

2009-1372, -1380, -1416, -1417

**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.

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

**RESPONSE OF LIMELIGHT NETWORKS, INC.
IN OPPOSITION TO AKAMAI TECHNOLOGIES, INC.'S
AND THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY'S
PETITION FOR REHEARING EN BANC**

MICHAEL W. DE VRIES
KIRKLAND & ELLIS LLP
333 South Hope Street
29th Floor
Los Angeles, CA 90071
(213) 680-8400

AARON M. PANNER
JOHN CHRISTOPHER ROZENDAAL
MICHAEL E. JOFFRE
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Defendant-Cross-Appellant Limelight Networks, Inc.

July 2, 2015

CERTIFICATE OF INTEREST

Counsel for Defendant-Cross-Appellant Limelight Networks, Inc. certifies the following:

1. The full name of every party or amicus represented by me is
Limelight Networks, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Not applicable.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

Young J. Park
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022

G. Courtney Holohan
Regan A. Smith
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654

Michael W. De Vries
Robert G. Krupka
Alexander F. MacKinnon
Nick G. Saros
Timothy G. Majors
Christopher C. Smith
Christopher M. Lawless
Thomas Richardson
Allison W. Buchner
KIRKLAND & ELLIS LLP
333 South Hope Street
Los Angeles, CA 90071

Gale Mahoney
Daniel K. Hampton
Thomas M. Johnston
HOLLAND & KNIGHT LLP
10 St. James Avenue
Boston, MA 02116

Aaron M. Panner
John Christopher Rozendaal
Michael E. Joffre
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

Dated: July 2, 2015

/s/ Aaron M. Panner
Aaron M. Panner

TABLE OF CONTENTS

| | Page |
|---|------|
| CERTIFICATE OF INTEREST | i |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION AND SUMMARY | 1 |
| ARGUMENT | 3 |
| I. THE RULE ARTICULATED BY THE PANEL IS CORRECT | 3 |
| II. THE CONTROL-OR-DIRECTION TEST PROMOTES CLEAR CLAIM DRAFTING, AND THERE IS NO EVIDENCE THAT IT CREATES ANY PATENT ENFORCEMENT LOOPHOLE..... | 8 |
| III. AKAMAI FAILED TO PRESERVE ANY ARGUMENT THAT THE RULE ARTICULATED IN <i>MUNIAUCTION</i> – WHICH FORECLOSES AKAMAI’S CLAIM – IS INCORRECT | 12 |
| CONCLUSION | 15 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|-------------------------|
| <i>Aguirre v. Turner Constr. Co.</i> , 501 F.3d 825 (7th Cir. 2007) | 5 |
| <i>Akamai Techs., Inc. v. Cable & Wireless Internet Servs., Inc.</i> , 344 F.3d 1186 (Fed. Cir. 2003) | 10 |
| <i>Aro Mfg. Co. v. Convertible Top Replacement Co.</i> , 365 U.S. 336 (1961)..... | 3 |
| <i>AT&T Co. v. Winback & Conserve Program, Inc.</i> , 42 F.3d 1421 (3d Cir. 1994)..... | 5 |
| <i>Blair v. Westinghouse Elec. Corp.</i> , 291 F. Supp. 664 (D.D.C. 1968) | 4 |
| <i>Blockel v. J.C. Penney Co.</i> , 337 F.3d 17 (1st Cir. 2003) | 13 |
| <i>BMC Res., Inc. v. Paymentech, L.P.</i> , 498 F.3d 1373 (Fed. Cir. 2007)..... | 2, 8, 9, 12, 13, 14, 15 |
| <i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994) | 1, 8 |
| <i>Clark v. Capital Credit & Collection Servs., Inc.</i> , 460 F.3d 1162 (9th Cir. 2006) | 6 |
| <i>Commil USA, LLC v. Cisco Sys., Inc.</i> , 135 S. Ct. 1920 (2015) | 3, 4 |
| <i>Deepsouth Packing Co. v. Laitram Corp.</i> , 406 U.S. 518 (1972)..... | 1-2, 8 |
| <i>Depositors Ins. Co. v. Wal-Mart Stores, Inc.</i> , 506 F.3d 1092 (8th Cir. 2007) | 6 |
| <i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006)..... | 5 |
| <i>Gleason v. Seaboard Air Line Ry.</i> , 278 U.S. 349 (1929)..... | 5 |
| <i>Global-Tech Applicances, Inc. v. SEB S.A.</i> , 131 S. Ct. 2060 (2011)..... | 4, 7 |

