to sell or sells . . . a material or apparatus for use in practicing a patented process . . . shall be liable as a contributory infringer.”

form principles of contributory infringement” to eliminate “doubt and confusion” created in the case law. S.Rep. No. 82-1979, at 8, as reprinted in 1952 U.S.C.C.A.N. 2394, 2402. At the same time, the Senate Report characterized §271(a) as “a declaration of what constitutes infringement in the present statute.” *Id.*

Thus, as later cases have confirmed, the addition of §§271(b) and (c) “left intact the entire body of case law on direct infringement.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 342 (1961); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 27 (1997) (“[P]re-1952 precedent survived the passage of the 1952 Act.”). Accordingly, while amici suggest Congress intended to abandon joint infringement as a theory of direct infringement, there is powerful evidence to the contrary.

4. Limelight Misreads This Court’s Precedent and the Pre-1952 Cases

Limelight cites five cases predating *BMC* to support its agency requirement. (Limelight-24-25.) Limelight first cites a single sentence in the background section of *Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565 (Fed. Cir. 1983), for the holding that a “manufacturer ‘cannot be liable for direct infringement with respect to’” plates in which the customer, not the manufacturer, applied a light-sensitive coating. (Limelight-24.) But this sentence lacks any analysis or supporting authority, and is not essential to the construction issues actually decided

by the Court. *Fromson*, 720 F.2d at 1568. Indeed, after this Court reversed the district court's claim construction and remanded the case for further determination, *id.* at 1571, the district court on remand reversed its finding of no infringement and found all asserted claims “*directly and contributorily*” infringed. *Fromson v. Advance Offset Plate, Inc.*, No. 76-4515-F, 1984 WL 1390, at *8 (D. Mass. Jul. 17, 1984) (emphasis added). This Court later affirmed the holding of infringement. *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1559 (Fed. Cir. 1985).

Limelight's reliance on *Cross Medical Products, Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293 (Fed. Cir. 2005) (Limelight-25-26), is similarly misplaced. As noted in Akamai's opening brief at 11-12, *Cross Medical* did not involve method claims. Moreover, as with *Fromson*, this relatively recent decision lacks any meaningful analysis or citation to authority. As such, it should not form the basis for this Court to limit joint infringement under §271(a).

Nor do the remaining cases referenced by Limelight support its agency or contract standard. (Limelight-25-26.) While the court in *Mobil Oil Corp. v. Filtrol Corp.*, 501 F.2d 282, 291-92 (9th Cir. 1974), questioned “whether a method claim can be infringed when two separate entities perform different operations and neither has control of the other's activities,” the court's noninfringement determination was not based on this ground but on a determination that *neither* party performed one of the steps.

In *Faroudja*, 1999 WL 111788, at *5-6, the court catalogued joint infringement precedent and noted that courts had found direct infringement where parties “worked in concert with other entities to complete the process of infringement.” That the court refused to find liability in that case because the connection between the parties was too remote, *id.* at *6, does not change the district court’s recognition that the law included acting-in-concert liability.

Finally, in *DuPont*, the patent at issue covered a three-step process for manufacturing carpet fibers. Under an agreement with another party (CaMac), Monsanto practiced step (a), then shipped the resulting product to CaMac, who performed the remaining steps and sold the final product. *DuPont*, 903 F.Supp. at 734. The court held CaMac liable for direct infringement of the process patent under §271(a) in view of the manufacturing agreement between Monsanto and CaMac, even though CaMac did not perform step (a) itself. *Id.* at 735. The court explained “a party cannot avoid liability for infringement by having someone else perform one or more steps of a patented process for them.” *Id.* It is true that *DuPont* states there is little precedent for holding a third party that performs a *single step* of a claim liable as a direct infringer. *Id.* But *DuPont* also states that there *is* precedent for holding the party that performs all the other claim steps—as does Limelight in this case—liable as a direct infringer. *Id.*

Limelight's attempts to distinguish certain cases relied on by Akamai are similarly misplaced. (Limelight-27-29.) Limelight first attempts to distinguish *Peerless* as a contributory infringement case, but for reasons noted above, this is incorrect.

