

2023-1111

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**United States Court of Appeals  
for the Federal Circuit**

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CLOUDOFCHANGE, LLC,

*Plaintiff-Appellee,*

– v. –

NCR CORPORATION,

*Defendant-Appellant.*

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*On Appeal from the United States District Court for the Western  
District of Texas in No. 6:19-cv-00513-ADA, Hon. Alan D. Albright*

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**COMBINED PETITION FOR PANEL REHEARING  
AND REHEARING EN BANC**

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*January 16, 2025*

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

**CERTIFICATE OF INTEREST**

**Case Number** 23-1111

**Short Case Caption** CloudofChange, LLC v. NCR Corporation

**Filing Party/Entity** CloudofChange, LLC

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 11/21/2022

Signature: /s/ John A. Yates

Name: John A. Yates

| <p><b>1. Represented Entities.</b><br/>Fed. Cir. R. 47.4(a)(1).</p>                            | <p><b>2. Real Party in Interest.</b><br/>Fed. Cir. R. 47.4(a)(2).</p>   | <p><b>3. Parent Corporations and Stockholders.</b><br/>Fed. Cir. R. 47.4(a)(3).</p>   |
|--|---|---|
| <p>Provide the full names of all entities represented by undersigned counsel in this case.</p> | <p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p> | <p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p> |
| <p>CloudfChange, LLC</p>   |   | <p>Interegister, Inc.</p>   |
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Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable  Additional pages attached

|               |                   |  |
|---------------|-------------------|--|
| Abelino Reyna | John H. Barr, Jr. |  |
|               |                   |  |
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**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable  Additional pages attached

|  |   |               |
|--|---|---------------|
| CloudofChange, LLC v. Lightspeed POS Inc.; 6:21-cv-01102 (W.D. Tex.) | CloudofChange, LLC v. Clover Network, Inc.; 6:22-cv-00634 (W.D. Tex.) | IPR2022-01143 |
| IPR2022-00997  | IPR2022-00779   |               |
|  |   |               |

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable  Additional pages attached

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|  |  |  |

## TABLE OF CONTENTS

|  | <i>Page</i> |
|--|-------------|
| CERTIFICATE OF INTEREST .....  | i           |
| TABLE OF CONTENTS.....   | iv          |
| TABLE OF AUTHORITIES .....   | v           |
| RULE 40(c) STATEMENTS OF COUNSEL .....   | 1           |
| I. INTRODUCTION AND STATEMENT OF THE CASE .....  | 1           |
| A. The Trial and Jury Verdict of Infringement.....   | 3           |
| B. The Order Denying NCR’s JMOL Motion of No Direct Use<br>Infringement .....  | 3           |
| C. NCR’s Limited Non-Infringement Appeal Arguments .....   | 5           |
| D. The Panel Decision Reversing Denial of JMOL on<br>Infringement .....  | 6           |
| II. ARGUMENTS IN SUPPORT OF REHEARING OR REHEARING<br><i>EN BANC</i> .....   | 7           |
| A. The Same Section 271(a) Direct-Use Vicarious Liability<br>Infringement Law Applies to Method and System Claims..... | 7           |
| B. <i>Akamai</i> ’s En Banc Vicarious Liability Analysis.....  | 9           |
| C. The Panel’s Analysis is Contrary to 35 U.S.C. § 271(a) and<br><i>Akamai</i> .....                                   | 10          |
| D. Substantial Evidence Supported the JMOL Denial Under<br><i>Centillion</i> .....                                     | 13          |
| III. CONCLUSION.....   | 16          |

**TABLE OF AUTHORITIES**

|   | <i>Page(s)</i> |
|---|----------------|
| <b>Cases</b>  |                |
| <i>Akamai Technologies, Inc. v. Limelight Networks, Inc.</i> ,<br>797 F.3d 1020 (Fed. Cir. 2015) .....    | <i>passim</i>  |
| <i>Aro Mfg. Co. v. Convertible Top Replacement Co.</i> ,<br>365 U.S. 336 (1961).....                      | 8              |
| <i>Centillion Data Sys., LLC v. Quest Communs. Int’l, Inc.</i> ,<br>631 F.3d 1279 (Fed. Cir. 2011) .....  | <i>passim</i>  |
| <i>Intell. Ventures I LLC v. Motorola Mobility LLC</i> ,<br>870 F.3d 1320 (Fed. Cir. 2017) .....          | 6, 15          |
| <i>Limelight Networks, Inc. v. Akamai Technologies, Inc.</i> ,<br>572 U.S. 915 (2014).....                | <i>passim</i>  |
| <i>Meyer v. Holley</i> ,<br>537 U.S. 280 (2003).....  | 7              |
| <i>NTP, Inc. v. Research in Motion, Ltd.</i> ,<br>418 F.3d 1282 (Fed. Cir. 2005) .....                    | 6, 7, 8, 10    |
| <i>Thomas v. Texas Department of Criminal Justice</i> ,<br>220 F.3d 389 (5 <sup>th</sup> Cir. 2000) ..... | 14             |
| <i>Warner-Jenkinson Co. v. Hilton Davis Chemical Co.</i> ,<br>520 U.S. 17 (1997).....                     | 8              |
| <b>Rules and Statutes</b>   |                |
| 35 U.S.C. § 271(a) .....  | 1, 7, 9, 10    |

**RULE 40(c) STATEMENTS OF COUNSEL**

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance: Whether the same vicarious liability analysis for direct use infringement under 35 U.S.C. § 271(a) must be applied to both method and system claims in view of *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. 915 (2014)?

/s/ Jerry R. Selinger  
ATTORNEYS FOR  
CLOUDOFCHANGE, LLC

Based on my professional judgment, I believe the panel decision is contrary to the precedent(s) of this court: *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (en banc) (per curiam).