| | |
|--|---------------|
| <i>Hunnicut v. Wright</i> , 986 F.2d 119 (5th Cir. 1993) | 5 |
| <i>Janus Capital Grp., Inc. v. First Derivative Traders</i> , 131 S. Ct. 2296 (2011)..... | 6 |
| <i>Laperriere v. Vesta Ins. Grp., Inc.</i> , 526 F.3d 715 (11th Cir. 2008)..... | 5 |
| <i>Limelight Networks, Inc. v. Akamai Techs., Inc.</i> , 134 S. Ct. 2111 (2014)..... | 1, 4, 14 |
| <i>Maruho Co. v. Miles, Inc.</i> , 13 F.3d 6 (1st Cir. 1993) | 5 |
| <i>Meyer v. Holley</i> , 537 U.S. 280 (2003) | 1, 5 |
| <i>Muniauction, Inc. v. Thomson Corp.</i> , 532 F.3d 1318 (Fed. Cir. 2008)..... | 2, 12, 13, 14 |
| <i>NTP, Inc. v. Research In Motion, Ltd.</i> , 418 F.3d 1282 (Fed. Cir. 2005)..... | 4 |
| <i>Rio Mar Assocs., LP v. UHS of Puerto Rico, Inc.</i> , 522 F.3d 159 (1st Cir. 2008)..... | 5 |
| <i>Teamsters Union, Local No. 59 v. Superline Transp. Co.</i> , 953 F.2d 17 (1st Cir. 1992)..... | 13 |
| <i>Thompson v. N.T. Bushnell Co.</i> , 96 F. 238 (2d Cir. 1899) | 4 |
| <i>Thurber Corp. v. Fairchild Motor Corp.</i> , 269 F.2d 841 (5th Cir. 1959)..... | 4 |
| <i>Toledo Plate & Window Glass Co. v. Kawneer Mfg. Co.</i> , 237 F. 364 (6th Cir. 1916) | 4 |

STATUTES

| | |
|--------------------------|-------------------------|
| 35 U.S.C. § 120..... | 9 |
| 35 U.S.C. § 271 | 3, 7, 8 |
| 35 U.S.C. § 271(a) | 1, 3, 4, 5, 6, 7, 8, 14 |

| | |
|--------------------------|------------|
| 35 U.S.C. § 271(b) | 1, 3, 6, 7 |
| 35 U.S.C. § 271(c) | 1, 3, 7 |

OTHER MATERIALS

| | |
|---|------|
| Christina Bohannon & Herbert Hovenkamp, <i>Creation without Restraint: Promoting Liberty and Rivalry in Innovation</i> (2012)..... | 11 |
| Robert C. Faber, <i>Faber on Mechanics of Patent Claim Drafting</i> (6th ed. 2012)..... | 9 |
| Mark A. Lemley et al., <i>Divided Infringement Claims</i> , 6 Sedona Conf. J. 117 (2005)..... | 7, 9 |
| Restatement (Third) of Agency (2006)..... | 6 |
| Harold C. Wegner, <i>E-Business Patent Infringement: Quest for a Direct Infringement Claim Model 14</i> (SOFTIC 2001 Symposium), available at http://www.softic.or.jp/symposium/open_materials/10th/en/wegner-en.pdf | 9 |

INTRODUCTION AND SUMMARY

The Court should deny the petition for rehearing because the panel decision – which reaffirms a standard that has governed for nearly a decade – is correct and creates no inappropriate gap in patent enforcement. On the contrary, this Court’s rule promotes clear claim drafting and encourages innovation. Moreover, as a result of Akamai’s litigation choices, this case presents a poor vehicle for consideration of the issues that it now seeks to raise.