Limelight next argues that *Halliburton v. Honolulu Oil Corp.*, 98 F.2d 436 (9th Cir. 1938), lacks any precedential value because it was reversed by the Supreme Court. (Limelight-28.) The Supreme Court's reversal on *validity*, however, did not disturb the Ninth Circuit's holding that two independent parties were liable for joint infringement. *Honolulu Oil Corp. v. Halliburton*, 306 U.S. 550, 562 (1939).

Limelight also attempts to distinguish *Shields*, contending that the court found that each defendant performed all of the claim steps and the claims were “*singularly* and jointly infringed.” (Limelight-27.) A fair reading of *Shields*, however, shows that the court attributed each party's performance of claim steps to the other and found the defendants jointly and severally liable. 493 F.Supp. at 1388-89. Indeed, the court held that “[w]hen infringement results from the participation and combined action of several parties, they are all joint infringers and jointly liable for patent infringement.” *Id.* at 1389.

Citing a wholly separate and unrelated decision, Limelight further argues that, in *Shields*, an agency relationship existed between Halliburton and its co-

defendant Brown and Root because Brown and Root was a wholly-owned subsidiary of Halliburton. (Limelight-27,49.) *Shields*, however, does not mention this fact, much less suggest that it was essential to its analysis. Instead, the opinion notes that Brown and Root employees “assisted” Halliburton by performing *one* of the claim steps and focuses on the “combined action” of Brown and Root employees and Halliburton in performing the claim steps. *Shields*, 493 F.Supp. at 1388-89.

Finally, Limelight attempts to minimize *Free Standing Stuffer, Inc. v. Holly Development Co.*, 187 USPQ 323 (N.D. Ill. 1974); *Metal Film Co. v. Metlon Corp.*, 316 F.Supp. 96 (S.D.N.Y. 1970); and *Jackson v. Nagle*, 47 F. 703 (C.C.N.D. Cal. 1891), as mere “contract cases” in which a defendant contracted out a step of a claim to another party. (Limelight-27-28.) But this is a “contract case” too. Indeed, Limelight’s contract with its customers assigns responsibility for performing the remaining claim steps to any customer who uses Limelight’s method. (See Akamai-52-54.)

5. The Restatement (Second) of Torts Supports Akamai’s Acting-in-Concert and Direction-or-Control Conduct-Attribution Rules

Sections 876 and 877 of the Restatement (Second) of Torts illustrate two vicarious liability doctrines that attribute one person’s conduct to another even when there is no agency or contractual relationship. Limelight does not dispute

that §877 attributes the conduct of one party to another where there is direction or control in the absence of an agency relationship. (See Limelight-34.) Indeed, comment a to this section states that the rule “is independent of the existence of liability” based on agency. §877, cmt.a. Comment a also shows that, contrary to amici’s contention (Facebook-16), this is a conduct-attribution rule, stating that “one who accomplishes a particular consequence is as responsible for it when accomplished through directions to another as when accomplished by himself.” §877, cmt.a.

Limelight criticizes Akamai’s reliance on §877 because it applies only “where the defendant orders or induces the conduct, *if he knows or should know of circumstances that would make the conduct tortious* if it were his own.” (Limelight-42-43 (emphasis added).) But a party that performs some steps of a claim and causes the performance of others does “know of circumstances that would make the conduct tortious if it were his own” because he knows the steps being performed. The quoted language in §877(a) does not require knowledge of the tortious nature of the conduct, but rather knowledge of the circumstances (here, performance of all the claim steps) that make the conduct tortious.

Moreover, Limelight, having conceded that the common law attributes conduct where a party directs or controls its agent, is hard pressed to draw a line and assert that attribution does not apply to other relationships given that both §877

and the Restatement (Second) of Agency §212³ make clear that attribution based on direction or control results not from an agency relationship, but from the general rule that “one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result.” §212,cmt.a.

As to the acting-in-concert doctrine, Restatement (Second) of Torts §876 attributes the conduct of one party to another who “does a tortious act in concert with the other.” The comments to this section make clear that this is also a conduct-attribution rule, stating: “The theory of the early common law was that there was a *mutual agency* of each to act for the other, which made all liable” §876(a), cmt.a (emphasis added). As noted by Prosser: “All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts for their benefit, are equally liable with him.” William L. Prosser, *Handbook of the Law of Torts*, 291-92 (4th ed. 1971).