/s/ Jerry R. Selinger  
ATTORNEYS FOR  
CLOUDOFCHANGE, LLC

**I. INTRODUCTION AND STATEMENT OF THE CASE**

CloudofChange, LLC (“CloudofChange”) sued NCR, alleging infringement of U.S. Patent Nos. 9,400,640 and 10,083,012. The shared specification discloses an online web-based point-of-sale builder system that a non-expert business operator can use to assemble a point of sale (“POS”) system for managing business operations. Slip Op. at 2. “The claims expressly require two entities: a vendor and a subscriber. The claims require the vendor’s remote servers to host the web server

software while subscribers possess the POS terminals that access the web server software.” *Id.* at 4.

CloudofChange asserted that NCR’s product, NCR Silver, infringed claims of the two asserted patents. “NCR Silver allows merchants to edit POS menus, perform transactions and build their own POS screens.... [U]se of NCR Silver requires application software, POS hardware ... and an Internet connection to NCR’s backend servers.” *Id.* at 4-5. NCR’s Silver Merchant Agreement contractually makes its customers responsible for supplying and maintaining an Internet connection to access and use NCR’s application software. *Id.* at 5. The Agreement also requires customers to obtain the computer hardware necessary to operate the system and grants NCR the right to access customer computer systems. Appx15485-15502.<sup>1</sup>

After a merchant signs the Agreement, NCR provides the customer with access to detailed training videos<sup>2</sup> and ongoing technical assistance.<sup>3</sup> Customers make each of the components of the patented system work for the component’s patented purpose and benefit from using it. Slip Op. at 7. NCR also benefits from

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<sup>1</sup> NCR supplies 25% of its customers with POS terminals. Appx18. NCR also sells other hardware and provides hardware maintenance. Appx11106.

<sup>2</sup> *See, e.g.*, JTX-30 (Appx11094-11098; Appx16787-16791); JTX-23, JTX-52, JTX-70, JTX-76, JTX-77 (Appx11094-11098).

<sup>3</sup> *See, e.g.*, JTX-80, §7.1 (Appx15490; Appx15497) (software support); JTX-98C (Appx15364; Appx15372; Appx15376) (support).



its customers using each system element. Customers pay NCR a monthly subscription fee. NCR also benefits from product improvements through testing and evaluation, product ideas, transaction data, revenues from third-party products and services, marketing rights from customer's use, and advertising. *Id.* at 12.

A. The Trial and Jury Verdict of Infringement

CloudofChange tried infringement based on NCR itself using every element of the claimed system either directly or based on vicarious liability. The jury found that NCR infringed. *Id.* at 7-8. The district court's JMOL ruling opined that "substantial evidence supports the jury's finding of direction and control, *i.e.*, divided infringement via vicarious liability, and control and beneficial use of each of the elements of the system." Appx13.

B. The Order Denying NCR's JMOL Motion of No Direct Use infringement

1. **Internet connection.** Starting from the guidance in *Centillion Data Sys., LLC v. Quest Communs. Int'l, Inc.*, 631 F.3d 1279 (Fed. Cir. 2011) the district court held CloudofChange adduced substantial evidence supporting the jury verdict that NCR vicariously met the "internet connection" limitations for direct-use infringement of the system claims. NCR's Silver Merchant Agreement required that the merchant "must maintain Internet access." Appx12-15. The district court pointedly noted NCR failed to dispute the Agreement was substantial evidence of NCR's "direction or control" as to the limitations. Appx12; Appx14-15.

2. **POS terminal limitations.** NCR argued it does not use POS terminals and “could not directly infringe as to a majority of” POS terminals based on it supplying its customer base with only 25% of the necessary terminals. Appx18.<sup>4</sup> The district court found there was substantial evidence that NCR controls the POS terminals. Appx18-19. In doing so, the district court discussed the evidence establishing NCR’s benefit and control. Appx18-19.

3. **The Other Challenged limitations.** NCR argued it did not meet the “PC workstation” limitation by either personal use or based on control or direction. Appx16-18. NCR argued its personal uses did not meet the “POS builder” or “web server” limitations. Appx19-22. The district court found there was substantial evidence supporting the jury verdict on each of these limitations. Appx16-22.

4. **The *Centillion* and *Akamai* findings.** After reviewing *Centillion*, the district court concluded there was substantial evidence supporting “the jury’s finding of direction and control ... and the control and beneficial use of each of the elements of the system.” Appx12-13. The district court also concluded substantial evidence supported the jury verdict under the “condition and benefit” analysis of *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (en banc) (per curiam). Appx15-16.

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<sup>4</sup> While NCR pushed its 25% argument to limit damages, CloudofChange’s expert excluded NCR hardware revenue in her damages analysis, relying only on NCR’s \$100 million in software subscription sales. Appx18.

C. NCR's Limited Non-Infringement Appeal Arguments

NCR did not challenge the district court's findings that NCR's use directly met the "POS builder" and "web server" limitations. NCR did not appeal the district court's finding of substantial evidence that NCR had direction or control meeting the "POS terminal" and "web server" limitations, arguing only lack of substantial evidence that NCR benefits from its uses. *See* NCR Principal Brief at 36. NCR argued *Centillion* and *Akamai* apply the concept of "benefit" in different ways. According to NCR, *Centillion* looks at a benefit to the accused infringer while *Akamai* asks whether a third party is encouraged to perform by receipt of a benefit. NCR Principal Brief at 31-35.<sup>5</sup>

NCR argued it cannot be a direct-use infringer because NCR has no control over whether its customers actually supply an internet connection and use NCR Silver. NCR Principal Brief at 20-22. NCR asserted it does not direct or control its customers to actually subscribe to the NCR Silver system, download the NCR Silver app on the POS terminals or put the NCR Silver system into use by initiating action at the POS terminals to cause the NCR Silver software to modify the POS terminals. Slip. Op. at 13.<sup>6</sup>

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<sup>5</sup> Thus, contrary to the Panel's criticism, Slip Op. at 12, there was no need for CloudofChange to present different infringement arguments depending on whether NCR also provided POS hardware to a customer.

<sup>6</sup> At the time of trial, NCR had at least 11,419 monthly subscribers paying for use of NCR Silver. Appx8852-8853; Appx8846.