I. The panel’s decision rests firmly on “what it means to infringe a method patent,” *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2117 (2014), and the common-law rules that inform the construction of the Patent Act, *see Meyer v. Holley*, 537 U.S. 280, 285 (2003). To establish liability for direct infringement of a method claim, plaintiff must prove that the accused infringer carried out every method step. *See Limelight*, 134 S. Ct. at 2117. And the only basis for attribution of third parties’ conduct to a defendant for purposes of a strict-liability claim of direct infringement is vicarious liability. Liability for conduct other than direct infringement is governed, not by § 271(a), but by § 271(b) and (c); to invent a new category of infringement tort – based on “concert of action” or other fault-based tort doctrines – would conflict with the statute. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531

(1972). The word “whoever” supports no different result: the question is not whether multiple people can infringe; it is whether *anyone* directly infringes when no defendant performs all the steps of a method directly or vicariously.

II. The rule rearticulated by the panel creates no patent enforcement loophole. Method claims can be drafted so that they are performed by a single potential infringer; sound patent drafting has long followed that practice. Akamai’s patent could have been drafted from the point of view of a single actor; the same is true of the medical-treatment patents alluded to by amici. Moreover, existing patents like Akamai’s can often be enforced against service providers by pursuing claims of induced infringement. Akamai originally claimed that Limelight’s customers directly infringed and that Limelight induced infringement, but Akamai dropped its inducement claim to avoid introduction of evidence of invalidity. As a result, this case does not present the question whether Akamai’s patent is “directly infringed” by anyone other than Limelight. *Cf.* Pet. 1.

III. This Court should not entertain arguments that Akamai failed to preserve. Akamai consistently argued in the district court (and on appeal) that the “control or direction” test of *BMC Resources v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007), and *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), governed its direct infringement claim. Until its original petition

for rehearing was granted, Akamai never argued for any other theory of liability under § 271. Akamai should not be permitted to raise a new claim of error.

ARGUMENT

I. THE RULE ARTICULATED BY THE PANEL IS CORRECT

Akamai’s effort to extend § 271(a) to reach conduct by multiple actors based on ill-defined “joint tortfeasor” principles is inconsistent with the Patent Act provisions governing infringement liability. Section 271(a) imposes strict liability for direct infringement, and, under common-law principles, liability for strict-liability torts based on another’s conduct is limited to *vicarious* liability – that is, situations in which the defendant has the legal right to direct or control the third party’s conduct. By contrast, Akamai seeks to rely on conduct-attribution rules derived from the law governing intentional or negligent torts; they cannot be applied to § 271(a) without disregarding the strict-liability nature of direct infringement and rendering § 271(b) and (c) of the Patent Act superfluous.

A. Section 271 of the Patent Act draws a sharp distinction between direct infringement – defined in § 271(a) – and indirect liability. *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 342 (1961) (noting that § 271(a) “defines ‘infringement’”); *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015). A defendant directly infringes if, without authority, it “uses . . . any patented invention[] within the United States.” 35 U.S.C. § 271(a). In the case of

method patents, infringement under § 271(a) requires that the accused infringer perform each step of the method. *Limelight*, 134 S. Ct. at 2117; *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005). Performance of less than all the steps of a method thus does not constitute direct infringement under § 271(a). When a patent holder alleges that multiple parties collectively carried out the steps of a method but that no party carried out all of the steps, such allegations fail to state a claim under § 271(a) as long as there is no basis for attributing the performance of *all* of the steps to at least one defendant.

A claim of direct infringement does not require proof of intent or knowledge: liability is strict. *See Commil*, 135 S. Ct. at 1926; *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2065 n.2 (2011). That understanding has deep roots: strict liability for direct infringement has remained a constant, both before and after the current codification in 1952.¹ Akamai itself pursued (exclusively) a strict-liability claim, obtaining a jury instruction that direct infringement does not depend on the infringer's knowledge of the patent or intent.²

¹ *See, e.g., Blair v. Westinghouse Elec. Corp.*, 291 F. Supp. 664, 670 (D.D.C. 1968); *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841, 849 (5th Cir. 1959); *Toledo Plate & Window Glass Co. v. Kawneer Mfg. Co.*, 237 F. 364, 369 (6th Cir. 1916); *Thompson v. N.T. Bushnell Co.*, 96 F. 238, 243 (2d Cir. 1899).