Limelight, however, asserts that §876 cannot apply because comment c states: “[I]t is essential that the conduct of the actor be in itself tortious.” (Limelight-20; Facebook-21.) Limelight’s interpretation of this comment—as meaning that the separate action of each actor alone must be tortious—ignores the

³ Section 212 states: “A person is subject to liability for the consequences of another's conduct which results from his directions . . . if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences.”

surrounding context. Comment c goes on to explain that an actor “who innocently, rightfully, and carefully does an act that has the effect of furthering the tortious conduct or cooperating in the tortious design of another” is not liable. Thus, read in context, this comment explains that innocent actors are not liable, not that each party in a concerted action must itself perform a tort.

Amici note that §875 states that the rule in §876 applies only where the defendant has been “personally guilty of tortious conduct.” (E.g., Facebook-19.) But a party that performs some steps of a claim while directing or causing another to perform the remaining steps as if he were performing those steps himself has the same knowledge as if he had performed all the steps himself and is therefore “personally guilty” of the conduct.⁴

Moreover, Limelight’s and amici’s contentions are incompatible with basic hornbook tort law. As Prosser correctly points out: “[A]cts which individually would be innocent may be tortious if they combine to cause damage The single act itself becomes wrongful because it is done in the context of what others are doing.” Prosser, §52 at 354.

Limelight also criticizes the “acting-in-concert” standard in §876(a) because “conspiracy to infringe a patent is a theory which has no basis in patent law.”

⁴ Further, the fact that this comment in §875 refers to §876 but not §877 wholly undermines the amici’s argument that §877 requires that the defendant be “personally guilty.” (Facebook-19.)

(Limelight-49, citing *Int'l Rectifier Corp. v. Samsung Elecs. Co.*, 361 F.3d 1355, 1360 (Fed. Cir. 2004).) But, in so arguing, Limelight misstates Akamai's "acting-in-concert" test. The parties need not conspire to infringe a patent under Akamai's proposed standard; the parties need only agree to perform certain steps. This case presents a perfect example, with Limelight's customers who want to use Limelight's services and obtain Limelight's service guarantee expressly agreeing to perform the claimed tagging and serving steps. There is ample support for this type of concerted action in the patent laws. *On Demand Mach. Corp. v. Ingram Indus., Inc.*, 442 F.3d 1331, 1344-45 (Fed. Cir. 2006) (discerning "no flaw" in a jury instruction when participants worked together in concert to perform steps of a method); *Evident Corp. v. Church & Dwight Co.*, 399 F.3d 1310, 1316 (Fed. Cir. 2005) (applying joint responsibility principles in a case involving inequitable conduct); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 729 (D. Utah 1973) (parties enjoined included those acting in concert); Fed. R. Civ. P. 65(d)(2)(C) (parties bound by an injunction include those acting in concert).

Finally, Limelight's specific criticisms of the Restatement do not relate to the knowingly-combine-the-steps conduct-attribution rule, which is supported by *Peerless* and other cases.

C. Current U.S. Law Requiring an Agency or Contractual Relationship Is Out of Step with That of Foreign Jurisdictions

Although the statutory schemes of foreign jurisdictions are obviously not identical to that of §271, the current U.S. law requiring an agency or contractual relationship is out of step with that of other countries, which import tort principles to find joint infringement. For example, the United Kingdom finds joint infringement where two parties have engaged in a “common design.” *See Unilever Plc v. Gillette (U.K.) Ltd.*, [1989] R.P.C. 583 (analyzing factors to determine whether there was a “common design” between the parties to allow discovery to be taken to determine if a party was a joint infringer). In Japan, the “tool theory” establishes infringement of a vendor where that vendor conducts steps of a method claim with a purchaser carrying out the final step as a tool of the vendor. *See In the Electrodeposited Image Case* (Tokyo District Court judgment on September 20, 2001). Thus, the current application of §271(a) to limit enforcement of otherwise valid claims could be argued to violate TRIPS, including Article 27, which allows for equal patent rights regardless of technology, and Article 28, which extends patent rights to process claims, by disadvantaging innovators of distributed methods compared to other types of technology. As a leading advocate of strong intellectual property rights under TRIPS, the United States should

interpret §271(a) to allow enforcement of patent rights in a fair and complete manner.

