

Nos. 12-786 and 12-960

IN THE
Supreme Court of the United States

LIMELIGHT NETWORKS, INC.,
Petitioner,

v.

AKAMAI TECHNOLOGIES, INC. AND
THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Respondents.

AKAMAI TECHNOLOGIES, INC. AND
THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Petitioners,

v.

LIMELIGHT NETWORKS, INC.,
Respondent.

**On Petition and Conditional Cross-Petition
for a Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit**

**SUPPLEMENTAL BRIEF OF AKAMAI
TECHNOLOGIES, INC. AND THE
MASSACHUSETTS INSTITUTE OF TECHNOLOGY**

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**SUPPLEMENTAL BRIEF OF AKAMAI
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The government's brief cannot be reconciled with itself. After explaining that the indirect-infringement question presented in Limelight's petition has only limited practical significance, the government recommends that the Court grant that petition to "bring certainty to the many parties potentially affected by the decision." U.S. Br. 20. But the government then asks this Court to deny that very certainty by declining to consider the logically antecedent and inextricably intertwined direct-infringement question presented in Akamai's conditional cross-petition. Even by the government's own logic, a grant of Akamai's cross-petition should follow a fortiori from any grant of Limelight's petition.

Indeed, *every* reason the government gives for granting Limelight's petition applies with equal or greater force to Akamai's cross-petition: the court of appeals' direct-infringement jurisprudence is wrong, as the government at least implicitly concedes; that issue is more ripe than the indirect-infringement question in this case, because it is the only one of those questions that the jury actually considered; and after the Federal Circuit's en banc decision below, the remaining uncertainty relates to direct, not indirect, infringement.

In Akamai's view, this Court should deny the petitions. But the course that would make by far the

least sense is the one recommended by the government—granting the petition while denying the cross-petition—especially considering that, as a matter of fundamental statutory-construction principles, this Court should not construe the Patent Act’s direct- and indirect-infringement provisions in isolation from one another.

I. THE COURT SHOULD DENY THE PETITION

The government’s brief persuasively refutes Limelight’s contentions that the inducement question on which Limelight has sought certiorari is extraordinarily important and that the court of appeals’ decision conflicts with decisions of this Court (decisions that do not even address the question presented). The government’s analysis of those points is correct; the problem is its conclusion, which is hard to square with the government’s underlying analysis.

Whereas Limelight and its amici argued that the sky was falling in any number of ways as a result of the appellate court’s ruling (*see, e.g.*, Pet. 31), the government at least implicitly rejects those contentions. As the government explains, an entity can be liable for inducement only in the limited circumstance when it intentionally performs some steps of a patented method while deliberately inducing others to perform the remainder. U.S. Br. 19-20 n.7. Thus, even in its view, there are no traps for the unwary here. Further, the government agrees that, “[i]n each circumstance [where joint infringement typically arises], the process has been

performed, and sound reasons of patent policy may support holding one or more parties liable.” *Id.* at 8. Indeed, “[a]s a matter of patent policy, there is no obvious reason why a party should be liable for inducing infringement when it actively induces another party to perform all the steps of the process, but not liable when it performs some steps and induces another party to perform the rest.” *Id.* at 9.¹

The government contends that certiorari is nonetheless warranted because some companies may have relied on prior decisions authorizing such “unfortunate” evasions of patent rights. *Id.* at 10, 18-19. But a change in the court of appeals’ jurisprudence is not, by itself, a reason to grant review—this Court has denied review in numerous cases in which the Federal Circuit or another court of appeals overruled one of its earlier decisions. *E.g.*, *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc) (overruling *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983), on willful infringement), *cert. denied*, 552 U.S. 1230 (2008); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348 (Fed. Cir. 2009) (en banc) (overruling *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*, 425 F.3d 1366 (Fed. Cir. 2005), on 35 U.S.C. § 271(f) and method patents), *cert. denied*, 558 U.S. 1115 (2010).

Moreover, there are no valid reliance interests here because the law has not traditionally

¹ The government also agrees that the question presented arises only in the context of method claims. U.S. Br. 2-3 n.2.

recognized the enormous loophole to patent protection that Limelight seeks. *See Akamai Opp'n* 16-17, 22-23. Instead, Limelight is relying on a line of decisions that began in 2007, just five years before the decision below.² As the court of appeals explained, it was those decisions that “changed the pre-existing regime with respect to induced infringement.” *Pet. App.* 28a. If the government is correct that some companies had been structuring their affairs to evade patent rights by taking advantage of those recent decisions, that is a reason to embrace the en banc court’s course correction, not to question it. In any event, this Court has rejected similar settled-expectations arguments in overruling far more established lines of Federal Circuit jurisprudence. *See e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013). There is no reason to discourage the Federal Circuit from correcting its own, recent mistakes.

In the end, therefore, the government’s underlying assessment of the importance of the question presented confirms that its conclusion is wrong—the existence of a limited inducement remedy against clearly culpable parties is not, by itself, sufficiently important to warrant review. Indeed, the government agrees that this Court’s

² *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007); *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008); *Golden Hour Data Sys., Inc. v. emsCharts, Inc.*, 614 F.3d 1367 (Fed. Cir. 2010).

precedents do not even address the question of joint infringement, undermining Petitioner's position that the appellate court's decision conflicts with this Court's precedents. U.S. Br. 12-13.