² There is no basis for the dissent's suggestion (at 3) that *Limelight* copied Akamai's method, and Akamai acknowledged in the district court that it was making no such claim. *See also* D. Ct. Dkt. 240, Tr. 47:18-21 ("no suggestion that they did copy"). Indeed, *Limelight* does not use the sole technique for tagging

Congress’s codification of a strict-liability tort in § 271(a) indicates that it “intend[ed]” for “ordinary tort-related vicarious liability rules” to apply. *Meyer*, 537 U.S. at 285; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006). Tort law draws a sharp distinction between attribution of conduct based on vicarious liability and doctrines that extend tort liability for another’s conduct based on fault. “Pure vicarious liability” is “based on the actions of the other party regardless of any allegation of culpability on the party held vicariously liable.” *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 722 (11th Cir. 2008) (per curiam).³ Such pure vicarious liability does not arise *except* in circumstances where the defendant has the legal right to direct or control the conduct of the third party. *See Meyer*, 537 U.S. at 286 (“[t]he Restatement [(Second) of Agency] § 1 specifies that the relevant principal/agency relationship demands . . . [*inter alia*] control (or the right to direct or control)”); *Maruho*, 13 F.3d at 11 (“[t]he theories of vicarious liability . . . all require [plaintiff] to show that [defendant] had the

described in Akamai’s patent, and its content delivery network architecture is fundamentally different from the architecture described in the patent. This Court has not reached Limelight’s alternative non-infringement arguments. *See Op.* 28.

³ *See also Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929); *Rio Mar Assocs., LP v. UHS of Puerto Rico, Inc.*, 522 F.3d 159, 165 (1st Cir. 2008) (distinguishing “vicarious liability” from “joint tortfeasor liability”); *Aguirre v. Turner Constr. Co.*, 501 F.3d 825, 828-29 (7th Cir. 2007) (same); *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1431 (3d Cir. 1994); *Maruho Co. v. Miles, Inc.*, 13 F.3d 6, 11 (1st Cir. 1993) (Breyer, C.J.) (discussing potential bases for vicarious liability where defendant is “without fault”); *Hunnicut v. Wright*, 986 F.2d 119, 123 (5th Cir. 1993).

legal right to control” the tortious conduct); *cf. Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (“Without control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.”).⁴ Only then is it proper to treat such conduct as that of the defendant.

Akamai argues (Pet. 12) that the strict-liability nature of direct infringement does not preclude application of fault-based attribution rules, but it offers no justification for this assertion, and it is incorrect. Vicarious liability rules are based on legal relationships that make it appropriate to hold one party responsible for another’s conduct regardless of fault, knowledge, or intent. By contrast, Akamai relies on rules of tort liability based on wrongful conduct and guilty knowledge. *See* Op. 20-23; *cf.* Pet. 12. Those fault-based attribution rules are “fundamentally incompatible” with the strict-liability nature of direct infringement. Op. 20.

B. Akamai’s effort to incorporate common-law joint tortfeasor principles into § 271(a) is also impossible to square with the statutory provisions expressly governing liability for indirect infringement. *See* Op. 14-15. If Akamai were correct, a defendant who encouraged another to carry out *all* the steps of a method – not just some of the steps – would be liable without fault under § 271(a).

Akamai’s reading would thus swallow up § 271(b) and render pointless the

⁴ *See also Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092, 1097 (8th Cir. 2007); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173 (9th Cir. 2006); Restatement (Third) of Agency § 1.01 (2006); *id.* § 7.04.

culpable-knowledge requirement that this Court recognized in *Global-Tech*. Similarly, § 271(c) imposes no liability when a defendant supplies a component of an invention that has “substantial noninfringing use.” Akamai’s theory would allow plaintiffs to circumvent limitations on liability under that provision as well. *See* Mark A. Lemley et al., *Divided Infringement Claims*, 6 Sedona Conf. J. 117, 119-20 (2005) (“Construing the patent laws to permit the individual, non-infringing acts of unrelated parties together to add up to infringement would render both Section 271(b) and Section 271(c) meaningless.”).

