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FEDERAL CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MAR 22 2011

JAN HORBALY
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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.

LIMELIGHT NETWORKS, INC.'S RESPONSE TO
AKAMAI'S COMBINED PETITION FOR PANEL REHEARING AND
REHEARING EN BANC

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March 22, 2011

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

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 us are:
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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. The Panel Did Not Announce a “New” or “Rigid” Rule	3
1. The Panel Did Not Create a “New” Rule.....	4
2. The Panel Did Not Create a Rigid Rule.....	7
B. Based on the Undisputed Evidence, the Panel Properly Affirmed JMOL of No Infringement.....	10
C. This Case Does Not Present a Question of Exceptional Importance	13
III. CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page No(s)
Cases	
<i>Akamai Techs., Inc. v. Limelight Networks, Inc.</i> , 629 F.3d 1311 (Fed. Cir. 2010)	passim
<i>Bilski v. Kappos</i> , 130 S. Ct. 3218 (2010).....	9
<i>BMC Res. Inc. v. Paymentech, L.P.</i> , 498 F.3d 1373 (Fed. Cir. 2007)	passim
<i>Centillion Data Sys., LLC v. Qwest Comm'cns Int'l, Inc.</i> , 631 F.3d 1279 (Fed. Cir. 2011)	7
<i>Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.</i> , 424 F.3d 1293 (Fed. Cir. 2005)	8
<i>Crowell v. Baker Oil Tools, Inc.</i> , 143 F.2d 1003 (9th Cir. 1944)	7
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006).....	10
<i>Fromson v. Advance Offset Plate, Inc.</i> , 720 F.2d 1565 (Fed. Cir. 1983)	4, 14
<i>Golden Hour Data Sys., Inc. v. emsCharts, Inc.</i> , No. 2:06-CV-381, 2009 WL 943273 (E.D. Tex. Apr. 3, 2009)	7
<i>KSR Int'l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007).....	9
<i>Muniauction, Inc. v. Thomson Corp.</i> , 532 F.3d 1318 (Fed. Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 1585 (2009) .	passim
<i>On Demand Mach. Corp., v. Ingram Indus., Inc.</i> , 442 F.3d 1331 (Fed. Cir. 2006)	8
<i>Pfaff v. Wells Elecs., Inc.</i> , 525 U.S. 55 (1998).....	10

<i>Sage Prods., Inc. v. Devon Indus., Inc.</i> , 126 F.3d 1420 (Fed. Cir. 1997)	15
--	----

<i>Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Corp.</i> , 520 U.S. 17 (1997).....	4
--	---

Statutes

35 U.S.C. § 271(a).....	4
-------------------------	---

Rules

Fed. Cir. R. 35(a)(2).....	1
----------------------------	---

TABLE OF ABBREVIATIONS

'703 patent	U.S. Patent No. 6,108,703
A__	For a cite to the Appendix, “A__” is to the page of the Appendix
A__:x:xx	For a cite to the '703 patent, x:xx refers to a column and line number; “A__” refers to the page of the Appendix where that citation appears.
Akamai	Plaintiff-Appellant Akamai Technologies, Inc.
<i>BMC Resources</i> or <i>BMC Res.</i>	<i>BMC Resources, Inc. v. Paymentech L.P.</i> , 498 F.3d 1373 (Fed. Cir. 2007)
<i>Centillion</i>	<i>Centillion Data Sys., LLC v. Qwest Comm'cns Int'l, Inc.</i> , 631 F.3d 1279 (Fed. Cir. 2011)
JMOL	Judgment as a matter of law
Limelight	Defendant-Cross Appellant Limelight Networks, Inc.
<i>Muniauction</i>	<i>Muniauction, Inc. v. Thomson Corp.</i> , 532 F.3d 1318 (Fed. Cir. 2008)
Petition or Pet.	Akamai's Combined Petition for Panel Rehearing and Rehearing En Banc

I. INTRODUCTION

The Court should deny Akamai's petition for panel rehearing and rehearing en banc. No conflict exists between the Panel's decision and this Court's prior joint infringement decisions, nor does the Panel's decision raise a question of exceptional importance. Fed. Cir. R. 35(a)(2). The decision merely applied this Court's well-established precedent on joint infringement to the specific facts of this case that are strikingly similar to those in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 1585 (2009).