D. The Panel Decision Reversing Denial of JMOL on Infringement

The Panel began by agreeing with the district court that NCR’s customers use every element of the claimed system. “Like the customers in *Centillion*, NCR’s merchants put the system into service because they initiate at the POS terminal a demand for service ... and benefit from the back end providing the service.” Slip Op. at 12. The Panel opined that the fact NCR supplies about 25% of its NCR Silver customers with POS terminals did not change its opinion. Appx18; Slip Op. at 12.

Next, the Panel criticized the evidence of NCR benefitting from the entire Silver system as “not the kind of benefits on which *Centillion* focuses.” Slip Op. at 12 citing *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329 (Fed. Cir. 2017) (parenthetical omitted). Reversing the jury verdict, the Panel held that “NCR does not direct or control the merchants to subscribe to the NCR Silver system, download the NCR app on their POS terminals, or put the NCR Silver system into use .... NCR merchants take these actions of their own accord.” *Id.* at 13.

Then, the Panel turned to the district court’s *Akamai* analysis, opining that “the district court’s analysis **conflates use of a method claim ... with use of a system claim....**” Slip. Op. at 14, quoting *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1317-18 (Fed. Cir. 2005) (“Under section 271(a), the concept of ‘use’ of a patented method or process is fundamentally different from the use of a patented

system or device.”) (emphasis added). The panel distinguished *Akamai*, believing that while Limelight performed every method step except one, NCR’s contractual obligation to obtain and maintain an internet connection “does not amount to direction or control of a merchant’s use of the claimed system.” Slip Op. at 15.

## II. ARGUMENTS IN SUPPORT OF REHEARING OR REHEARING EN BANC

### A. The Same Section 271(a) Direct-Use Vicarious Liability Infringement Law Applies to Method and System Claims

Section 271(a) of Title 35 defines torts of direct patent infringement, *i.e.*, making, using, offering to sell or selling within the United States, or importing into the United States. *Id.* The tort of direct use infringement applies to both system and process claims. *Cf.*, *NTP*, 418 F.3d at 1319-21. Moreover, § 271(a) incorporates ordinary tort-related vicarious liability rules. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 285 (2003) (“The Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.”). Accordingly, analysis of direct use infringement based on vicarious liability should apply the same vicarious liability rules.

Instead, the Panel relied on *NTP*’s pre-*Limelight* distinction between use of a patented method and use of a patented system or device to distinguish *Akamai*. Slip Op. at 14, citing *NTP*, 418 F.3d at 1318 (“Because a process is nothing more than

the sequence of actions of which it is comprised, the use of a process necessarily involves doing or performing each of the steps recited. This is unlike use of a system as a whole, in which the components are used collectively, not individually.”).

*Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. 915 (2014), reversed a panel decision holding a defendant liable for inducing patent infringement when no one person directly infringed. *Id.* at 917. “A method patent claims a number of steps; under this Court’s case law, the patent is not infringed unless all the steps are carried out.” *Id.* at 920-21, citing *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 344 (1961); *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 29 (1997). *Aro* analyzed system claims while *Warner-Jenkinson* analyzed process claims. *Aro*, 365 U.S. at 339 n.1; *Warner-Jenkinson*, 520 U.S. at 22. *Limelight* thus realigned method and system claim infringement jurisprudence into a common framework.

In so doing, *Limelight* effectively rejected the notion that infringing “use” of a patented method “is fundamentally different” (*see NTP*, 418 F.3d at 1317) from infringing use of a patented system. *Limelight*, 572 U.S. at 920-21. Further, *Limelight*’s rejection of the idea of “two parallel bodies on infringement law: one for liability for direct infringement, and one for liability of inducement,” *id.* at 922, further counsels there should not be two parallel bodies of law for vicarious-liability

direct use infringement, depending on whether the claims are system or method claims.

The full Court should go en banc to hold that *Limelight* requires common analysis vicarious liability for infringing uses of method and system claims. This issue is ripe because the Panel expressly holds the district court erred in conflating uses of method and systems claims. Slip Op. at 14. And that holding led to an erroneous conclusion, as explained below.

#### B. Akamai's En Banc Vicarious Liability Analysis

The en banc *Akamai* opinion began by noting the “possibility that [we] erred by too narrowly circumscribing the scope of §271(a),” after which “the court set forth the law of divided infringement under 35 U.S.C. § 271(a).” *Akamai*, 797 F.3d at 1024. While the decision expressly calls out method claims, under *Limelight's* guidance, the en banc analysis applies equally to method and system claims. The statute requires nothing less, and the Court en banc should so hold.

In pertinent part, *Akamai* reiterated that vicarious liability attaches if an actor “contracts with another to perform one or more steps of a claimed invention. *See BMC*, 498 F.3d at 1380-81.” *Akamai*, 797 F.3d at 1023. “[L]iability can also be found when an alleged infringer conditions participation in an activity **or** receipt of a benefit upon performance of a step or steps of a patented method **and** establishes the manner **or** timing of that performance.” *Id.* (citation omitted) (emphases added).

Limelight’s customers performed “the ‘tagging’ and ‘serving’ steps in the claimed method.” *Id.* at 1024. “The jury heard substantial evidence that Limelight directs or controls its customers’ performance of **each** remaining method step. Specifically, Limelight conditions its customers’ use of its content delivery network upon its customers’ performance of the tagging and serving steps and Limelight establishes the manner or timing of its customers’ performance.” *Id.* (emphasis added.)

Applying fact to law, Limelight’s “standard contract” with its customers constituted substantial evidence Limelight conditioned customers’ use of its content delivery network upon its customers’ performance of the tagging and serving steps. *Id.* Limelight’s welcoming letter, detailing instructions for customer use of Limelight’s services, constituted substantial evidence that Limelight established the manner or timing of its customers’ performance. Limelight engineers were available to assist customers, so customers “do not merely take Limelight’s guidance and act independently on their own.” *Id.* at 1024-25.

C. The Panel’s Analysis is Contrary to 35 U.S.C. § 271(a) and *Akamai*

The district court correctly applied *Akamai* in its JMOL opinion. The Court should go en banc to confirm that *NTP*’s distinction between use infringement in the United States of system and method claims is no longer correct law in view of



*Limelight*. The full Court should then reinstate the jury verdict after applying the vicarious liability framework of *Akamai* to the system claims at issue here.