To avoid this result, Akamai asserts that a defendant who does not perform at least one step of a method does not “use” it. *See* Dissent 14 n.2. But one who performs some but not all the steps of a method does not “use” the method either. There is no reason why Akamai’s standard would not lead to the attribution of conduct under § 271(a) even when the defendant does not itself carry out any method steps.

Akamai seeks to rely on pre-1952 cases and treatises, but its argument ignores the fact that liability for infringement – direct and indirect – was, before 1952, a matter of judge-made law; with the codification of § 271, Congress “removed joint-actor patent infringement liability from the discretion of the courts, defining ‘infringement’ in § 271(a) and expressly outlining in § 271(b) and (c) the *only* situations in which a party could be liable for something less than an

infringement.” Op. 10-11. Since 1952, Congress has adopted additional modifications to § 271 to impose liability for other types of conduct that do not themselves constitute infringement. The codification of the bases for infringement liability in § 271 forecloses Akamai’s attempts to blur the lines that Congress drew. *See Central Bank of Denver*, 511 U.S. at 176 (“Congress knew how to impose . . . liability when it chose to do so.”); *Deepsouth*, 406 U.S. at 531.

C. The statute’s use of the word “whoever” – which can refer to multiple actors – does not support any different result. First, no one disputes that infringement can involve conduct by multiple parties, if the performance of all the method steps is attributable to one or more defendants under vicarious liability standards. Second, the case presents the question whether *Limelight* (the only accused infringer) has used Akamai’s method; because it has not performed all the steps of the method, it has not done so. *See also* Op. 12 n.2.

II. THE CONTROL-OR-DIRECTION TEST PROMOTES CLEAR CLAIM DRAFTING, AND THERE IS NO EVIDENCE THAT IT CREATES ANY PATENT ENFORCEMENT LOOPHOLE

Maintaining the integrity of § 271(a) in this context creates no unwarranted enforcement loophole while serving important patent-law policies.

First, existing standards do nothing to discourage future innovation because, as this Court has repeatedly noted, “[a] patentee can usually structure a claim to capture infringement by a single party.” *BMC Res.*, 498 F.3d at 1381; *see* Op.

16-17; *see also* Lemley, 6 Sedona Conf. J. at 124 (“Most inventions that involve cooperation of multiple entities can be covered using claims drafted in unitary form simply by focusing on one entity.”).⁵ An inventor can obtain appropriate protection for her inventions by taking care to draft claims from the point of view of a single actor – including, as appropriate, multiple claims covering the actions of different actors.⁶ Akamai has never contested that it could have written its claims that way. *See also* San Diego Intellectual Property Law Ass’n et al. En Banc Amicus Br. 20-26.

The biotech and pharmaceutical industries (Akamai’s sole industry supporters) claim that *BMC Resources* makes it harder to draft enforceable claims on treatment methods,⁷ but they cite no case in which enforcement was denied.

Treatment claims can be drafted from the point of view of the treating physician by

⁵ This has been preferred practice for many years. *See* Robert C. Faber, *Faber on Mechanics of Patent Claim Drafting* § 7:3, at 7-7 (6th ed. 2012) (“Advice by this author for drafting a method claim remains as previously. Draft at least some of the method claims to focus on steps to be performed by a single entity.”); Harold C. Wegner, *E-Business Patent Infringement: Quest for a Direct Infringement Claim Model* 14 (SOFTIC 2001 Symposium), available at http://www.softic.or.jp/symposium/open_materials/10th/en/wegner-en.pdf (noting the need to draft claims to have “a single, direct infringer for every claim”).

⁶ If an inventor realizes that he has failed to claim precisely what he invented, he can file a continuation application. *See* 35 U.S.C. § 120. Akamai still has continuation applications pending based on the specification of the ’703 patent.

⁷ *See* Biotechnology Industry Organization Amicus Br. 5-10; Coalition of 21st Century Medicine Amicus Br. 4-7; Pharmaceutical Research and Manufacturers of America Amicus Br. 8-10.

claiming steps of (1) obtaining an assessment and (2) administering treatment. None of the amici explains why this does not protect their legitimate interests.