As its opinion makes clear, the Panel applied "relevant factors in assessing liability for joint infringement" as previously set forth by this Court in *BMC Resources* and *Muniauction*. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 629 F.3d 1311, 1319 (Fed. Cir. 2010). Limelight did not carry out what Akamai alleges is the "tagging" step in the patented method; Limelight's customers did.¹ Accordingly, Limelight could be liable for infringement only if the tagging carried out by customers may properly be attributed to Limelight. Applying the analysis of *BMC Resources* and *Muniauction*, the Panel found that it would *not* be appropriate to hold Limelight responsible for its customers' acts because Limelight

¹ Limelight also did not carry out the step of "serving the page" from claims 19, 21, and 22. Akamai's petition, however, only addresses the "tagging" step.

had no way to compel the customers to carry out the tagging step, either via contractual control or an agency relationship.

The Panel's decision does not disturb settled expectations. As the Panel held, "[i]t is well settled that direct infringement requires a single party to perform every step of a claimed method." *Id.* at 1318. Thus, when different parties each perform different steps in a claimed process, the default rule — and the settled expectation — is that there is *no infringement*.

Contrary to Akamai's petition, the Panel did not create a "bright-line rule" or a "new, rigid rule" for determining whether an accused infringer exerted control or direction over another party sufficient to be held responsible for the other party's acts. Instead of making that determination formalistically, based on a rigid test, the Panel emphasized that the substance of the relationship between the particular parties is what counts. Thus, "[a] party that engages another to perform a step of a claimed method as its agent cannot escape liability simply by designating its agent an independent contractor if all the elements that otherwise reflect an agency relationship are present." *Id.* at 1320. Here, Limelight did not engage its customers to do anything; rather, the customers engaged Limelight's content delivery network ("CDN") to deliver their Internet content.

In holding that Limelight could not be held vicariously liable for its customers' acts, the Panel applied settled law to the particular facts before it. The

result is entirely consistent with the holdings of *BMC* and *Muniauction* because “there is nothing to indicate that Limelight’s customers are performing any of the claimed method steps as agents for Limelight,” and Limelight’s standard contract “does not obligate Limelight’s customers to perform any of the method steps.” *Id.* at 1320, 1321.

Finally, Akamai’s petition does not raise an exceptional question justifying panel rehearing or rehearing en banc. Akamai chose to include a “tagging” limitation in the asserted method claims, and Limelight does not perform that required step. As in many cases, the noninfringement finding resulted from Akamai’s claim drafting choices and the facts of Limelight’s conduct.

II. ARGUMENT

A. The Panel Did Not Announce a “New” or “Rigid” Rule

The Panel unambiguously applied the “relevant factors in assessing liability for joint infringement” already set out in *BMC Resources* and *Muniauction*. The Panel noted that, when evaluating joint infringement, “what is essential is not merely the exercise of control or the providing of instructions, but whether the relationship between the parties is such that acts of one may be attributed to the other.” *Id.* at 1319. As the Panel explained, it is “[i]mplicit in this court’s holdings in *BMC Resources* and *Muniauction*” that attribution of responsibility for another party’s acts is proper when one party is the agent of another or when one party is

contractually obligated to another to carry out a particular act. *Id.* at 1319-20. The Panel correctly found that neither condition was satisfied in this case. Because the customers had no duty, either in agency or in contract, to follow Limelight's instructions — or to use Limelight's services at all, for that matter — Limelight was not responsible for the customers' actions. This result is fully consistent with existing law.

1. The Panel Did Not Create a "New" Rule

Years before Akamai applied for its patent, this Court recognized that an entity is not liable for direct infringement of a patented method where at least one step is performed by the entity's customers. *See Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565, 1568 (Fed. Cir. 1983); *see also Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Corp.*, 520 U.S. 17, 40 (1997). These holdings derive from the direct infringement statute itself. *See* 35 U.S.C. § 271(a). "Thus, liability for infringement requires a party to . . . use . . . the patented invention, meaning the entire patented invention." *BMC Res. Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1380 (Fed. Cir. 2007).

Later decisions of this Court articulated that, under special circumstances, a party may be liable for direct infringement despite not performing every step in a patented method itself. *BMC* addressed "the proper standard for joint infringement by multiple parties of a single claim." *Id.* at 1378. Referencing agency and

vicarious liability principles, *BMC* set out a “control or direction” standard for joint infringement while also acknowledging that “[a] party cannot avoid infringement, however, simply by contracting out steps of a patented process to another entity. In those cases, the party in control would be liable for direct infringement.” *Id.* at 1380–81. As recognized by the Panel, the Court’s decision in *BMC* “established a foundational basis” for determining direct infringement liability. *Akamai*, 629 F.3d at 1319.

The Court’s *Muniauction* decision further clarified the scenarios in which there could be joint infringement. There, the Court applied *BMC*’s “control or direction” standard and found no direct infringement because “Thomson neither performed every step of the claimed methods nor had another party perform steps on its behalf, and Muniauction has identified no legal theory under which Thomson might be vicariously liable for the actions of the bidders.” 532 F.3d at 1330.