The record before the jury equates to the record on which the en banc *Akamai* decision reinstated the jury verdict of infringement. *Limelight* contractually conditioned its customers' use of its content delivery network on its customers' performance of the tagging and serving steps. *Akamai*, 797 F.3d at 1024 (“[I]f *Limelight*'s customers wish to use *Limelight*'s product, they must tag and serve content.”) This was “substantial evidence” that *Limelight* conditions customers' use of its content delivery network upon its customers' performance of the tagging and serving method steps.” *Id.*

Likewise, NCR contractually conditions its customers' use of its NCR Silver system on their obtaining and maintaining an Internet connection between NCR's web server and customer POS terminals. Appx12-16; JTX-80 (Appx15485-154999). Customers who do not obtain Internet access cannot use NCR's software product. NCR thus conditions customer use of the NCR Silver system on the customer obtaining and using an Internet connection. *Akamai*, 797 F.3d at 1023. The district court correctly ruled the record contained substantial evidence attributing merchants' use to NCR to support the jury verdict. Appx12-16.

The appellate record establishes NCR directly or vicariously uses every element of the claimed system because NCR's argument there was not substantial

evidence NCR benefits from its uses meeting the “POS terminal” and “web server” limitations fails on the law and evidence of record. Contrary to the Panel’s observation, Slip Op. at 14, *Akamai* was not limited to one limitation, and restricting *Akamai*’s vicarious liability analysis to cases in which there is only one disputed limitation is inconsistent with *Akamai*’s express language. 797 F.3d at 1023 (“liability can be found when an alleged infringer conditions ... upon performance of a step or steps of a patented method.”). In all events, the full Court should hold NCR’s challenge of only “benefits” findings with respect to two limitations is well within *Akamai*’s ambit.

Limelight also established the manner of its customers’ performance, based on its customer welcome letter, step-by-step instructions and ongoing technical assistance as needed. *Akamai*, 797 F.3d at 1024-25. In like fashion, NCR established the manner of its customers’ performance, based on detailed, step-by-step training videos, and contractual customer software and hardware support and maintenance.<sup>7</sup>

There also was substantial evidence that NCR conditions customer receipt of a benefit upon the customer obtaining and using an Internet connection. *Id.* at 1023. See Slip Op. at 12 (“NCR’s merchants put the system into service ... and benefit

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<sup>7</sup> See, e.g., JTX-23, JTX-30, JTX-52, JTX-70, JTX-76, JTX-77 (Appx11094-11098; Appx16787-16791) (training videos); JTX-80, §7.1 (Appx15490; Appx15497) (software support); JTX-98C (Appx15364; Appx15372; Appx15376) (support).

from the back end providing that service.”) Substantial evidence supports the district court’s reliance on *Akamai* to deny NCR’s JMOL motion under both prongs of *Akamai*’s conditions and benefits analysis.

*Akamai* held substantial evidence supported the jury verdict based on Limelight conditioning “participation in an activity upon performance of a step or steps of a patented method” and establishing the manner of that performance. *Akamai*, 797 F.3d at 1023. In like fashion, the district court held there was substantial evidence supporting the jury verdict based on *Akamai*’s “conditions and benefits” analysis. Appx15-16. The Panel did not consider this alternative analysis on the merits, based on its view that *Akamai* did not apply to system claims. Slip Op. at 14. *Limelight* shows that is not the case, and substantial evidence supports the jury verdict and the district court’s denial of JMOL based on *Akamai*.

D. Substantial Evidence Supported the JMOL Denial Under *Centillion*

*Centillion* held Quest could not be liable for direct-use vicarious-liability infringement because it was the customer’s decision whether to install and operate Quest’s software. 631 F.3d at 1287. Our district court began with *Centillion*, but reached an opposite conclusion based on the trial record. Appx14-15. The Panel reversed, holding NCR did not direct or control its merchants to subscribe to the NCR Silver system, download the NCR app on their POS terminals, or put the NCR Silver system into use by initiating action at the POS terminal.” Slip Op. at 13.

Those findings, however, do not preclude NCR from also directly or vicariously using and benefitting from every element of the claimed system. Otherwise, since the evidence showed Quest's customers made comparable business decisions, *Centillion* would not have separately assessed Quest's potential infringement. *Id.*, 631 F.3d at 1284-87.

Our jury had substantial evidence on which to find NCR also directed or controlled customers. The jury heard that thousands of merchants signed NCR's Agreement and made monthly payments to NCR, and thousands also bought NCR POS terminals (and/or other hardware). That does not appear to have been the record before the Court in *Centillion*. One reasonable inference from our trial record was that the merchants were directed or controlled to use each element of the claimed system to get the benefit of their business investments. *See, e.g., Thomas v. Texas Department of Criminal Justice*, 220 F.3d 389, 392 (5<sup>th</sup> Cir. 2000) ("If reasonable persons could differ in their interpretation of the evidence, then the motion should be denied."). While identifying who took the first step is one way to assess direction or control, it should not be the only way if, as here, substantial evidence shows another reasonable interpretation of the evidence.

Turning to benefit, following NCR's lead, the panel improperly conflated "benefit from it" into one specific benefit resulting from practicing all claim elements. Slip Op. at 12. NCR's customers benefitted from using every element of

the system by making them work together for the patented purpose, Slip Op. at 7, but NCR **also** benefitted from using every element. *See* Slip Op. at 12 (listing benefits inuring to NCR). NCR's benefits were different than the benefits to its customers, but flowed from NCR and its customers' collective uses of every element in the system. NCR would have received no benefit if it had not used every element. NCR thus "controls the [NCR Silver] system and obtains benefit from it," *Centillion*, 631 F.3d at 1287.

