

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.*

**BRIEF OF AMICUS CURIAE
NEW YORK INTELLECTUAL PROPERTY LAW
ASSOCIATION IN SUPPORT OF DEFENDANT-CROSS
APPELLANT ON REHEARING EN BANC**

CHARLES A. WEISS
Amicus Committee
NEW YORK INTELLECTUAL
PROPERTY LAW ASSOCIATION
c/o Kenyon & Kenyon LLP
1 Broadway
New York, NY 10004-1007
(212) 425-7200

THERESA M. GILLIS
President
NEW YORK INTELLECTUAL
PROPERTY LAW ASSOCIATION
c/o Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

August 10, 2011

CERTIFICATE OF INTEREST

Counsel of record for amicus curiae New York Intellectual Property Law

Association certifies the following:

1. The full name of every party or amicus represented by me is: New York Intellectual Property Law Association.

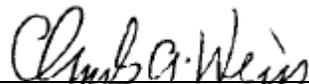
2. The party represented by me as amicus curiae is the real party in interest.

3. The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates represented by me are: None.

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

Charles A. Weiss
Amicus Committee
NEW YORK INTELLECTUAL
PROPERTY LAW ASSOCIATION
c/o Kenyon & Kenyon LLP
1 Broadway
New York, NY 10004
(212) 425-7200

Theresa M. Gillis
President
NEW YORK INTELLECTUAL
PROPERTY LAW ASSOCIATION
c/o Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500



CHARLES A. WEISS

August 10, 2011

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New York Intellectual Property Law Association (“NYIPLA” or “the Association”) is a bar association of more than 1,600 attorneys whose professional interests and practices lie principally in the areas of patents, copyrights, trademarks, trade secrets and other forms of intellectual property. Since its founding in 1922, NYIPLA has been committed to maintaining the integrity of the U.S. patent law and to the proper application of that law and the related bodies of contract and trade regulation law to commercial transactions involving patents.

The NYIPLA and its undersigned counsel represent that they have authored this brief, that no party or counsel for a party in this proceeding authored any part of the brief, and that no person other than the NYIPLA, its members or its counsel, including any party or counsel for a party, made any monetary contribution intended to fund the preparation or submission of the brief.

The arguments set forth in this brief were approved on or about August 9, 2011, by an absolute majority of the total number of officers and members of the Board of Directors (including those who did not vote for any reason, including recusal), but may not necessarily reflect the views of a majority of the members of the NYIPLA or of the organizations with which those members are affiliated. After reasonable investigation, the NYIPLA believes that no person who voted in favor of the brief, no attorney in the firms or companies with which such persons

are associated, and no attorney who aided in preparation of this brief represents a party in this litigation. Some such persons may represent entities that have an interest in other matters which may be affected by the outcome of this proceeding.

This brief is filed pursuant to paragraph 6 of the Order granting the petition for rehearing en banc (April 20, 2011), which provided that amicus briefs may be filed without consent and leave of Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case lies at the intersection of two well-established doctrines, *i.e.*, the all-elements rule and the difference between direct and indirect infringement. The “all elements” rule under which infringement of a claim does not occur unless each and every step of the claim is practiced has been a feature of patent law for decades. *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 31 (1997); *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993) (“[A] method or process claim is directly infringed only when the process is performed.”). Similarly, the difference between direct and indirect infringement has been a feature of patent law long pre-dating its codification in the 1952 Act.

Nothing about this case calls for the application of a special new rule of patent law. Although the method claims at issue are in the field of information management, a relatively new occurrence in patents, their infringement can be fairly assessed by the application of existing patent-law doctrines. Doing so will not disrupt the settled expectations of those who have organized their activities in reliance on existing precedent.

The inventions protected by such claims should (i) receive the same protection as any other type of invention best protected by method claims and (ii) not compel a change in the law that will generate a ripple effect of uncertainty beyond the narrow confines of the present dispute. History has shown that the

creation of special rules for different types of inventions is not the right path. Indeed, an important feature of the 1952 Act was the clearing away of an accretion of unhelpful and arbitrary precedent that gave different degrees of protection to allegedly different categories of invention. P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. § 1 (West 1954), reprinted in J. Pat. & Trademark Off. Soc’y 161, 170 (1993). Absent a statutory requirement or future intervention by Congress, that underlying principle of uniform treatment should be applied here, and points to adherence to current precedent under which method claims are governed by the same rules that apply to other statutory classes.