D. Claim Drafting Is Not the Problem or the Solution

Limelight's argument that proper claim drafting will somehow mitigate the "problem" of joint infringement is simply wrong. (Limelight-52-56.) This was demonstrated in *Golden Hour Data Systems, Inc. v. emsCharts, Inc.*, 614 F.3d 1367 (Fed. Cir. 2010). There, the claims were drafted to cover a single actor carrying out the steps. *Id.* at 1380-81. But the defendants divided the performance of the different steps between them. *Id.* at 1382-83. The joint infringement "problem" in that case was thus not one of claim drafting. Indeed, it is extremely difficult for any claims draftsman to contemplate all the ways in which would-be copyists might evade infringement by designing their activities to jointly perform a method. In addition, there are important "multiple participant" inventions that are best captured by multi-participant claims or that should not be claimed to cover each party separately. A good example is the invention at issue here. (Akamai-34-35.)

Amici PhRMA, BIO, and Myriad provide other examples of multi-participant claims. (PhRMA-10-12; BIO-8-9; Myriad-11-17.) Myriad, for example, notes that the Court's current rule will be "devastating in personalized medicines" and points to two cases as evidence, *Prometheus Laboratories, Inc. v.*

Mayo Collaborative Services, 628 F.3d 1347 (Fed Cir. 2010), and *Metabolite Laboratories, Inc. v. Laboratory Corp. of America Holdings*, 370 F.3d 1354 (Fed. Cir. 2004) (“*LabCorp*”). (Myriad-11-14.) Both *Prometheus*, 628 F.3d at 1350-51, and *LabCorp*, 370 F.3d at 1363-64, involve claims with steps routinely performed by two different parties, a doctor and a laboratory, where it is the *correlation* between these steps that constitutes the invention. Further, as noted by Myriad, “the USPTO currently interprets 35 U.S.C. §101 and *Bilski v. Kappos* to require the explicit recitation of a transformative step (e.g., the ‘determining’ step and/or the ‘administering’ step). In other words, the claims in *Prometheus* and *LabCorp* could not have been drafted better and still survived examination. (Myriad-16 (citations omitted).)

Similarly, in the biotechnology field, the efficacy of certain drug treatments has been linked to biomarkers. (BIO-8-9.) This allows, for example, patients taking oncology drugs to save precious time by undergoing treatments that will be more effective for them. (BIO-9.) But, because these drugs were previously used to treat the general population, the addition of an assay step—necessarily performed by a *different* party from that administering the drug—is needed to confer patentability. Otherwise, the claims would likely be inherently anticipated. (*Id.*; see also PhRMA-11-12 (discussing a variety of inventions in the medical field that require multiple parties for patentability).) There is no basis for essentially

disallowing patents on such inventions by making it difficult if not impossible to impose liability for joint infringers of the claimed method.

E. “Innocent” Actors Will Not Be Ensnared

Numerous amici assert incorrectly that Akamai’s proposed rules would ensnare consumers and other parties who are unaware of steps that others perform. (CTIA-9-11; Thompson-6-7.) Based on this incorrect understanding, amici posit numerous scenarios in which unknowing parties would be liable for infringement. (Thompson-6-7.) As explained in Akamai’s opening brief at 37-42, however, an innocent actor who performs steps of a method *without knowledge of the other steps that are being performed* would not be liable under Akamai’s proposed standards. Further, there are additional ways to protect such parties. (Akamai-39-42.) Accordingly, the doomsday scenarios the amici posit are not realistic.

F. This Court Should Not Adopt a Bright-Line Test for the Sake of Simplicity

Certain amici support the Panel’s bright-line rule as easy to apply and assert that the standards proposed by Akamai would create a nebulous rule that would be difficult to apply. (See Facebook-22-23; Cisco-22; CTIA-9-10.) That Akamai’s rule is fact-based does not make it nebulous. Patent law includes many fact-based questions that are both technically and legally complex and decided by juries. The question here, about the parties’ relationships, is comparatively simple and one that juries have decided in tort cases for over a century.

These same amici assert that they will face gamesmanship and increased litigation if this Court allows anything other than an agency or contract standard. (CTIA-9-10.) But these gamesmanship concerns are overblown. Akamai's proposed test includes an important safeguard—requiring knowledge of the steps that are being performed—designed to minimize gamesmanship. And, to the extent anyone tries to take unfair advantage of these rules, this Court will readily see through it and remedy the problem as it has done in areas like damages and venue. While concerns about ill-founded suits filed by non-practicing entities are legitimate, the problems occur when such suits involve clearly invalid patents or weak claims of infringement. These problems do not justify the effective denial of patent protection for legitimate multi-participant inventions like Akamai's invention here.

