No. 12-786

IN THE
# Supreme Court of the United States

LIMELIGHT NETWORKS, INC.,
*Petitioner*,
*v.*

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

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## BRIEF FOR RESPONDENTS

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## QUESTION PRESENTED

The jury found that Limelight directly infringed the patent-in-suit under 35 U.S.C. §271(a) because it performed most of the steps of Akamai's patented method and "directed or controlled" other parties in the performance of the remainder. A panel of the Federal Circuit disagreed, applying a rigid "single entity" rule under which two or more parties may perform all steps of a patented method with impunity, as long as they do not have a formal agency relationship or contractual obligation to perform those steps. The en banc Federal Circuit vacated the panel decision and held that Limelight could be liable for indirect infringement under §271(b).

Limelight's petition to this Court presented, and this Court granted certiorari on, the following question: "Whether the Federal Circuit erred in holding that a defendant may be held liable for inducing patent infringement under 35 U.S.C. §271(b) even though no one has committed direct infringement under §271(a)." Because the question regarding §271(b) is predicated on the logically antecedent question whether there is liability for direct infringement under §271(a), the following two issues are fairly included within the question presented:

Whether a defendant is (1) liable for direct infringement under 35 U.S.C. §271(a), where the defendant performs some steps of a patented method and directs, controls, or acts in concert with another who performs the remaining steps, or (2) alternatively, liable for inducing infringement under 35 U.S.C. §271(b), where the defendant knowingly causes the performance of all steps of the patented method.

## CORPORATE DISCLOSURE STATEMENT

Akamai Technologies, Inc. and the Massachusetts Institute of Technology have no parent corporations. MIT does not issue stock, and no publicly held company owns 10 percent or more of Akamai's stock.

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## BRIEF FOR RESPONDENTS

## INTRODUCTION

This case concerns a patented invention fundamental to the Internet's growth in the twenty-first century, but invisible to the average user. One billion people daily rely on Akamai's services whenever they use iTunes to download songs, watch clips of basketball games on ESPN.com, browse goods for sale on Amazon.com and eBay.com, or use any of thousands of other websites that employ Akamai to distribute online content. JA81, 117-119, 124, 129. But less than two decades ago, Akamai's patented method for delivering content was just an academic theory developed by an MIT professor and a graduate student. JA91-92, 94-96.

Their genius and hard work yielded a pioneering invention, and the patent-in-suit disclosed their method for distributing content collaboratively—a method that transformed the Internet and turned Akamai into a successful business. This case involves Akamai's effort to protect that innovation, and Limelight's unauthorized use of it for its own gain.

The asserted claims involve the performance of several steps by parties working in collaboration. Limelight, a direct competitor of Akamai, performs all but one or two of those steps and instructs its content provider customers—like Microsoft, ABC Radio, and DirecTV (JA139, 177-178)—how to perform the rest. As the government concedes (Br. 9, 31), "sound patent policy" justifies holding Limelight liable in this situation. Yet Limelight insists that the Patent Act reflects a legislative judgment (or perhaps a legislative oversight) permitting Limelight to benefit from Akamai's invention with impunity, simply because no "single entity" performs all steps, as is also true when Akamai practices the claims-in-suit.

Limelight is wrong; indeed, its argument depends on rewriting the Patent Act's text and ignoring the background principles of joint liability against which Congress legislated. Limelight is in fact liable in two ways. First, as the jury found, Limelight is liable for *direct* infringement under 35 U.S.C. §271(a). Pet. App. 185a-186a. Limelight directed, controlled, or acted in concert with third parties to bring about the infringing conduct—a form of liability long recognized in patent law and analogous tort law. Second, as the en banc Federal Circuit ruled, Limelight may be liable for *induced* infringement under §271(b) because it induced third-party conduct that, when combined with Limelight's own conduct, performed all steps of the claimed invention. Pet. App. 30a. Neither theory is rebutted by the fact that the claimed steps are performed by *two* entities rather than one. Instead, both theories are fully consistent with the text, purpose, and history of the Patent Act, this Court's decisions, the common law, and common sense.