The panel opinion and existing precedent properly balance the rights and interests as between patentees and the public. A person who practices every step of a method claim realizes the full economic value of the invention and is properly liable to the patentee for infringement. Conversely, a person who does not practice every step of a method claim does not appropriate the full economic value of the claimed invention and cannot be liable for infringement because patent law does not recognize partial or incomplete infringement.¹

¹ The concept of “imperfect infringement” is a different issue not applicable here. *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1548 & n.2 (Fed. Cir. 1989) (remarking that “inferior infringement is still infringement”).

Consider, for example, a multistep industrial method-of-manufacture claim that includes an intermediate step of irradiating the in-process material. Assuming that the irradiation step is useful, a manufacturer that omits that step but uses every other step, and sells a nonirradiated product, has not realized the full economic benefit of the claimed invention and is not liable for infringement. And existing precedent stops the manufacturer from realizing that full economic benefit by artifice: if the nonirradiated product is useful only when irradiated by the purchaser, the manufacturer is almost certainly liable for contributory infringement under 35 U.S.C. § 271(c), and also perhaps for inducement of infringement under § 271(b). Or if the manufacturer outsources that step to an irradiation company across town, those companies are in a master-servant or principal-agent relationship and the manufacturer is liable as a direct infringer, just as if it had had one employee perform all steps of the claimed method with the exception of the irradiation step, and simply assigned a different employee to do the irradiation.

The application of these principles outside the more familiar industrial context is no different. In this case, the facts suggest that Limelight does not realize the full economic value of the claimed invention because it does not control its customers' websites and perform the tagging step. Limelight's service would seem to be more valuable if it provided that step, because the customer would not have to have its own personnel do that work. For example, the home center that

custom mixes paint to its customers' specifications charges less to the customers who apply the paint themselves than to customers who want the home center to also send an employee to apply the paint to the customers' walls.

An expansion of the circumstances under which a single person who performs fewer than all steps of a method claim is nonetheless liable as a direct infringer would upset the decisions made by businesses in reliance on existing law. The NYIPLA has no knowledge of Limelight's reason for organizing its service the way it did—and its motivations are seemingly irrelevant to the legal question presented in this appeal—but it is not hard to posit that a similarly situated company could rationally (and with advice of counsel) decide to refrain from offering its customers the tagging step for the purpose of avoiding infringement. As between such hypothetical company and the hypothetical patentee, the consequence (noninfringement) is properly borne by the latter because it is the patentee that (i) failed to present for examination a broader claim that omitted the tagging step, (ii) narrowed its claims by adding the tagging step, or (iii) elected to draft and present claims that did not read on the activity of providing the information to a customer without actually controlling the customer's website.

The limits of judicial power mean that substantive rules of law changed by adjudication can rarely be limited to prospective operation. Here, a change in the rules governing multiparty infringement of method claims to broaden the

circumstances under which direct infringement occurs is likely to make infringers out of many businesses that ordered their activities to avoid infringement in reliance on existing precedent. Perhaps the “better” rule of law would have been the position advocated by Akamai (a position on which NYIPLA expresses no view). But the heavy thumb of *stare decisis* on the scales of justice requires a different outcome. The change advocated by Akamai should occur, if ever, only prospectively, and only Congress has the power to make the change in that fashion.

ARGUMENT

I. Because it is Important to Maintain the Distinction Between Direct Infringement (a Strict Liability Offense) and Indirect Infringement (which Requires a Showing Of Intent), the Court Should Preserve Existing Law Under Which Direct Infringement Does Not Occur Unless One Person Performs all Elements of the Claim, With No Exception Created for Method Claims

The doctrine of indirect infringement protects against subversion of the patent system by imposing liability on those who misappropriate the claimed invention through the acts of others. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 188-89 (1980) (“[T]he contributory infringement doctrine . . . exists to protect patent rights from subversion by those who, without directly infringing the patent themselves, engage in acts designed to facilitate infringement by others.”). At the same time, because the law does not lightly impose liability on one for the acts of another, an element of intent is required before liability exists for indirect infringement. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068

(2011) (holding that “induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement” just as “§ 271(c) requires knowledge of the existence of the patent that is infringed”).