The Panel erred in relying on *Centillion* to limit the relevant scope of benefits. *See* Slip Op. at 14 (the benefits NCR received "are not the kind on which *Centillion* focuses.") The panel cited *Intellectual Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329 (Fed. Cir. 2017), but the dispute there was whether showing a benefit from any claimed component would suffice. Here, all of the benefits to NCR flowed from using all of the claimed components. *Centillion* identified the benefit to Quest's customers as obtaining the result of having used the system as a whole. *Id.* at 631 F.3d at 1285. By contrast, *Centillion* did not consider or analyze benefit to Quest because the evidence did not support direction or control by Quest. *Id.* at 1287 ("Quest in no way directs its customers to perform ...."). *Centillion* does not require the same or even similar benefits for NCR and its customers.

To the extent, *arguendo*, *Centillion* mandates one result and *Akamai* a different result, *Akamai* necessarily controls. CloudofChange submits that vicarious

liability attaches because substantial evidence supports infringement under both *Centillion* and *Akamai*. If not, the full court should reinstate the jury verdict of direct use vicarious liability infringement under *Akamai*'s "conditions and benefits" analysis.

### III. CONCLUSION

The petition for rehearing and for rehearing en banc should be granted. The Court should vacate the panel decision, affirm the jury verdict of infringement and the district court's denial of JMOL, and return the case to the panel to resolve any remaining appellate issues, subject to whatever different or additional relief the Court deems appropriate under the circumstances.

Respectfully submitted,

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*Counsel for Plaintiff-Appellee*

**United States Court of Appeals  
for the Federal Circuit**

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**CLOUDOFCHANGE, LLC,**  
*Plaintiff-Appellee*

v.

**NCR CORPORATION,**  
*Defendant-Appellant*

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2023-1111

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Appeal from the United States District Court for the  
Western District of Texas in No. 6:19-cv-00513-ADA, Judge  
Alan D. Albright.

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Decided: December 18, 2024

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Before DYK, REYNA, and STOLL, *Circuit Judges*.



STOLL, *Circuit Judge*.

This case asks us to consider again whether to attribute a customer’s use of a claimed system to the manufacturer of only part of the system. Appellant NCR Corporation (“NCR”) appeals the United States District Court for the Western District of Texas’s denial of judgment as a matter of law (“JMOL”) of no direct infringement. NCR asserts it could not directly infringe the claims of U.S. Patent Nos. 9,400,640 and 10,083,012 as a matter of law because NCR itself does not use the claimed system; rather, its merchants do. The district court found that the merchants’ use of the system could be attributed to NCR under our precedent involving divided infringement and principles of vicarious liability. For the following reasons, we reverse.

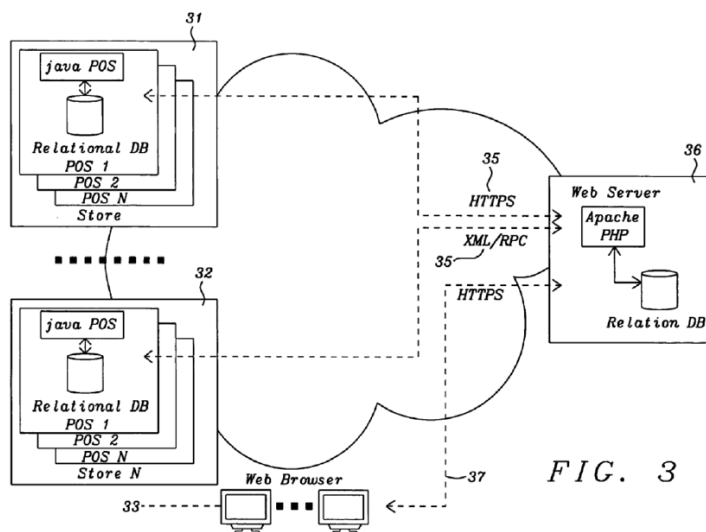
## BACKGROUND

### I

CloudofChange, LLC (“CloudofChange”) sued NCR, alleging infringement of the ’640 and ’012 patents (collectively, the “Asserted Patents”). The Asserted Patents share a specification and a priority date of February 5, 2008. The shared specification discloses an online web-based point-of-sale-builder system that a non-expert business operator can use to assemble a point of sale (“POS”) system for managing their business operations. ’640 patent, col. 1 ll. 10–18. The specification explains that the conventional process of assembling a POS system required manually coding information, such as menu selections, and defining the position and operation of touch screen keys and their database correspondence. *Id.* at col. 1 ll. 20–32. According to the specification, this process was time-consuming and prone to mistakes, only specially trained individuals could build or change POS screens, and store owners tended to retain out-of-date POS screens to avoid the editing process. *Id.* at col. 1 ll. 32–37.

The disclosed object of the Asserted Patents is “to provide an online, web-based point of sale builder system,” *id.* at col. 2 ll. 3–4, that a non-expert business operator can use to assemble a POS system, which she could then use to manage her business.

Figure 3 of the Asserted Patents, reproduced below, illustrates an embodiment of the web-based POS system. *Id.* Fig. 3; col. 3 ll. 38–49. As shown, “[t]here are N POS terminals (POS 1, POS 2, . . . POS N) in ‘Store’ 31 and in ‘Store’ 32.” *Id.* at col. 3 ll. 37–40. “Each POS includes personal computer hardware and software,” and “[e]ach POS operates with a hardware/software connection 35 to the Internet.” *Id.* at col. 3 ll. 40–41, 43–44. Connection 35 allows each POS to communicate via Hypertext Transfer Protocol (HTTP) with Back-Office (“BO”) software implemented on web servers 36. *Id.* at col. 4 ll. 16–19. “In addition, the BO software and data can be viewed from any store employee at any PC 33 who has Internet access 37 and a password.” *Id.* at col. 4 ll. 20–22.



*Id.* Fig. 3.

Claim 1 of the '640 patent is illustrative of the asserted claims and recites:

1. A web-based point of sale (POS) builder system comprising:

one or more point of sale terminals, that display POS screens,

an internet connection from said one or more point of sale terminals to a web server,

one or more local or remote POS workstations, and point of sale builder software that runs on said web server, wherein said local or remote workstations are utilized to build or edit said POS terminals in real time, from anywhere in the world and over the worldwide web,

wherein said web servers are provided as a vendor subscription service *wherein web server software resides and is hosted on said vendor's remote servers and wherein subscriber company's POS terminals access and repeatedly interact with said web server software* from said vendor's remote servers, in order to perform the subscriber's desired terminal function, over a network, wherein the network comprises the Internet.