Limelight's argument, by contrast, rests on a rigid "single entity" rule—an nonstatutory loophole created by a handful of recent Federal Circuit decisions, culminating in the panel decision in this case. Pet. App. 109a-117a; *see also id.* 30a. Under that rule, method claims that require multiple actors—including claims to many important inventions of the last century—are essentially unenforceable, and even claims requiring only a single actor can be circumvented by two actors who divide up performance of the steps. This Court should disapprove the "single entity" rule and reaffirm the long-accepted principle that a party who directs, controls, or acts in concert with another to bring about the tort of patent infringement is liable as a direct infringer under §271(a)—an issue fairly included within the grant of certiorari that would lead to reinstatement of the jury verdict. Alternatively, the Court should recognize, as the en banc Federal Circuit did, that the "single entity" rule does not confine inducement liability under §271(b). Either way, the correct result under the Patent Act is not that Limelight "avoid[s] liability altogether" (U.S. Br. 14), but that the Patent Act is enforced as written and intended: to protect innovative methods from unauthorized use.

## STATEMENT

### A. Akamai's Innovation

1. In the mid-1990s, four problems dramatically threatened the Internet's development. First, the number of Internet users was "exploding," "doubling every three months." JA82. Second, more data was needed to convey higher-quality pictures, video, and other objects on webpages. JA83. The resulting increased load on the Internet's infrastructure was exacerbated by the third problem: "flash crowds," which occur "when a lot of people come to a [w]ebsite all at the same time." JA85-86. The fourth problem was geographic distance: the Internet experiences greater strain when a Silicon Valley-based website is accessed by a user in Washington, DC than when the user is in Los Angeles. JA89. These factors combined to slow the Internet's speed significantly, turning the World Wide Web into "the worldwide wait." JA85.

Experts writing in the 1990s predicted that the Internet might collapse under the increasing load. JA90; *see also* Joseph, *Aloha Akamai*, Forbes (June 18, 1999), *available at* http://www.forbes.com/1999/06/18/feat.html ("Unquestionably, the time lag in network connectivity has become the most serious obstacle blocking the growth of the web."). The consequences were already being felt; a 1999 Super Bowl ad produced a flash crowd so big that it not only crashed the advertiser's website, but also shut down the Internet in Dallas, where the website was based. JA90-91.

Despite the efforts of "[r]esearchers … all around the country," no satisfactory solution appeared. JA90. "The problem was simple to state, but the answer was nearly impossible to put a finger on." Raskin, *No Bet-*

*ter Time: The Brief, Remarkable Life of Danny Lewin, The Genius Who Transformed the Internet* 21 (2013).

2. Dr. Tom Leighton, a theoretical mathematics professor at MIT, began work on the problem in 1995, eventually "to the point of near obsession." JA91-92. He was soon joined by Danny Lewin, one of his graduate students. JA92.

By 1998, Dr. Leighton and Mr. Lewin had conceived of their solution, which relied on a "content delivery network" (CDN) service that was scalable, meaning that it could deliver thousands of pieces of content per second just as easily as one piece of content every few minutes. JA96, 118-119; *see also* Pet. App. 103a. Generally speaking, a CDN has three distinctive attributes: (1) "shared" servers that are (2) "distributed" geographically and (3) "flexible" in how they deliver content. JA97.

Part of the genius of Dr. Leighton's and Mr. Lewin's innovation was that it allowed the website owner (known in the patent as the "Content Provider") to "retain control" over the site's content. JA69; *see also* JA106. The patent-in-suit explains that one of the problems it addresses is the "significant need … to provide a decentralized hosting solution" while "enabl[ing] the Content Provider to maintain control over its content" and not "disrupting the Content Provider's direct relationship with the end user." JA68.