Second, neither Akamai nor any amicus offers empirical support for the assertion that the rule reaffirmed by the panel has proved a significant barrier to enforcement even of previously issued patents. In many cases, performance of all the steps of the method is attributable to a single actor: for example, when a service provider carries out some steps of a method pursuant to a contract with a customer, all of the steps of a method may be attributable to that customer, and the patentee may have a viable claim of inducement against the service provider. *See* Op. 19 (“[W]hen a contract mandates the performance of all steps of a claimed method, each party to the contract is responsible for the method steps for which it bargained.”). In this case, Akamai originally asserted that Limelight’s customers infringe. *See* D. Ct. Dkt. 240, Tr. 36:7-10 (“The customers also infringe, because Limelight engages on behalf of the customers in the series of steps that constitute the infringing conduct.”); *see also* Dissent 3 (suggesting that Limelight’s customers “[u]s[e] the[] invention”). But Akamai dropped its indirect infringement claims to shield the jury from the fact that other claims of Akamai’s patent had been held invalid as anticipated. *See Akamai Techs., Inc. v. Cable & Wireless Internet Servs., Inc.*, 344 F.3d 1186, 1194-95 (Fed. Cir. 2003). Because Akamai made the strategic choice to drop its claims that *content providers* infringe,

this Court does not properly have before it the question whether Akamai could have enforced the '703 patent under this Court's current standards.

Third, Akamai's effort to eliminate settled limits on direct infringement would improperly broaden the scope of method claims, burdening rivals' efforts to invent around – or to avoid – a patented method. Akamai insists that it should not be required to prove either that the defendant carried out all the steps of the claimed method or that the defendant induced another to do so. Rather, it seeks to establish liability by combining the actions of independent parties, even though none of the steps of Akamai's method is new, and the independent party is simply doing something that it was already doing on its own – including serving its own web page. Permitting a patentee to prevent a rival from performing fewer than all the steps because its customer separately performs an additional, conventional step would expand the scope of a patentee's rights and correspondingly would narrow what remains in the public domain. *See* Christina Bohannon & Herbert Hovenkamp, *Creation without Restraint: Promoting Liberty and Rivalry in Innovation* 10 (2012) (“Broad construction reduces rivals’ incentive to improve by turning their improvements into infringements.”); *see also* Op. 25 (under Akamai's incorrect view, “the addition of a claim *limitation* can actually serve to make more parties liable”).

Concerns about unpredictable litigation have led leading companies and trade associations – from financial services, consumer electronics, software, social media, electronic equipment, wireless communications, and Internet retailing – to support Limelight in this litigation, including in the original en banc proceeding.⁸ Yet amici also depend on patents to protect their investments in innovation – as does Limelight, which owns more than 100 patents and has more pending. The settled rule of *BMC Resources* and *Muniauction* promotes a strong and predictable patent regime, not the creation of any “loophole.”

III. AKAMAI FAILED TO PRESERVE ANY ARGUMENT THAT THE RULE ARTICULATED IN *MUNIAUCTION* – WHICH FORECLOSES AKAMAI’S CLAIM – IS INCORRECT

Rehearing should be denied for the additional reason that Akamai has preserved no challenge to the district court’s judgment that is not foreclosed by the Supreme Court’s decision. In the district court, Akamai sought and received a jury instruction – based on this Court’s decision in *BMC Resources* – that the conduct of Limelight’s customers could be attributed to Limelight for purposes of imposing liability for direct infringement if the customers acted “under the direction [or] control of Limelight, such that Limelight can properly be deemed to be the one to

⁸ See, for example, the en banc amicus briefs filed by Altera Corp. et al.; Apple Inc.; Cisco Systems, Inc. et al.; CTIA and MetroPCS Wireless; Facebook, Inc. and LinkedIn Corp.; Financial Services Roundtable; Internet Retailers; and Thomson Reuters Corp.

do it.” The jury returned a verdict for Akamai, and the district court denied Limelight’s motion for JMOL. After this Court decided *Muniauction*, Limelight moved for reconsideration. In response, Akamai argued that *Muniauction* “did not change the legal standard; it simply reiterated and applied the standard announced in *BMC Resources*.” D. Ct. Dkt. 379, at 1; *cf.* Dissent 6-7 (equating standard articulated in *BMC Resources* and *Muniauction*). Akamai did not argue, even in the alternative, that *Muniauction* misconstrued *BMC Resources* or had improperly narrowed the “control or direction” standard.⁹