When the performance of the elements of a claim is divided between a vendor and its customer, the proper mode of analysis is that of indirect infringement. And the codified standards for indirect infringement address exactly those situations. A manufacturer that sells an incomplete or unassembled product (that is by itself noninfringing because the claims cover only a finished product) that is not useful except for completion or assembly into an infringing whole is the poster child of indirect infringement. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) (explaining that the most common scenario of common-law contributory infringement pre-1952 Act was the sale of a component that does not itself infringe but has no use except for the claimed product or process). Under the 1952 Act, such conduct is clearly proscribed by § 271(c) as contributory infringement, and will in many circumstances (as when the product is shipped with instructions to assemble it) be prohibited under § 271(b) as active inducement. *See, e.g., Biotec Biologische GmbH v. Biocorp, Inc.*, 249 F.3d 1341, 1351 (Fed. Cir. 2001) (shipping product with instructions to remove water resulting in satisfaction of “substantially water free” element of claim).

Similarly, in the common example of pharmaceutical method-of-use claims—in which the claim is directed to using a specified pharmaceutical product in a certain way and/or to treat a particular disease—the patient (or occasionally the prescribing doctor) will be the direct infringer and the claimed invention is well-protected by the law of active inducement. *See, e.g., AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1059-60 (Fed. Cir. 2010) (finding intent to induce infringement of such claim when product was sold with directions to use it in manner that infringed).

Finally, the patentee who proves her case under a theory of indirect infringement is not deprived of the full measure of damages as compared to a claim of direct infringement, because the indirect infringer is liable for the full measure of patent damages (jointly and severally in the case of multiple infringers). *Hewlett-Packard*, 909 F.2d at 1469.

The key difference, of course, is that the patentee proceeding under a theory of indirect infringement must prove the requisite degree of intent. *SEB*, 131 S. Ct. at 2065 & n.2. The requirement of intent or culpability is deeply rooted in common-law principles predating the codification of indirect infringement in the 1952 Act, which preserved that requirement. *Hewlett-Packard*, 909 F.2d at 1469. Any expansion of the scope of direct infringement alters the balance between that strict-liability tort and the intent-based tort of indirect infringement. The facts of

this case do not call for any such alteration, and changing the balance here is likely to have substantial effects in other fields of technology and other types of patent claims (as suggested by the varied industrial interests represented by other *amici* participating in this case).

II. Because Businesses Have Ordered Their Activities Based on Existing Law, and Reversal of the Panel Decision Would Create Infringement Retroactively in Circumstances Where None Currently Exists, Reliance Interests Favor Application of *Stare Decisis* and Adherence to Existing Precedent Even if the Theoretical “Better” Rule Were the One Proposed by Akamai

Even if the judgment of noninfringement seems aberrant or inequitable in the case at bar, the reliance interest of others that have conformed their business activities to existing law favors the application of *stare decisis*, leaving to Congress the option to change the law prospectively if necessary. *Stare decisis*, in its core application, lends predictability to the law. *See, e.g., Warner-Jenkinson*, 520 U.S. at 32 & n.6; *see generally* Benjamin N. Cardozo, *The Nature of the Judicial Process* 149-156 (1921) (discussing the role of adherence to precedent in the judicial process, which “should be the rule and not the exception,” as well as “considerations of policy that dictate adherence to existing rules when substantive rights are involved”). Consistency and predictability have particular significance in the context of conduct-ordering rules like the one at issue here, *i.e.*, rules that influence the way businesses organize, develop, and invest. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 724, 730-32 (2002); *Warner-*

Jenkinson, 520 U.S. at 32 & n.6; *see generally* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 453-54 (2010) (discussing reliance on *stare decisis* “by specific individuals, groups, and organizations” and observing that those “who do their best to comply with the law only to find that the rules have changed may feel forsaken by the very government whose edicts they endeavored to respect”). Consistency allows competitors to invest in technology outside the scope of the patents, establish businesses, and avoid litigation. *Festo*, 535 U.S. at 732.

With the clear standard of “direction and control” from the prior cases in mind, patent attorneys and their clients have drafted claims, negotiated contracts, and conformed business activities to comport with the existing law that limits claims of “divided” infringement. *See, e.g.*, Kurtis A. Kemper, *Software and System Protection—Infringement*, in *Computer and Information Law Digest* § 2:15.20 (2d ed. 2011); Lisa M. Brownlee, *Internet Considerations—Changes in Business Method and Joint Infringement Patent Law and Their Potential Impact on Internet-Related Patents*, in *Intellectual Property Due Diligence in Corporate Transactions* § 5:97 (2011); W. Keith Robinson, *Ramifications of Joint Infringement Theory on Emerging Technology Patents*; 18 Tex. Intell. Prop. L.J. 335 (Spring 2010); Raymond Millien, *Drafting Business Method and Software Claims in a Post Bilski, Muniauction and NTP World*, 55 Prac. Law. 27 (Aug.