The patented method accomplished this by having content providers "tag" content (such as image, video, and audio files) that they want the CDN, rather than their own servers, to distribute. Pet. App. 103a-104a; *see also* JA71. As stipulated below, "tagging" means having a website owner (such as ESPN.com) attach a virtual "pointer" to a piece of content (such as a picture or video clip) so that the user's computer knows to go to the CDN's servers to get it. A17874 (defining tagging as "'providing a "pointer" or "hook" so that the object resolves to a domain other than the content provider domain'"); JA71-72, 103-104.

With the pointer in place, a user's request for an ESPN video clip is not served by the ESPN.com website but, rather, is directed to a specialized computer housed within the CDN, sometimes called the "intelligent DNS [domain name system]." JA106. The intelligent DNS automatically finds a suitable CDN server to provide the user with the video clip, taking into account whether the server is (1) close to the user, (2) not already overloaded, and (3) likely to have the clip already. JA69-70, 105; Pet. App. 141a-142a. The result is less strain on ESPN's website and on the Internet generally. *See* Joseph, *Aloha Akamai* (Akamai's "method for reproducing and routing data rapidly over a large and decentralized network of servers … stands in great contrast to the more common centralized 'server silo' approach favored by … competing network technology firms"). In addition, the patented method facilitates the use of the same CDN servers by multiple websites, producing a shared and highly scalable infrastructure.

Akamai's invention thus allows a website owner like ESPN—indeed, thousands of website owners simultaneously—to deliver the text for their webpages from their own servers, while tagging larger files like photos and videos for delivery from a CDN like Akamai. As a result, although a visitor to ESPN.com only sees a single webpage with text, images, and videos, ESPN only needs server capacity to deliver the text, while the photos and videos are delivered seamlessly and efficiently from Akamai's servers.

The patented method logically requires the two parties—in this example, Akamai and ESPN.com—to work together. ESPN tags the content to be delivered by Akamai, and Akamai delivers that content to users. The method's collaborative nature benefits both the CDN and the content provider. For example, ESPN constantly updates its content in real time to reflect recent developments. Tagging allows ESPN to quickly identify the content it wants delivered by Akamai, which offers not only convenience, but also efficiency. If a CDN had to do the tagging step itself—identifying each new piece of content to be delivered on behalf of thousands of content providers—the system would be unworkable.

The patent-in-suit, U.S. Patent No. 6,108,703, issued on August 22, 2000, and names Dr. Leighton and Mr. Lewin as co-inventors and MIT as assignee. JA64. Akamai is the patent's exclusive licensee. Claim 34 states:

> A content delivery method, comprising:
>
> distributing a set of page objects across a network of content servers managed by a domain other than a content provider domain, wherein the network of content servers are organized into a set of regions;
>
> for a given page normally served from the content provider domain, *tagging at least some of the embedded objects of the page so that requests for the objects resolve to the domain instead of the content provider domain*;
>
> in response to a client request for an embedded object of the page:

> resolving the client request as a function of a location of the client machine making the request and current Internet traffic conditions to identify a given region; and
>
> returning to the client an IP address of a given one of the content servers within the given region that is likely to host the embedded object and that is not overloaded.

JA77 (emphasis added). Claim 19 and dependent claims 20 and 21 are similar, but require the content provider to serve the webpage's base document (usually a webpage's text without images or videos, and instructions on formatting the page). *Id.*; Pet. App. 139a-140a.

As Dr. Leighton explained at trial, the interaction between a "tagged" piece of content and the CDN's intelligent DNS was the "central idea" of the patent. JA131. No one "anywhere [had] come up with the combination of using [tagging] and an intelligent DNS in a content delivery network." *Id.*; *see also* JA69 (patent describing its "novel technique for distributing the embedded object requests").

3. Dr. Leighton and Mr. Lewin initially tried to find business partners but received little support. JA108-109. People in the technology industry "didn't think [their idea] was going to work." JA109. Internet service providers, like AOL, thought it "sounded very much like an ivory tower concept … that … wouldn't work in practice." *Id.* The inventors were left with two options: abandon the idea or form their own company. JA110-111.