These cases recognized, and addressed, the tension between the single-actor requirement of direct infringement, principles of vicarious liability, and “the well-settled rule that ‘a defendant cannot . . . avoid liability for direct infringement by having someone else carry out one or more of the claimed steps on its behalf.’” *Muniauction*, 532 F.3d at 1329 (citing *BMC*, 498 F.3d at 1379). In particular, the Court expressed concern about expanding the statutory definition of direct

infringement and subverting the scheme for indirect infringement. *BMC*, 498 F.3d at 1381.

The Panel's decision applied this controlling precedent to the facts of this case, analyzing whether the mere presence of a form contract with instructions on how to use a service, if desired, could result in vicarious liability for the service provider. *Akamai*, 629 F.3d at 1319–22. Specifically, the Panel rejected Akamai's assertion that Limelight could be held accountable for others' actions merely by describing how to perform a certain step in a claimed method. *Id.* at 1320. Rather, as noted above, the Panel understood that "what is essential is not merely the exercise of control or the providing of instructions, but whether the relationship between the parties is such that acts of one may be attributed to the other." *Id.* at 1319. That occurs when the defendant has the power to enforce its control or direction over the third-party, either due to "an agency relationship between the parties who perform the method steps" or because "one party is contractually obligated to the other to perform the steps." *Id.* at 1320. Because Limelight's customers are *not* its agents and are *not* contractually obligated to Limelight to carry out any steps, Limelight is not accountable for its customers' actions.

The Panel's analysis is nothing new. Courts have routinely asked when it is appropriate to hold one party vicariously liable for another's action. As early as the decision in *Crowell v. Baker Oil Tools, Inc.*, 143 F.2d 1003, 1004 (9th Cir.

1944), courts concluded that “[i]t is obvious that one may infringe a patent if he employ an agent for that purpose or have the offending articles manufactured for him by an independent contractor.” This same point is “implicit in th[e] court’s holdings in *BMC Resources* and *Muniauction*.” *Akamai*, 629 F.3d at 1319.² Indeed, the Court’s recent *Centillion* decision cites the Panel’s decision as “explain[ing]” the “controls or directs” analysis in the Court’s “vicarious liability precedents” regarding joint infringement. *Centillion Data Sys., LLC v. Qwest Comm’cns Int’l, Inc.*, 631 F.3d 1279, 1286–87 (Fed. Cir. 2011) (citing to *BMC*, *Muniauction*, and *Akamai*).

2. The Panel Did Not Create a Rigid Rule

In applying settled precedent, the Panel considered alternative ways to establish joint infringement — agency relationship *or* contractual obligation. It did not collapse its analysis into a single bright-line test of whether there is a formal fiduciary agency relationship, but made clear that the parties’ conduct governed. *Akamai*, 629 F.3d at 1320.

Under the Panel’s decision and the Court’s prior cases, a spectrum of activities exists whereby multiple parties can participate in steps of a patented

² See also *Golden Hour Data Sys., Inc. v. emsCharts, Inc.*, No. 2:06-CV-381, 2009 WL 943273, at *4 (E.D. Tex. Apr. 3, 2009) (granting JMOL of noninfringement where no agency relationship or contractual obligation to act), *aff’d*, 614 F.3d 1367 (Fed. Cir. 2010), *reh’g and reh’g en banc denied* (Nov. 24, 2010).

method. At one end of the spectrum, mere arms-length cooperation does not trigger joint infringement liability. *BMC*, 498 F.3d at 1381; *Muniauction*, 532 F.3d at 1329. At the other end, an agency relationship may exist between the parties, where the common law and the Court’s precedent would impose vicarious liability on the principal for acts of its agent. *BMC*, 498 F.3d at 1379; *Muniauction*, 532 F.3d at 1330; *cf. Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1311 (Fed. Cir. 2005) (finding no direct infringement by Medtronic and stating, “if anyone makes the claimed apparatus, it is the surgeons, who are, as far as we can tell, not agents of Medtronic.”). Between arms-length and agency relationships are arrangements where one party may be contractually obligated to perform a particular action. The Panel’s analysis and prior cases provide liability for joint infringement under this type of “contracting out” relationship. *See Muniauction*, 532 F.3d at 1330; *BMC*, 498 F.3d at 1381; *On Demand Mach. Corp., v. Ingram Indus., Inc.*, 442 F.3d 1331, 1345 (Fed. Cir. 2006).