By pursuing its direct infringement claim against Limelight in express reliance on *BMC Resources* and *Muniauction*, under governing First Circuit precedent, Akamai forfeited the ability to make any argument before this Court that those cases are incorrect. “We consider arguments raised for the first time on appeal only in exceptional circumstances threatening a ‘clear miscarriage of justice.’” *Blockel v. J.C. Penney Co.*, 337 F.3d 17, 25 (1st Cir. 2003); *Teamsters Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992) (“If

⁹ Moreover, on appeal, Akamai continued to rely on *BMC Resources* and *Muniauction*. In its panel briefing, Akamai embraced *Muniauction* and failed to preserve the argument that the case should be overruled. *See* Akamai Panel Br. 44-50; Akamai Panel Reply Br. 4-7. In its petition for en banc rehearing, Akamai asserted that the standard applied by the panel conflicted with both *BMC Resources* and *Muniauction*. Akamai Pet. 12. Akamai did not argue that *Muniauction* was incorrect, and it did not ask the en banc Court to revisit any precedent pre-existing the panel decision in this case.

any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.”). Akamai could have pursued alternative “joint tortfeasor” theories of liability in the district court, but it did not do so.

Any argument that the judgment was inconsistent with *BMC Resources* and *Muniauction* is foreclosed by the Supreme Court’s decision in *Limelight*. The Supreme Court noted that, under the *Muniauction* standard, this Court had properly determined that Limelight could not be held liable for direct infringement under § 271(a). “Because Limelight did not undertake all [the] steps of the ’703 patent and cannot otherwise be held responsible for all those steps, respondents’ rights have not been violated.” 134 S. Ct. at 2119. “[U]nder the *Muniauction* rule, respondents’ interests in the . . . patent have not been invaded.” *Id.*

Akamai asserts (Pet. 13 n.5) that it did not waive its challenge to *BMC Resources* and *Muniauction* because it “criticized” *Muniauction* in its en banc brief. But Akamai forfeited the argument it now seeks to raise in the *district court*, when it pursued its claim under the “control or direction” standard articulated in *BMC Resources* and *Muniauction*. And it continued to embrace that standard in its panel briefing and its initial petition for rehearing. Moreover, nowhere in its en banc brief did Akamai assert that *Muniauction* or *BMC Resources* was wrongly decided. On the contrary, Akamai continued to argue that the jury verdict should

be upheld on the basis that the evidence was sufficient to establish that Limelight directed or controlled the actions of its customers. *See Akamai En Banc Br. 20-22, 49-51.* To the extent Akamai argued, for the first time, that Limelight could be found liable under other joint tortfeasor doctrines, *see id. 23-28, 51-52,* Limelight promptly asserted that Akamai had waived any theory of liability other than the “direction or control” standard of *BMC Resources*, *see Limelight En Banc Br. 44-47.* There is no justification for relieving Akamai of the consequences of its litigation choices, making this case an inappropriate vehicle for reconsidering governing precedent.

CONCLUSION

The petition for rehearing should be denied.

Respectfully submitted,

/s/ Aaron M. Panner

AARON M. PANNER
JOHN CHRISTOPHER ROZENDAAL
MICHAEL E. JOFFRE
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL W. DE VRIES
KIRKLAND & ELLIS LLP
333 South Hope Street
29th Floor
Los Angeles, CA 90071
(213) 680-8400

Counsel for Defendant-Cross-Appellant Limelight Networks, Inc.

July 2, 2015

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on
by:

- US mail
- Fax
- Hand
- Electronic Means
(by email or CM/ECF)

Name of Counsel

Signature of Counsel

Law Firm

Address

City, State, ZIP

Telephone Number

FAX Number

E-mail Address

NOTE: For attorneys filing documents electronically, the name of the filer under whose log-in and password a document is submitted must be preceded by an “/s/” and typed in the space where the signature would otherwise appear. Graphic and other electronic signatures are discouraged.