In August 1998, they founded Akamai, initially using their personal credit cards to pay for supplies. JA111, 114. The company soon won major customers, including Disney and CNN. JA124; Raskin, *No Better Time* 131-133, 137. Indeed, in the weeks after it began offering commercial service, Akamai "delivered more than ten billion hits for some of the biggest players on the Internet." Raskin, *No Better Time* 138; *see also* Akamai Technologies, Press Release (June 2, 1999), *available at* http://www.akamai.com/html/about/press/releases/1999/press_060299b.html. The innovation was soon compared to "great historical shifts—discoveries of better, faster ways—like the invention of Arabic numerals, or the development of seafaring." Spinrad, *The New Cool: Akamai Overcomes The Internet's Hot Spot Problem*, Wired (Aug. 1999), *available at* http://www.wired.com/wired/archive/7.08/akamai_pr.html; *see also id.* ("The Web's largest sites were straining to meet demand—and frequently failing.... Tom [Leighton] and Danny [Lewin] had conceived a solution, a grand-scale alternative to the Net's routing system.").

In early 1999, Apple co-founder Steve Jobs became so enamored with Akamai that he offered to buy the company. JA121. When Dr. Leighton and Mr. Lewin declined, Apple became one of Akamai's best customers and the company's first corporate investor. JA121-122. The U.S. government also turned to Akamai, first during the "Code Red" cyber-terrorist attack in mid-2001 and again on September 11, 2001, when many government websites were overloaded. JA125-127.

### B. Limelight's Infringing Conduct

Limelight was founded several years after Akamai established itself in the marketplace. JA134. The two companies are direct competitors. JA191.

Limelight's content delivery service depends on the performance of every step of the processes disclosed in claims 19-21 and 34 of the patent-in-suit. Pet. App. 4a, 106a-108a. As the claims envision (and as occurs with Akamai's own service), Limelight offers a *collaborative* service in which both the CDN and the content provider/website owner perform particular steps of the claimed methods. Specifically, Limelight performs nearly every step itself, but leaves the act of tagging (and, under claims 19-21, the act of delivering the base page) to the website owner. *Id.* 106a-107a.[1]

Tagging is vital to Limelight's business model. As Limelight's founder conceded at trial, "[i]f the customer chooses to purchase the Limelight service," the customer must use the Limelight-provided "pointer" (called a "hostname") to tag embedded objects. JA206. Otherwise, Limelight cannot deliver the customer's content. *Id.* (Limelight founder testifying that "[w]e won't see a request for … content [from a customer] … if the Limelight hostname is not somehow involved in

[1] Contrary to Limelight's assertion that it is "disputed" whether its customers perform the tagging step (Br. 7 n.4), the jury found that Limelight infringed claims 19-21 and 34, thus necessarily concluding that Limelight's customers perform the tagging step (JA236-237). As the Federal Circuit panel explained, "[t]here are two tagging methods used by Limelight's customers. … 'In the first method, the customer changes the … address of one or more page objects in the initial web page to point to Limelight's servers (the "prepend method"). In the second method, the customer adds or changes alias information in its [domain name system] record so that the … addresses of the page objects [direct] to Limelight's servers without requiring any change to the customer's initial web page (the "CNAME method").'" Pet. App. 106a-107a (quoting *id.* 181a-182a n.23). The jury was instructed on both tagging methods (*id.* 184a-185a) and specifically found that each infringes (JA236-237).

the process"). Thus, any time Limelight's service is used, the claimed steps of Akamai's patent are performed because a content provider has followed *Limelight's* instructions to use the *Limelight*-provided pointer to tag content.