*Id.* at col. 6 ll. 11–28 (emphasis added). The claims expressly require two entities: a vendor and a subscriber. The claims require the vendor's remote servers to host the web server software while subscribers possess the POS terminals that access the web server software.

## II

CloudofChange accused NCR's product, NCR Silver, of infringing several claims of the Asserted Patents. NCR Silver is a web-based POS solution designed for small and independent business owners. NCR Silver allows

merchants<sup>1</sup> to edit POS menus, perform transactions, and build their own POS screens.

Relevant here, a merchant's use of NCR Silver requires application software, POS hardware—such as a tablet or personal computer—and an Internet connection to NCR's backend servers. It is undisputed that NCR does not provide all the necessary components of the accused system. Specifically, (1) NCR contractually makes users responsible for supplying and maintaining an Internet connection, which is necessary to use NCR Silver; and (2) most users supply their own POS hardware. While most merchants supply the POS hardware, a small number of merchants obtain the hardware from NCR. Hardware products available through NCR include tablets, display screens, payment processors, and cash drawers. Merchants download NCR Silver software from an app store onto their POS hardware.

### III

In the district court, CloudofChange pursued a single theory of infringement: that NCR directly used the claimed system by putting it into beneficial use under this court's *Centillion* precedent. *Centillion Data Sys., LLC v. Qwest Commc'ns Int'l, Inc.*, 631 F.3d 1279 (Fed. Cir. 2011). Specifically, CloudofChange asserted that NCR controls and benefits from each component recited in the claimed system and thus, under *Centillion*, uses the system. CloudofChange abandoned all other infringement theories, including induced infringement, contributory infringement, and direct infringement by importing, making, or selling the claimed system. The district court observed that CloudofChange's "proof requirements are particularly

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<sup>1</sup> NCR refers to its customers as merchants. Appellee's Br. 10. This opinion refers to users, customers, and merchants interchangeably.

difficult” because CloudofChange “only asserts a direct infringement theory of ‘use’ against NCR” and “abandoned all other theories.” *Cloudofchange, LLC v. NCR Corp.*, No. W-19-cv-00513-ADA, 2022 WL 15527756, at \*5 (W.D. Tex. Oct. 27, 2022). Under CloudofChange’s theory “[i]t’s the defendant [NCR] that uses the Internet connection as part of the system,” and thus has “control and beneficial use of the system per *Centillion*.” J.A. 8195 (Pretrial Conference Tr. 45:16–18).

At trial, CloudofChange’s technical expert, Gregory Crouse, testified that a customer-merchant downloads the NCR Silver software from an app store onto a POS terminal such as a tablet. He explained that a merchant can use NCR Silver, for example, to add new categories and add or edit buttons on the merchant’s POS screens. He also testified that using NCR Silver requires an Internet connection between the merchant’s POS terminal and NCR’s backend server. Mr. Crouse concluded that use of NCR Silver infringed claim 1 of the ’640 patent, but he did not discuss how that use could be attributed to NCR, as opposed to the merchants or users of NCR Silver.

CloudofChange’s direct infringement theory turned on its argument that “NCR controls and benefits from its Silver system, including the requirement that customers who use the system supply an internet connection and network access to do so.” J.A. 11059. In support of this argument, CloudofChange pointed to Mr. Crouse’s testimony that a merchant who purchases NCR Silver must supply their own Internet access to use NCR Silver. CloudofChange also introduced into evidence NCR Silver’s Merchant Agreement, which directs the merchant to “maintain Internet access at your own expense” to use the service. J.A. 15490. For its part, NCR did not dispute that its Merchant Agreement makes Internet access the merchant’s responsibility; rather, NCR argued that this does not demonstrate control of the merchant’s *use of* NCR Silver.

On cross-examination, CloudofChange's technical expert, Mr. Crouse, agreed that it is NCR's customer-merchants who put NCR Silver into service and benefit from using it. J.A. 9049 (Trial Tr. 469:6–25); J.A. 9051 (Trial Tr. 471:17–25). The following exchange from NCR's cross-examination of Mr. Crouse is illustrative:

Q. And so as part of the merchant agreement, NCR tells customers that they need to get their own Internet access, correct?

A. Yes, sir.

Q. Okay. And so it's the consumers, the merchants that actually use NCR Silver, correct, in their retail operations?

A. Yes, sir.

Q. Okay. So you admit that a merchant who purchases the NCR Silver has to obtain their own Internet access, don't you?

A. Yes, sir.

Q. Okay. You admit that the merchants put NCR Silver into service, don't you?

A. Yes, sir.

....

Q. You admit that merchants benefit from the use of NCR Silver, don't you?

A. Yes, sir. I do.

J.A. 9049 (Trial Tr. 469:6–25). Citing this testimony, NCR timely moved for JMOL under Federal Rule of Civil Procedure 50(a), arguing that no reasonable jury could find infringement.

After a four-day trial, the jury found that NCR directly infringed all asserted claims, including claims 1, 3, 4, 5, 6,

11, 12, and 13 of the '640 patent and claims 1–4 of the '012 patent (collectively the “Asserted Claims”). The jury also found that NCR had not proven that the Asserted Claims were invalid. Finally, the jury found NCR’s infringement willful and awarded CloudfChange lump sum damages totaling \$13.2 million.

NCR then renewed its motion for JMOL under Rule 50(b) or, in the alternative, moved for a new trial under Rule 59. NCR’s renewed motion challenged the verdict for five principal reasons: (1) the jury was erroneously instructed; (2) the district court erred by failing to interpret the claim term “builder”; (3) the Asserted Claims are invalid; (4) NCR does not use the claimed system (and thus does not infringe) as a matter of law; and (5) the jury’s award of damages under the entire market value rule was erroneous.