By expressly identifying agency principles as one way of establishing joint infringement, the Panel recognized this common law doctrine as a historical basis for vicarious liability, including its flexibility for addressing varying fact patterns. *Akamai*, 629 F.3d at 1319–21. Regardless of the label used by the parties, the question is whether a defendant has authority to require that the third-party act on its behalf. *Id.* at 1320–21. This common law doctrine thus examines the substance

of the parties' relationship as opposed to applying a formalistic, rigid test. As an alternative and separate basis for joint infringement, the Panel confirmed that a party cannot avoid infringement liability by "contracting out" the steps of a patented method, even if no agency relationship exists between the actors. *Id.* at 1319–21.

Although Akamai's petition complains that the Panel eliminated "traditional liability for 'masterminds,'" it fails to explain how a "mastermind" differs from the principal in an agency relationship or, as the Court in *BMC* defined the rhetorical term, "A party . . . contracting out steps of a patented process to another entity." *BMC*, 498 F.3d at 1381. Neither type of "mastermind," as defined by this Court's precedent, would escape liability under the Panel's decision. *See Akamai*, 629 F.3d at 1320–22. Also contrary to Akamai's petition, the Panel's articulation of alternative tests for joint infringement does not conflict with Supreme Court precedent. First, Akamai's premise — that the Panel collapsed the Court's joint infringement analysis into a single agency test — is plainly wrong. *See id.* at 1321 (analyzing the contracts between Limelight and its customers). Additionally, the Panel's decision neither seizes on a single, exclusive test, such as the one rejected in *Bilski*, nor applies a "rigid, mandatory formula" of the type rejected in *KSR*. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3226–27 (2010); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 401 (2007). The flexible alternative tests articulated by the Panel

are more similar to that in *Pfaff*, where the Supreme Court adopted a flexible, two-part test for when the “on sale” bar is triggered. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67 (1998). And the Panel’s decision places patent law clearly within the context of common law, as the Supreme Court in *eBay* did in the context of injunctive relief. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

B. Based on the Undisputed Evidence, the Panel Properly Affirmed JMOL of No Infringement

As the Panel concluded, the material facts regarding Limelight’s relationship with its customers are highly similar to those in *Muniauction*, 532 F.3d at 1328–29, — where the Court also held that there was no direct infringement as a matter of law. Here, as Thomson did in *Muniauction*, Limelight provided instructions to its customers. But, as in *Muniauction*, this does not suffice to hold Limelight accountable for its customers’ actions.

Limelight’s customers (content providers) are separate entities that acted for their own benefit, not for Limelight’s. (A570-571:60-65, A442:39-40.)

Limelight’s CDN service allowed these content providers to direct some or all requests for content to Limelight’s servers, reducing load on the content provider’s resources. (A573-74:71-74.) If a customer chose to use Limelight to deliver all or a portion of its content, the customer then followed instructions provided by Limelight, including modification of the URLs for the objects it chose to have delivered by the CDN. (A570:58-61; A587:121-122.) On an object-by-object

basis, customers selected for themselves what content, if any, to ask Limelight to deliver, to ask another CDN to, or to deliver it themselves. (A570:59-61; A586:119.)

Akamai argues in its petition that Limelight “contractually obligates its customers, the content providers, to perform the tagging step” Akamai Pet. at 4. Although Limelight provided instructions, so that its customers will know how to use the CDN service if they so chose (A575:79; A587:120-122), the undisputed evidence showed that Limelight customers did not have a contractual obligation to modify their URLs or take any other steps in connection with use of Limelight’s CDN services. “Limelight’s customers decide what content, if any, they choose to have delivered by Limelight’s CDN and only then perform the ‘tagging’ and ‘serving’ steps. The form contract does not *obligate* Limelight’s customers to perform any of the method steps.” *Akamai*, 629 F.3d at 1321 (emphasis in original).

In *Muniauction*, this Court found the same type of customer relationship legally insufficient to establish vicarious liability. There, steps of a method claim for Internet auctions were performed by the auction bidders or by the auctioneer (Thomson), but neither performed them all. Because no single party performed every step of an asserted claim, the plaintiff argued that Thomson should be liable

for direct infringement based on the combined actions of Thomson and the bidders. *Muniauction*, 532 F.3d at 1329.

This Court reversed a jury verdict of direct infringement against Thomson, holding that “arms-length cooperation” among multiple parties does not establish control or direction. *Id.* at 1329–30 (citing *BMC*, 498 F.3d at 1373). Further, this Court held that “Thomson controls access to its system and instructs bidders on its use is not sufficient to incur liability for direct infringement.” *Id.* at 1330.