Limelight collaborates closely with content providers to ensure that they correctly perform the tagging step. Limelight creates a unique hostname for each content provider to use when tagging, such that the Limelight network recognizes that it should serve *that* customer's content. JA192-194, 208. Limelight provides its customers with detailed instructions on how to tag. Pet. App. 115a; JA213-215, 221-226. Limelight employees are on call if a content provider needs additional assistance. Pet. App. 115a; JA216-218, 227-228. Limelight assigns each content provider "a dedicated Technical Account Manager" who Limelight promises will "coordinate between your technical team and our engineers to ensure a quick and complete implementation of your services." JA220. And Limelight's contract with its customers requires that they tag objects in the manner designated by Limelight in order to enjoy Limelight's services. JA231-232; Pet. App. 107a.[2]

As the Federal Circuit panel summarized, Limelight "calls for its customers to assign a unique hostname [to each piece of content they want served], requires content providers to perform certain claim steps

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[2] A content provider may theoretically "choose" not to tag, but that means forgoing Limelight's services. Pet. Br. 5. Whenever Limelight's services are used, the customer must perform the tagging step. The performance of the method is thus not the result of independent choices made without knowledge of what the other actor is doing; it is the product of close collaboration between Limelight and its content provider customers.

if they choose to use Limelight's service, and provides instructions and offers technical assistance for performing those steps." Pet. App. 115a. In the words of one witness: "If the customer … wants Limelight to serve the content, it has to follow the instructions that Limelight has given them." JA132.

### C. Proceedings Below

1. Akamai sued Limelight for direct and indirect infringement of claims 19-21 and 34 of the patent-in-suit, as well as infringement of two other patents not at issue here. Pet. App. 104a-105a.[3] Akamai ultimately withdrew its induced infringement argument under 35 U.S.C. §271(b) and tried its case under a joint infringement theory under 35 U.S.C. §271(a). *Id.* 109a n.3. At the time of trial, Federal Circuit case law held that an accused infringer who performed some steps of a patented method and directed or controlled a third party's performance of the remaining steps could be liable for direct infringement under §271(a). *See BMC Res., Inc.* v. *Paymentech, LP*, 498 F.3d 1373, 1381 (Fed. Cir. 2007). The jury was instructed accordingly.

The jury found the asserted claims valid and directly infringed by Limelight, thus necessarily finding that all steps of those claims were performed by Limelight and content provider customers acting under Limelight's direction or control. JA236-239. The jury awarded Akamai over $40 million in damages. JA240-242.

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[3] Limelight's discussion (Br. 5-6) of *Akamai Technologies, Inc.* v. *Cable & Wireless Internet Services, Inc.*, 344 F.3d 1186 (Fed. Cir. 2003), is irrelevant, as claims 19-21 and 34 were not at issue there. *See* 344 F.3d at 1196.

Limelight moved for judgment as a matter of law (JMOL), but the district court denied the motion, finding that the verdict, including the necessary subsidiary finding of direction and control, was supported by substantial evidence. Pet. App. 148a, 186a.

Several weeks later, the Federal Circuit issued *Muniauction, Inc.* v. *Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), which substantially restricted the scope of joint infringement liability under §271(a). As relevant here, *Muniauction* stated that "direct infringement requires a single party to perform every step of a claimed method," and that where multiple parties perform the steps of a patented method, liability attaches "only if … every step is attributable to the controlling party, i.e., the 'mastermind.'" *Id.* at 1329. This insistence on a hierarchical relationship meant that "'arms-length cooperation' will not give rise to direct infringement by any party." *Id.* Seeing "no material difference" between the facts of *Muniauction* and this case, the district court reversed itself and granted JMOL of noninfringement. Pet. App. 193a.

2. A panel of the Federal Circuit affirmed. Pet. App. 135a. Extending *Muniauction*, the panel decreed a bright-line rule that "direct infringement requires a single party to perform every step of a claimed method," *id.* 109a, and "there can *only* be joint infringement when there is an *agency relationship* between the parties … or when one party is *contractually obligated* to the other to perform the steps," meaning that the contract compels the party to perform the steps, *id.* 112a (emphases added). The court reasoned that Limelight's customers were not its agents in the strict sense, nor were they contractually obligated to perform the claimed steps because they could always forgo Limelight's services. *Id.* 113a, 115a-116a. Therefore,

"[w]hile acknowledging the difficulty of proving infringement of claims that must be infringed by multiple parties," the panel held that Limelight was not liable for direct infringement. *Id.* 116a-117a.