Most relevant to this opinion, NCR argued it was entitled to JMOL of no infringement because CloudfChange did not offer substantial evidence that NCR (as opposed to its merchant customers) controls and benefits from every element of the claimed system as required by *Centillion*. Specifically, NCR argued that “[s]imilar to Qwest [the accused infringer in *Centillion*], NCR does not infringe the asserted system claim because ‘the entire system is not used until a customer loads software on its personal computer and processes data.’” J.A. 10781 (quoting *Centillion*, 631 F.3d at 1287). NCR pointed to CloudfChange’s expert’s admission that NCR’s merchants, not NCR, put NCR Silver into service, control their use of NCR Silver, and benefit from the use of NCR Silver.

The district court held that substantial evidence supported the jury’s infringement findings and denied NCR’s JMOL motion. In so holding, the court acknowledged that NCR is liable for direct infringement for “use” only if it controls the system and obtains benefit from it. But the court explained that the “sticking point is whether

[CloudofChange] provided substantial evidence to support a theory of vicarious liability as to certain claim elements.” *Cloudofchange*, 2022 WL 15527756, at \*5.

The district court first held “that NCR, although it owns and operates the Back Office, does not put the accused system into service because it does not itself control the network.” *Id.* at \*7. Instead, the court concluded that NCR’s merchants were analogous to the accused infringer’s customers in *Centillion* because the merchants benefit from and put the system into service by initiating demand for service at the front-end. Accordingly, the district court held that NCR’s customers—not NCR—“put the accused system into service by obtaining internet access” and “therefore, control this portion of the accused system.” *Id.*

The court then turned to whether the merchants’ use of NCR Silver could be attributed to NCR under *Centillion* and *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (en banc) (per curiam). Relying on the legal framework for direct infringement of method claims in *Akamai*, the court held that substantial evidence supported the jury’s finding that NCR directed or controlled its merchants’ use of the claimed system. In so holding, the court distinguished the facts in this case from those in *Centillion*, noting that in *Centillion* there was “no vicarious liability because ‘Qwest in no way direct[ed] its customers to perform nor d[id] its customers act as its agents.’” *Cloudofchange*, 2022 WL 15527756, at \*7 (quoting *Centillion*, 631 F.3d at 1287). The court concluded that “[u]nlike Qwest in *Centillion*, NCR ‘directs its customers to perform’ by requiring its merchants to obtain and maintain internet access.” *Id.* at \*8. To support its conclusion, the court pointed to the NCR Silver Merchant Agreement as evidence that “NCR ‘contracts with [merchants] to perform one or more’ of the claimed elements, i.e., internet or network access.” *Id.* (quoting *Akamai*, 797 F.3d at 1023) (alteration in original).



NCR appeals, arguing *inter alia* that the district court erred in denying JMOL of noninfringement. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

#### DISCUSSION

We review the grant or denial of a motion for JMOL under the law of the regional circuit. *Kaufman v. Microsoft Corp.*, 34 F.4th 1360, 1368 (Fed. Cir. 2022). The Fifth Circuit reviews the grant or denial of JMOL de novo. *Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377, 384 (5th Cir. 2017). Under the Fifth Circuit’s standard for JMOL, a jury’s determination on infringement must be upheld unless it is not supported by substantial evidence. *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1311 (Fed. Cir. 2007).

#### I

Because this case turns on the application of *Centillion* and principles of vicarious liability, we begin by discussing our precedent and the relevant legal framework.

This court first addressed the issue of infringement for “use” of a system claim that includes elements in the possession of more than one actor in *Centillion*. We held that a party “uses” a system for purposes of infringement when it “control[s] the system as a whole and obtain[s] benefit from it.” *Centillion*, 631 F.3d at 1284. The control contemplated is not direct or physical control over each individual element of the system, but rather the ability to make the system elements “work for their patented purpose” and thus use “every element of the system by putting every element collectively into service.” *Id.*

At a high level, the claims at issue in *Centillion* involved a system for presenting information to an end user related to transaction records and summary reports from those records. *Id.* at 1281. The system claims included both a back-end system, maintained by the service provider, and a front-end system with a personal computer,

maintained by the end user. *Id.* The accused systems also included two parts: (i) Qwest’s back-office system that processed data and (ii) Qwest’s customers’ front-end client application with a personal computer for managing billing information. *Id.* The parties disputed whether it was Qwest or its customers that “used” the claimed system for purposes of direct infringement.

We held that Qwest’s customers (not Qwest) used the claimed system as a matter of law. *Id.* at 1285. Because the customers chose when to put the system into service either by (1) creating queries, which in turn resulted in the back-end processing by Qwest; or (2) by subscribing to receive monthly electronic billing information from Qwest’s back-office system, we concluded the customer controlled the system. We reasoned that if the customer did not make the request or subscribe, then the back-end processing would not be put into service. *Id.* We further explained that this was “use” because “but for the customer’s actions, the entire system would never have been put into service” and “the customer clearly benefit[ed] from this function.” *Id.*

We next considered whether Qwest was vicariously liable for the actions of its customers such that the customers’ use may be attributed to Qwest. We looked to our precedent on vicarious liability regarding both method claims and system claims. *Id.* at 1286–87 (collecting cases). Applying this precedent, we held that because Qwest “in no way directs its customers to perform nor do its customers act as its agents,” Qwest was not vicariously liable for the actions of its customers. *Id.* at 1287.