Further, courts should not adopt bright-line rules simply for ease of convenience in their application or to limit liability. Indeed, the Supreme Court has instructed this Court not to create bright-line rules that retroactively destroy the value of existing patents, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) (citing *Warner-Jenkinson*, 520 U.S. at 28), and has been particularly vigilant where a rigid new rule is adopted that alters a previous, more flexible standard. (See Akamai-31-32 (citing five Supreme Court cases in support of this proposition).) Here, the Panel's bright-line rule harms the settled

expectations and property rights of a multitude of patent holders. (ShuffleMaster-26-28; Myriad-11-17; BIO-2-10; AIPLA-4-5; PhRMA-5-18.) Indeed, gamesmanship already results from the Court's current rule, which allows would-be infringers to engage in gamesmanship by splitting up the performance of steps in method claims to avoid liability. See §II.D, *supra*, discussing *Golden Hour*.

G. There Was No Waiver

Limelight asserts that Akamai is barred from relying on any liability theory other than direction or control because that is the sole jury instruction it sought before the district court. (Limelight-44-47.) Limelight's argument makes no sense in that it suggests that Akamai should have advanced a jury instruction that was contrary to the law as it then existed. In deciding the issue on appeal, the Panel, for the first time, held that liability for joint infringement could *only* be imposed if one party was the agent of the other or if the parties had entered into a contract. *Akamai Techs. Inc. v. Limelight Networks, Inc.*, 629 F.3d 1311, 1319 (Fed. Cir. 2010). This was a significant departure from the law that could not have been anticipated at the trial court level. Indeed, even the district court held that an agency relationship was not required and Limelight did not argue to the contrary on appeal. (A53-54.) Once the Panel articulated its new requirements, Akamai was entitled to challenge that holding in support of its previously advanced claim that there was joint infringement. *Minton v. Nat'l Assoc. of Sec. Dealers, Inc.*, 336

F.3d 1373, 1377 (Fed. Cir. 2003) (“[W]e have discretion to reach an issue not decided below when ‘there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result.’”).⁵

Furthermore, as set forth by the Supreme Court, a party can advance “any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here, Akamai *did* raise direct infringement below based on a theory of joint infringement and thus is not precluded from arguing so on appeal. That Akamai proffers different arguments for analyzing the joint infringement issue should not result in waiver.

Further, even if Akamai had failed to raise the issue of direct infringement below, the First Circuit would still consider the issue if it were of sufficient importance to justify departing from the normal rules of appellate review. *T.I. Fed. Credit Union v. DelBonis*, 72 F.3d 921, 929 (1st Cir. 1995); *Rodriguez v. Munoz*, 808 F.2d 138, 140 (1st Cir. 1986). In undertaking such an inquiry, the First Circuit has considered whether the issue raises a pure question of law that could be considered on the existing appellate record, the importance of the legal issue, and

⁵ Moreover, based on this same case law, should this Court adopt a new standard for the determination of joint infringement as either induced or contributory infringement, Akamai respectfully submits that, at a minimum, this Court should remand for a new trial based on that standard.

whether the law is unclear and lacked clarity that should be resolved. *Rodriguez*, 808 F.2d at 140. This Court’s acceptance of this case for en banc review by definition establishes that it is a manifestly important issue for the entire patent community. Accordingly, even if not raised at the district court, the First Circuit could consider the issues raised by this appeal en banc.

H. This Court Should Reinstate the Jury Verdict of Infringement

Limelight agrees that a party that “controls or directs” another’s performance of a claim step should be liable for infringement regardless of the existence of an agency relationship. (Limelight-33.) Indeed, Limelight acknowledges that “whether the ‘agency’ label applies more broadly to a particular relationship is not controlling,” but rather liability attaches where the defendant “directs, orders, or knowingly authorizes another to perform an act.” (*Id.*) Limelight nonetheless asserts that the Panel “considered whether the relevant conduct was carried out pursuant to Limelight’s direction and on Limelight’s behalf” and “found that those circumstances were not present in this case.” (*Id.* at 34.)