The Panel recognized the strong parallels between the facts in *Muniauction* and this case. *Akamai*, 629 F.3d at 1320. The method claims in both cases include multiple steps, some of which are performed by the provider of an Internet-based system while others are allegedly performed by customers. In both cases, the system providers made their systems available and provided instructions to customers on how to use those systems. In both, customers paid the system provider when the customers chose to use the system.

As in *Muniauction*, Limelight’s customers decided for themselves whether to use the Limelight CDN to deliver content embedded in their web pages. The trial record, however, contained no evidence that customers did this on behalf of, or as agents of, Limelight. Rather, customers changed hostnames in their URLs as a result of their own choices to use the Limelight CDN. (A587.) The Panel expressly addressed Limelight’s contractual relationship with its customers,

concluding that the contract “merely explains that the customer will have to perform the steps *if* it decides to take advantage of Limelight’s service.” *Akamai*, 629 F.3d at 1321 (emphasis in original). The Panel further concluded: “the agreement merely provides the customers with the tools to allow them to exercise their independent discretion and control over how and in what respect they implement the system.” *Id.*

Here, as in *Muniauction*, “an accused infringer’s control over its customers’ access to an online system, coupled with instructions on how to use that system, was not enough to establish direct infringement.” *Id.* at 1318.

C. This Case Does Not Present a Question of Exceptional Importance

Akamai now claims (for the first time) that the ’703 patent presents an example of an invention that *must* be carried out by multiple parties, and thus, joint infringement must be found if the patent is to have any value. To support this new assertion, Akamai cites several statements in the specification referring to use of the invention by “content providers.” (Akamai Pet. at 10, citing the ’703 patent at A267-68:2:16-21; 3:1-16.) Yet those passages do not state that multiple parties must combine their actions to use the patent’s invention, and nothing in the specification or the asserted claims requires multiple-party involvement to modify URLs (what Akamai alleges is “tagging”). (See, e.g., A268:4:2-4; A269:6:41-45.) Indeed, the ’703 specification states that modification of URLs is preferably done

in an “offline process” (A269:6:42), suggesting that either the content provider or a separate CDN could do it. And the claim language is similarly actor-neutral, simply requiring “tagging the embedded object of the page” (A276.)

The undisputed evidence showed that Limelight never performed the “tagging” step. To the extent URLs were modified, the proof at trial showed that customers always did the modification as a matter of their own choice. But nothing in claim language or the supposed “core” of the ’703 invention requires the customer — as opposed to a CDN—to perform this step. Indeed, it is entirely conceivable that a CDN *could* perform every step in the claim — and thus directly infringe on its own. Limelight just does not do so as a matter of fact.

Since well before the ’703 patent, direct infringement has required that a single actor perform every step of the claimed method. *See, e.g., Fromson*, 720 F.2d at 1568. Nothing about that fundamental patent principle could have surprised Akamai. As in *Fromson*, Limelight did not perform multiple steps of the patented method — including the “tagging” step. Customers did not serve as Limelight’s agents, nor did Limelight contractually obligate its customers to perform any step. Accordingly, Limelight did not directly infringe Akamai’s patent under well-established joint infringement precedent.³

³ Akamai waived any assertion of indirect infringement before trial. *Akamai*, 629 F.3d at 1318 n.3.

To the extent Akamai wanted to eliminate “tagging” altogether as an affirmative step in the claimed method, it could have done so by drafting the claims differently. However, that is no different from many patent cases where a patentee included an element in a claim but later learns that an accused method or product does not include the element. This result follows from settled law, rather than raising an exceptional question of patent policy or justifying redefining the standard for joint infringement to remedy the results of Akamai’s own claim-drafting decisions. *BMC*, 498 F.3d at 1381; *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1425 (Fed. Cir. 1997) (“[A]s between the patentee who had a clear opportunity to negotiate broader claims but did not do so, and the public at large, it is the patentee who must bear the cost of its failure to seek protection for this foreseeable alteration of its claimed structure.”). As the Panel noted, Akamai itself has prosecuted other patents based on this same specification and has employed different claim structures in those patents. *Akamai*, 629 F.3d at 1322.

III. CONCLUSION

The Panel properly applied this Court’s precedent to the facts of this case and affirmed the district court’s judgment as a matter of law. Akamai’s petition for panel rehearing and rehearing en banc should be denied.

March 22, 2011

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "R. G. Krupka", with a horizontal line extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the foregoing LIMELIGHT NETWORKS, INC.'S RESPONSE TO AKAMAI'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC was served by Overnight Courier on this 22nd day of March, 2011, on the following counsel of record:

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