Beyond that, the government's analysis of the merits generally parrots arguments made by Limelight, but fails to consider Akamai's responses (Akamai Opp'n 17-27). The government does, however, concede that the common law provides the relevant backdrop for construing 35 U.S.C. § 271 (U.S. Br. 8-9). And there can be no serious contention that the common law would not have tolerated such an evasion of a legally protected interest. *See, e.g.*, Restatement (Second) of Torts § 877(a) (1979) (person liable for tortious conduct if he "orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own" regardless of induced party's liability); Pet. App. 16a-18a. The Patent Act does not clearly displace that considered jurisprudence.

II. AT A MINIMUM, THE COURT SHOULD GRANT THE CROSS-PETITION

If the Court grants Limelight's petition, it follows that the Court should also grant Akamai's conditional cross-petition. The premise for the government's argument advancing review of § 271(b) is that there can be no liability for induced infringement under § 271(b) unless there is a liable direct infringer under § 271(a). Therefore, under the government's own analysis, to properly address

§ 271(b) liability, one must first address the question: what constitutes infringement under § 271(a). The government would nonetheless have this Court consider only the second (indirect-infringement) half of the relevant analysis—which is not the half that was tried to a jury, resulted in the jury verdict in Akamai’s favor, and became the question presented on appeal in this case. The government’s brief merely assumes *arguendo* the absence of a liable direct infringer in this case.

This case presents a situation in which Limelight joined together with another entity to collectively perform all the steps of a claimed method. Indeed, the combined performance of those steps was the entire basis of Limelight’s business model. At the same time that it assumes that Limelight is not liable, the government recognizes that this is an “unfortunate result” and attributes that result to an alleged “gap” in the “Patent Act.” In fact, any such “gap” would be a creation of the Federal Circuit’s incorrect interpretation of § 271(a), the very provision that the government urges this Court to ignore. As Akamai has explained, nothing in the statute creates such a gap. Cross-Pet. 21-22.

The government’s justifications for leaving § 271(a) liability unexamined are incorrect. The standard for direct infringement under § 271(a) has greater impact than the Federal Circuit’s recognition of a limited inducement remedy under § 271(b). Moreover, the § 271(a) issue was the one actually put to the jury in this case and provided the lower court’s basis for rejecting the jury’s verdict. Thus, any

argument that the untried issue, § 271(b) liability, is somehow “more ripe” for review rings hollow.

**A. The Government’s Brief Shows
that the § 271(b) Issue Requires
Consideration of § 271(a)**

Although the government states in a footnote that the direct- and indirect-infringement issues are not “inextricably intertwined” (U.S. Br. 22 n.9), it ignores the parts of Limelight’s and its own briefs that show they are. Specifically, Limelight’s question presented—whether a defendant may be liable “under 35 U.S.C. § 271(b) even though no one has committed direct infringement under § 271(a)” — expressly presumes that there is no direct-infringement liability. If the Federal Circuit is wrong about direct infringement under § 271(a), the inducement question presented would not even arise in this case.

Equally important, the government’s brief makes clear its view that interpretation of subsection (a) informs the interpretation of subsection (b). The government analyzes subsection (a) as part of its interpretation of subsection (b), asserting that “[t]he ‘infringement’ to which Section 271(b) refers is the conduct defined in Section 271(a).” U.S. Br. 11-14. Thus, even if the Court were to grant only the petition, the parties would have to brief the issue in the cross-petition as part of their statutory construction of subsection (b). Indeed, Limelight and others have repeatedly argued that subsections (a) and (b) must be read in

light of one another as part of Congress's overall design. Pet. 21-22.

The government also concludes that “the Patent Act” may not provide a complete solution to the problem of joint infringement and that it would be up to Congress—not the courts—to close any statutory gap in § 271. U.S. Br. 10. As the government acknowledges, however, § 271(a) and (b) incorporate the common-law backdrop of joint- and vicarious-liability rules. *Id.* at 8-9. The entire point of the doctrine that Congress presumptively incorporates background common-law principles into its statutes is to avoid unnecessarily creating the kind of gap at issue here. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (interpreting Copyright Act to include contributory infringement despite absence of express language in the statute). Moreover, the common-law rules work together, not in isolation from one another: “the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn” precisely because they are all “species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” *Id.* The close relationship and overlap between the common-law attribution doctrines would make it especially unreasonable to create an unnecessary gap by considering only indirect infringement in isolation from direct infringement.

Finally, the government argues that it would be anomalous to recognize liability for inducement in circumstances where no one entity would be liable

for direct infringement. U.S. Br. 9-10. To the extent that the government implies that the court of appeals found that no direct infringement was required for a finding of induced infringement, it is wrong. Akamai Opp'n 13-14. In any event, that argument too ties the two questions in the petition and cross-petition together.