3. The Federal Circuit granted rehearing en banc and asked the parties to address a single question:

> If separate entities each perform separate steps of a method claim, under what circumstances would that claim be directly infringed and to what extent would each of the parties be liable?

Pet. App. 196a. The court subsequently granted rehearing en banc in another case involving questions of induced and contributory infringement. *McKesson Techs. Inc.* v. *Epic Sys. Corp.*, 463 F. App'x 906, 907 (Fed. Cir. 2011) (per curiam). The two cases were consolidated for purposes of argument, but Akamai, Limelight, and their amici were not asked to brief or argue the additional issues.

The Federal Circuit issued a single en banc ruling deciding both cases on induced infringement grounds under §271(b). The court held that inducement requires "all the steps of a claimed method [to] be performed … but … it is not necessary to prove that all the steps were committed by a single entity." Pet. App. 3a. This holding partially overruled the Federal Circuit's 2007 ruling that "[i]ndirect infringement requires, as a predicate, a finding that some party amongst the accused actors has committed the entire act of direct infringement." *BMC*, 498 F.3d at 1379.

The en banc court explained that "[r]equiring proof that there *has been* direct infringement as a predicate for induced infringement is not the same as requiring proof that a single party would be *liable* as a direct infringer." Pet. App. 9a. Not only is this interpretation supported by precedent, the text of §271, legislative history, and rules in analogous areas of the law, *id.* 10a-19a, but "[i]t would be a bizarre result to hold someone liable for inducing another to perform all of the steps of a method claim but to hold harmless one who goes further by actually performing some of the steps himself," *id.* 10a; *see also id.* 9a ("[T]here is no reason to immunize the inducer from liability for indirect infringement simply because the parties have structured their conduct so that no single defendant has committed all the acts necessary to give rise to liability for direct infringement."). Because *BMC* had prevented Akamai from raising a viable induced infringement claim earlier, the en banc court remanded for further proceedings. *Id.* 30a.

Judge Newman, writing separately, disagreed with the majority's focus on §271(b). Judge Newman noted that the case could be "readily decided" in Akamai's favor "under the present law" of direct infringement under §271(a). Pet. App. 61a (dissenting opinion). Judge Newman explained that the anomalous "single entity" rule created in *BMC* and *Muniauction* was "a departure from established precedent" and clashed with the Patent Act's text and legislative history. *Id.* 68a; *see also id.* 37a-46a. Infringement under §271(a) simply "requires that every claimed step of a patented method or system is performed in accordance with the limitations stated in the claim. Thus, when more than one entity performs all the steps, the claim is directly infringed." *Id.* 38a-39a.

In a separate dissent, Judge Linn, joined by three others, agreed with Judge Newman that the majority had wrongly "skirt[ed] … the question of 'joint infringement' liability under §271(a)." Pet. App. 71a. Section 271(a), Judge Linn concluded, "is essential to the resolution of these appeals." *Id.* Judge Linn would have held that "[u]nless someone is *liable* as a direct infringer, no one is liable for indirect infringement." *Id.* 77a (emphasis added).

Limelight petitioned for certiorari, challenging the §271(b) ruling. Akamai's opposition noted (Opp. 35-38), *inter alia*, that Limelight's petition was based on the false premise that Limelight was not liable under §271(a). Akamai also filed a conditional cross-petition, arguing that if this Court granted Limelight's petition, it should directly review the Federal Circuit's "single entity" rule under §271(a). *See* No. 12-960. The Court granted Limelight's petition; Akamai's cross-petition remains pending.

## SUMMARY OF ARGUMENT

I. This case was tried based on Limelight's liability for direct infringement under 35 U.S.C. §271(a). Although Limelight's question presented concerns liability under §271(b), that question arises only on the assumption that Limelight is not liable under §271(a). Section 271(a) liability is thus a logically antecedent question that could fully resolve the case, and this Court should consider that issue first.