2009); Sriranga Veeraraghavan, *Joint Infringement of Patent Claims: Advice for Patentees*, 23 Santa Clara Computer & High Tech. L.J. 211, 233 (Nov. 2006). The overruling of precedent to expand the scope of direct infringement would be (i) a windfall for patentees who presented and obtained claims not likely to be infringed by a single person, and (ii) an imposition on those who arranged their services to avoid infringement but suddenly find themselves redefined by judicial action as infringers.

As between the patentee, who has the option to draft claims that read on the activity of a single person and the obligation to present those claims for examination, and members of the public who review issued patents with the benefit of binding Federal Circuit precedent, the balance clearly favors the public. *See, e.g., BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2011) (observing that “steps of the claim might have featured references to a single party’s supplying or receiving each element of the claimed process” and remarking that “this court will not unilaterally restructure the claim or the standards for joint infringement to remedy these ill-conceived claims”); *see generally* Ken Hobday, *The Incredibly Ever-Shrinking Theory of Joint Infringement: Multi-Actor Method Claims*, 38 Cap. U. L. Rev. 137 (2009); *see also Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1425 (Fed. Cir. 1997) (“[F]or a patentee who has claimed an invention narrowly, there may not be infringement . . . even though the patentee

might have been able to claim more broadly. . . . otherwise, then claims would be reduced to functional abstracts, devoid of meaningful structural limitations on which the public could rely.”).

In this regard, *amicus* respectfully disagrees with the dissent in the panel opinion in *McKesson*, which argues that predicating indirect infringement on direct infringement—when due to the involvement of multiple parties there cannot be direct infringement—creates a paradox where patent rights become a cynical and expensive delusion. *McKesson Techs. Inc. v. Epic Sys. Corp.*, 98 USPQ2d 1281, 1287 (Fed. Cir. 2011) (Newman, J., dissenting). Although it is entirely possible that the particular claims at issue in these cases have little economic value under existing law, narrowly drafted claims that are readily circumvented are no stranger to patent lawyers who counsel clients on their freedom to operate. For whatever reason, there are myriad issued patents that seem not to have even justified payment of the issue fees except to obtain handsome documents to display on the inventors’ walls. The Court does not often adjudicate cases involving such patents, because they are rarely asserted. But the existence of claims that may be incapable of being meaningfully asserted against substantial infringement is a reality of patent practice, not a paradox to be “corrected” by a change in precedent. As the Court has observed, the result in cases of this type is attributable to the patentee’s failure to draft claims targeting a single entity. *See BMC Res.*, 498 F.3d at 1381.

Indeed, other cases provide examples of claims that were drafted to read on the action of a single entity even where multiple parties are involved. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), held a system claim directly infringed when, despite the involvement of multiple parties, the system claim focused on the software registration station itself and merely defined the environment in which third parties participated. *Id.* at 1309 (“[t]hat other parties are necessary to complete the environment in which the claimed element functions does not necessarily divide the infringement between the necessary parties”). Also instructive is the Court’s recent decision in *Advanced Software Design Corp. v. Fiserv Inc.*, which involved a method of validating negotiable instruments such as checks. 641 F.3d 1368 (Fed. Cir. 2011). The preamble of the claim, which the parties agreed was limiting, described a check with some information variously encrypted and printed. The body of the claim recited validating the check by reading the information and subjecting it to certain processing steps. Accused infringer Fiserv provided a check security product that performed the claimed validation, but it did not print checks. The Court reversed the district court’s judgment of noninfringement based on that court’s incorrect reading of *BMC Resources*, holding on appeal that Fiserv’s conduct of the validating step was sufficient because the encryption and printing steps simply defined the

characteristics of the check on which the validating step had to be conducted. *Id.* at 1374.

The outcomes of *Uniloc* and *Advanced Software Design* illustrate that the *BMC Resources* line of cases regarding method claims do not deprive patentees of viable ways to draft method claims that will be directly infringed by the conduct of a single person even when the activity as a whole involves multiple parties. To the extent that existing patentees have failed to do so, some may still have time to obtain relief through broadening reissue proceedings.

CONCLUSION

For the reasons stated above, *amicus curiae* New York Intellectual Property Law Association respectfully submits that the panel decision applying the holding of *BMC Resources* was correct.