Notwithstanding the substantial evidence standard, however, the Panel did not accord any deference to the jury’s infringement finding, despite the fact that the jury was instructed consistent with *BMC*. (A93-94.) Nor did the Panel

consider whether Limelight directed, controlled, or “knowingly authorized” (Limelight’s test) its customers to perform the remaining steps of the claims.

In particular, the Panel (like Limelight) focused on the fact it is the customer’s choice to serve the page and tag any objects on that page. But, in so doing, the Panel (like Limelight) incorrectly focused on the existence of control or direction when the method was *not* used, instead of focusing on the time when the method *is* used. Indeed, *BMC* and *Muniauction* speak of “control or direction over the entire [claim] process,” *Muniauction*, 532 F.3d at 1329, and “control[ing] or direct[ing] each step of the patented process,” *BMC*, 498 F.3d at 1380, suggesting that this Court should not look at the existence of direction or control in a vacuum, but instead should focus on the existence of such control or direction when the invention is used. Here, Limelight performs all the steps of the claim except tagging and serving and, as set forth in Limelight’s detailed directions to customers and the contract between them, the customers “shall be responsible” for performing those claim steps “to enable such Customer Content to be delivered” by Limelight. (A17807; A17787-92.) In particular, the customer must use the specific tag provided by Limelight if Limelight is to serve content for it. Based on these facts, there is substantial evidence to support the jury verdict that, by selling a service in which Limelight performs some steps and requires its customers to

perform others in order to effectuate the service, Limelight was responsible for each step of the patented process.

The jury verdict is also supported under Akamai's alternative acting-in-concert and knowingly-combine-the-steps theories. Limelight does not dispute that it performed certain elements of the asserted claims knowing that its customers would perform the remaining elements. Nor does Limelight dispute that, as the Panel recognized, Limelight and its customers agreed that certain claim steps would be performed by Limelight while others would be performed by Limelight's customers. *Akamai*, 626 F.3d at 1317.

I. Limelight Stipulated That Tagging Does Not Require Prepending

Finally, Limelight improperly advances arguments in an attempt to change the basic facts framing the legal dispute before this Court. For example, Limelight asserts that the Panel decision "makes clear that 'tagging,' as used in the patent claims, must involve prepending." (Limelight-14.) According to Limelight, its system does not involve prepending, and the Panel would need to reach this issue if this Court rules in favor of Akamai. (*Id.*)

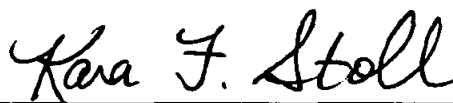
Limelight fails to mention, however, that at trial, Limelight *stipulated* to a construction of "tagging" that does *not* require "prepending." (A17874.) Indeed, some of the claims of the '703 patent expressly require prepending and some do not, reinforcing a construction that "tagging" need not always involve prepending.

(A260-261,col.17l.39-col.20l.15.) Moreover, Limelight did not object to the agreed-upon jury instruction regarding the meaning of “tagging,” which did not include prepending. (A100; A20856.) Limelight cannot change the basic facts at this late stage.

III. CONCLUSION

For all the reasons noted above and in Akamai’s opening brief, this Court should reinstate the jury verdict of infringement in this case. At a minimum, should this Court adopt a new standard for the determination of joint infringement as either induced or contributory infringement, Akamai respectfully submits that this Court should remand for a new trial based on that standard.

Respectfully submitted,



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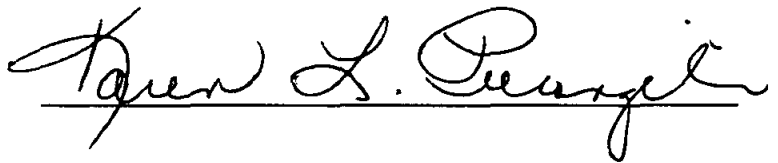
CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2011, two true and correct copies of the foregoing **Reply Brief for Plaintiff-Appellant Akamai Technologies, Inc. On Rehearing En Banc** were served by the indicated means to the persons at the addresses listed:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing **Principal Brief for Plaintiff-Appellant Akamai Technologies, Inc. on Rehearing En Banc** contains 6,981 words as measured by the word processing software used to prepare this brief.

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