Akamai does not believe that a cross-petition is jurisdictionally required for this Court to consider the logically antecedent, and thus fairly included, question of direct infringement. Akamai Reply 5. But not granting the cross-petition would introduce confusion and potential for further delay into the proceedings. If this Court grants the cross-petition, in contrast, there is no question that this Court will have jurisdiction to resolve this case on the ground of its choosing, as the Federal Circuit did by expressly granting en banc review of both issues.

B. The Question in the Conditional Cross-Petition Is at Least as Important and Ripe as That in the Petition

Even apart from its relationship with the indirect-infringement question, the direct-infringement question is actually the more certworthy of the two. The government does not dispute that the direct-infringement issue is at least as important as the inducement one. U.S. Br. 21-23. A method claim is infringed when every step of the claim is performed. *Id.* at 2 (citing *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005)). Thus, every time a patented method is

infringed, there will necessarily be one or more direct actors who perform the steps of the claim, but there may or may not be an inducer of that performance. Further, whereas direct infringement requires only that all of the method steps are performed, there are a number of other criteria for finding inducement. *See* Pet. App. 30a (identifying criteria Akamai must satisfy on remand). As a result, direct infringement may provide the only viable remedy in many if not most joint-infringement cases. In addition, if a direct actor is liable for direct infringement, that actor's liability unquestionably provides a predicate for holding an inducer liable (U.S. Br. 18-19), making Limelight's question presented irrelevant. For at least these reasons, the cross-petition raises an issue as important, if not more important, than the petition.

The government asserts that granting Limelight's petition would "bring certainty to the many parties potentially affected by the decision." *Id.* at 20. But, after the appellate court's en banc rulings, the remaining uncertainty relates to direct infringement. Indeed, in arguing otherwise, the government has it backwards because, under the appellate court's current case law, there is certainty about the inducement question. The government simply disagrees with the appellate court's holding, but that does not make it in any way unclear. In contrast, there is uncertainty about direct infringement because the en banc court failed to resolve it (Pet. App. 6a) and recent panel decisions on direct infringement are inconsistent with each other (*see* Akamai Reply 6-7) and earlier decisions. Indeed, prior to 2007, the appeals court had agreed

that “[i]t is not necessary for the acts that constitute infringement to be performed by one person or entity. When infringement results from the participation and combined action(s) of more than one person or entity, they are all joint infringers and jointly liable for patent infringement.” *On Demand Mach. Corp. v. Ingram Indus., Inc.*, 442 F.3d 1331, 1344-45 (Fed. Cir. 2006).

On the merits, the government pointedly refuses to fully endorse the Federal Circuit’s direct-infringement jurisprudence, stating only that the court is generally correct to look to common-law principles of vicarious liability. U.S. Br. 8-9, 22. In so doing, the government never identifies the Federal Circuit’s actual holding—that “[a]bsent an agency relationship between the actors or some equivalent,” a party cannot be held liable “even if the parties have arranged to ‘divide’ their acts of infringing conduct for the specific purpose of avoiding infringement liability.” Pet. App. 6a. This is telling.

As Akamai has already explained, and the government does not dispute, common-law attribution principles are much broader than the Federal Circuit’s test acknowledges. Akamai Reply 8-11. These principles of joint and vicarious liability have developed over time and reflect the “circumstances in which” experience has shown “it is just to hold one individual accountable for the actions of another.” *Sony*, 464 U.S. at 435. For example, the common law has long imposed liability “where the acts of each of two or more parties, standing alone, would not be wrongful, but together

they cause harm to the plaintiff.” W. Page Keeton et al., *Prosser & Keeton on Torts* § 52, at 354 (5th ed. 1984). Otherwise, the defendants “might all laugh [at the plaintiff] and say, ‘You cannot sue any one of us because you cannot prove that what each one of us does would of itself [have been] enough to cause you damage.’” *Blair v. Deakin*, 57 L.T. 522, 525 (1887). The government argues that courts should not “attempt to devise patent-specific rules of vicarious liability” for § 271(a). U.S. Br. 9. But that is unquestionably what the Federal Circuit has done, which is presumably why the government does not acknowledge, much less agree with, the Federal Circuit’s agency or contractual-obligation test.

That leaves the government’s suggestion that the direct-infringement issue is not ripe for review, but the inducement issue is. *Id.* at 21-23. The government gets matters backwards because, of the two issues, direct infringement is the *only* one litigated below. Indeed, the jury was specifically instructed on the *BMC* control or direction test and found that Limelight directly infringed, but the appellate court found no agency or contractual-obligation. Pet. App. 107a-108a. On the other hand, the jury was not even asked to consider the induced-infringement question. On appeal, the Federal Circuit vacated the direct-infringement judgment and remanded so that Akamai could pursue an inducement remedy in the district court. Given this procedural posture, the direct-infringement issue is more ripe for review than the inducement-infringement issue, which would be considered for the first time on remand.

* * *

In the end, the government's recommendation of a grant is premised on its assertion that clarity is needed. If so, the only way to provide that clarity is to consider the logically antecedent and more important direct-infringement question, especially since that was the question considered on the merits below.

CONCLUSION

For the foregoing reasons, the Court should deny the petition or, if it does grant the petition, it should also grant the cross-petition.

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