Respectfully submitted,

KENYON & KENYON LLP

Attorneys for *Amicus Curiae*
New York Intellectual
Property Law Association

By: 
CHARLES A. WEISS

DATED: August 10, 2011

**United States Court of Appeals
for the Federal Circuit**
AKAMAI TECH v LIMELIGHT NETWORKS,
2009-1372, -1380, -1416, -1417

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by KENYON & KENYON LLP to print this document. I am an employee of Counsel Press.

On the **10th Day of August, 2011**, I served the within **Brief for Amicus Curiae NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION** upon the following counsel for the parties in the appeal:

Donald R. Dunner
Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
901 New York Avenue, N.W.
Washington, D.C. 20001-4413
(202) 408-4000
Don.Dunner@finnegan.com
*Counsel for Appellant
Akamai Technologies, Inc.*

Robert S. Frank, Jr.
Choat, Hall & Stewart, LLP
Two International Place
Boston, MA 02110
(617)-248-5000
rfrank@choate.com
*Counsel for Appellant
The Massachusetts Institute of
Technology*

Aaron M. Panner
Kellogg, Huber, Hansen, et al.
1615 M Street, N.W.
Suite 400
Washington, DC 20036-3209
(202) 326-7900
*Counsel for Cross Appellant
Limelight Networks, Inc.*

via Express Mail, by causing 2 true copies of each, enclosed in a properly addressed wrapper, to be deposited in an official depository of the U.S. Postal Service.

Additional the following Counsel for Amicus Curiae have been sent a courtesy copy via email:

William G. Barber
Pirkey Barber, LLP
600 Congress Avenue, Suite 2120
Austin, TX 78701
(512) 332-5200
bbarber@pirkeybarber.com
*Counsel for American Intellectual
Property Law Association*

John W. Ryan
Sullivan & Worcester
1666 K Street, N.W., Suite 700
Washington, DC 20006
(202) 775-1215
jryan@sandw.com
*Counsel for Biotechnology
Industry Organization*

Raymond P. Niro
Niro, Scavone, Haller & Niro
181 W. Madison Street, Suite 4600
Chicago, IL 60602
(312) 236-0733
rniro@nshn.com
*Counsel for Cascades Ventures, Inc.
and VNS Corporation*

Meredith M. Addy
Brinks, Hofer, Gilson & Lione
455 North Cityfront Plaza Drive
Suite 3600
Chicago, IL 60611-5599
(312) 321-4280
maddy@brinkshofer.com
*Counsel for Aristocrat
Technologies Australia Pty
Limited*

Eric L. Abbott
Shuffle Master, Inc.
1106 Palms Airport Drive
Las Vegas, NV 89119
(702) 897-7150
eabbott@shufflemaster.com
Counsel for Shuffle Master, Inc.

Jeffrey E. Francis
Pierce Atwood LLP
100 Summer Street
Suite 2250
Boston, MA 02110
(617) 488-8136
jfrancis@pierceatwood.com
*Counsel for Boston Patent Law
Association*

Steven C. Sereboff
SoCal IP Law Group LLP
310 N. Westlake Boulevard
Suite 120
Westlake Village, CA 91362
(805) 230-1350
ssereboff@socalip.com
Counsel for Conejo Valley Bar Assn.

Benjamin Jackson
Myriad Genetics
320 Wakara Way
Salt Lake City, UT 84108
(801) 883-3328
bjackson@myriad.com
Counsel for Myriad Genetics, Inc.

Robert P. Taylor
Arnold & Porter, LLP
One Embarcadero Center, 22nd Floor
San Francisco, CA 94111
(415) 356-3400
robert.taylor@aporter.com
*Counsel for Pharmaceutical
Research and Manufactures of
America*

Jerry R. Selinger
Patterson & Sheridan, LLP
1700 Pacific Avenue
Suite 2650
Dallas, TX 75201
(214) 272-0957
jselinger@pattersonsheridan.com
*Counsel for Altera Corporation,
HTC Corporation, HTC America,
Inc., and Weatherford
International*

Gregory P. Stone
Munger, Tolles & Olson LLP
355 S. Grand Avenue, Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9100
gregory.stone@mto.com
*Counsel for CTIA – The Wireless
Association and MetroPCS Wireless,
Inc.*

Unless otherwise noted, 31 copies have been hand-delivered to the Court on the same date as above.

August 10, 1011



John C. Kruesi, Jr.
Counsel Press

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Charles A. Weiss

(Name of Attorney)

Amicus curiae NYIPLA

(State whether representing appellant, appellee, etc.)

August 10, 2011

(Date)