## II

Turning to the facts of this case, we hold that the district court correctly determined that it is NCR’s merchants (not NCR) that use the claimed system. *See id.* at 1284. As the district court explained “NCR, although it owns and operates the Back Office, does not put the accused system into

service.” *Cloudfchange*, 2022 WL 15527756, at \*7. Like the customers in *Centillion*, NCR’s merchants put the system into service because they initiate at the POS terminal a demand for service (for example, building or editing a POS) and benefit from the back end providing that service. NCR’s merchants therefore “control the system as a whole and obtain benefit from it.” *Centillion*, 631 F.3d at 1284. In other words, the merchants make the system parts “work for their patented purpose,” and thus use “every element of the system by putting every element collectively into service.” *Id.*

That NCR occasionally provides the POS hardware used by the customer-merchants does not change our view. J.A. 8195–96. CloudfChange admitted that, in most cases, NCR’s merchants provide their own hardware. And CloudfChange did not present different infringement arguments based on whether NCR merely provided the software or provided both the POS hardware and the software. Because in most cases NCR provides only the software to the merchant and CloudfChange forfeited any argument for those few circumstances where NCR provides the POS hardware, we see little daylight between this case and *Centillion*. Moreover, as CloudfChange’s own expert agreed, it is NCR’s merchants who put NCR Silver into service, control their own use of NCR Silver, and benefit from the use of NCR Silver.

CloudfChange next argues that, in fact, NCR “benefits from” the entire NCR Silver system from the monthly subscription fee, product improvements through testing and evaluation, product ideas, transaction data, revenues from third-party products and services, marketing rights associated with the merchant’s use, and advertising. Appellee’s Br. 26–27. But these are not the kind of benefits on which *Centillion* focuses. See, e.g., *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329 (Fed. Cir. 2017) (rejecting notion that an accused infringer need only derive a benefit from a claimed component of the claimed

system to directly infringe). *Centillion* asks whether a party uses the entire claimed system by putting that system to use and receiving the benefit (i.e., the recited purpose or result) of that use. Here, we agree with the district court that it is NCR's merchants, not NCR, who initiate the use of NCR Silver at the POS terminals and benefit from the POS builder software at the web server building or editing the POS terminals.

### III

We now turn to whether NCR is vicariously liable for its merchant-customers' use of the claimed system. As the district court correctly recognized, *Centillion's* analysis did not end after concluding that Qwest's customers used the claimed invention. Instead, we considered whether "Qwest is vicariously liable for the actions of its customers such that 'use' by the customers may be attributed to Qwest." *Centillion*, 631 F.3d at 1286. Answering this question, we held that because Qwest "in no way directs its customers to perform nor do its customers act as its agents," Qwest was not vicariously liable for the actions of its customers. *Id.* at 1287. In so holding, we emphasized that while Qwest provided application software and technical assistance, it was entirely the decision of the customer whether to install and operate the software on its personal computer data processing means. *Id.*

So too here. NCR does not direct or control its merchants to subscribe to the NCR Silver system, download the NCR Silver app on their POS terminals, or put the NCR Silver system into use by initiating action at the POS terminals to cause the NCR Silver software to modify its POS terminals. NCR's merchants take these actions of their own accord. That NCR's Merchant Agreement makes merchants responsible for obtaining and maintaining Internet access does not equate to contractually obligating merchants put the entire accused NCR Silver system into use. We thus conclude as a matter of law that NCR does not

direct or control its merchants' use of the claimed system, nor do its merchants act as NCR's agents.

In concluding otherwise, the district court erred by focusing its direction or control analysis on one element of the system—Internet access. Because NCR's Merchant Agreement makes merchants responsible for obtaining and maintaining Internet access, the district court determined "NCR 'contracts with [merchants] to perform one or more' of the claimed elements." *Cloudofchange*, 2022 WL 15527756, at \*8 (alteration in original) (quoting *Akamai*, 797 F.3d at 1023). Based on this conclusion, the district court held that NCR directed or controlled its merchant-customers' use of the claimed system. But, in the context of this case, directing the merchants to perform one element of a system claim is not the proper test for analyzing vicarious liability for use of a system claim.

Specifically, the district court's analysis conflates use of a method claim (which was at issue in *Akamai*) with use of a system claim (which was at issue in *Centillion*). "Under section 271(a), the concept of 'use' of a patented method or process is fundamentally different from the use of a patented system or device." *NTP, Inc. v. Rsch. In Motion, Ltd.*, 418 F.3d 1282, 1317 (Fed. Cir. 2005). "[T]he use of a process necessarily involves doing or performing each of the steps recited," while the "use of a system as a whole" involves putting that entire system to use and benefitting from it. *Id.* at 1318.

In *Akamai*, the accused infringer, Limelight, performed every step of the claimed method except one, which was performed by its customer. *Akamai*, 797 F.3d at 1024. It was in this unique context that this court focused on one claim element (the one that Limelight itself did not perform) and considered whether Limelight directed or controlled its customers' performance of this claim step. *Id.* at 1024. After answering this question in the affirmative, the court held that Limelight was vicariously liable for the

performance of all the steps of the method claim because it either performed or directed or controlled the performance of all of the claim elements. *Id.* at 1024–25.

Applying the vicarious liability principles from *Akamai* to this case, the appropriate question is whether NCR directed or controlled or should otherwise be vicariously liable for its customers' use of the system claim. Specifically, the issue is whether NCR directed or controlled its merchant-customer's actions in putting the entire claimed system to service to build or edit POS systems. As the contractual obligation to supply an Internet connection does not amount to direction or control of a merchant's use of the claimed system to build POS systems, we hold that NCR is not vicariously liable for that infringing use.

#### CONCLUSION

Because we conclude the district court erred in denying JMOL of no infringement, we do not reach the other issues presented on appeal.<sup>2</sup> For the reasons discussed above, we reverse the district court's denial of JMOL and vacate the jury verdict.<sup>3</sup>

#### REVERSED

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<sup>2</sup> At oral argument, NCR contingently abandoned its counterclaim for declaratory judgment of invalidity should this court reverse the infringement verdict. Oral Arg. at 8:03–8:57, [https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1111\\_06042024.mp3](https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1111_06042024.mp3). Accordingly, we do not reach the issue of invalidity.

<sup>3</sup> In light of our disposition on the merits, we deny as moot Appellant NCR's Renewed Motion Regarding IPR Decisions asking us to take judicial notice of *inter partes* review decisions related to the Asserted Patents (ECF No. 67).

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

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS**

**Case Number:** 2023-1111

**Short Case Caption:** CloudofChange, LLC v. NCR Corporation

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Date: 01/16/2025

Signature: /s/ Jerry R. Selinger

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