The text of the Patent Act and background common law principles permit and, indeed, compel liability for direct infringement of a method patent when multiple entities, working in concert or under common direction or control, perform every step of the claimed method in the United States. The Federal Circuit's contrary ruling depends on a rigid, recently minted "single entity" rule that is inconsistent with the statutory language and introduces an unwarranted, nonstatutory loophole into patent protection for method claims.

Under the narrow "single entity" rule, parties who wish to practice a patented method may simply divide up the steps of the method and infringe with impunity. But traditional common law principles, which this Court often consults in interpreting the Patent Act, make clear that liability for direct infringement, as for any other tort, may arise under accepted theories of joint liability, including direction, control, or concerted action. Interpreting §271(a) in this way also aligns with the policies underlying the Patent Act while protecting unwitting actors who do not know that each step of the patented method will be performed. The jury's verdict—which found, based on substantial evidence, that Limelight directed or controlled the conduct of its content provider customers—should accordingly be reinstated.

II. Alternatively, the en banc Federal Circuit's ruling that Limelight may be held liable for "actively induc[ing] infringement of a patent" under 35 U.S.C. §271(b) should be affirmed. "Infringement" of a patent is a violation of an inventor's exclusive right to the patented invention. 35 U.S.C. §154(a)(1). "Infringement" accordingly occurs when the patented invention is made, used, offered for sale, or sold within the United States, or imported into the United States, without authorization. For purposes of the method claims in this case, the invention is used, and infringement occurs, when the claimed steps are performed in this country. Limelight "actively induces infringement" when it knowingly causes or brings about such performance of the claimed steps.

Limelight's challenge depends on rewriting §271(b) to proscribe only the inducement of "*actionable* direct infringement," which, it asserts, happens only when a single entity performs all claim steps. Pet. Br. 20, 22-23 & n.9 (emphasis added). But the statute does not say "actionable direct infringement"; it says "infringement." Holding a defendant liable when it induces all the *acts* required to constitute direct infringement—whether performed by one or more parties—is consistent with the plain text of the Patent Act of 1952, relevant pre-1952 patent cases, the law of aiding and abetting, tort principles, and this Court's precedent. Limelight's position, by contrast, would convert the inventor's "exclusive right" to the patented invention into a partial, incomplete right easily avoidable by parties who do not design around the invention, but simply structure their activity to avoid having a "single entity" perform all claim steps.

Absent clear statutory direction not present here, the Court should not assume that Congress intended the "bizarre result" (Pet. App. 10a) that an entity that performs all the steps of a patented method or induces another to perform all the steps is liable for infringement, but an entity like Limelight that performs some of the steps while inducing another to perform the rest avoids liability entirely.

III. As the government acknowledges (Br. 7), "sound reasons of patent policy" support holding Limelight liable. Limelight's rhetoric about unpredictable liability is misplaced: because joint liability under §271(a) requires direction, control, or concerted action, and because inducement liability under §271(b) requires a showing of specific intent, "innocent" or "independent" parties will not be implicated. Similarly fanciful are Limelight's attempts to portray its efforts to create and exploit a legal loophole as "designing around" Akamai's patent. Nor can the harm from Limelight's rule be counteracted by directing all method claims to conduct performed by a single actor; not only is that often not possible (*see, e.g.*, U.S. Br. 33, ABA Br. 5), but even "single-actor" claims are ineffective if, as Limelight urges, two actors can evade liability by simply dividing up performance of the patented steps.

## ARGUMENT

### I. LIMELIGHT IS LIABLE FOR DIRECT INFRINGEMENT UNDER §271(a) UNDER A THEORY OF JOINT LIABILITY

#### A. Limelight's Liability Under §271(a) Is Fairly Included In The Question Presented

Limelight has urged this Court (Pet. Br. i; Pet. i) to determine whether "a defendant may be held liable for inducing patent infringement under 35 U.S.C. §271(b) even though no one has committed direct infringement under §271(a)." The meaning of "direct infringement under §271(a)," and in what circumstances liability for such infringement attaches, is thus "a predicate to an intelligent resolution of the question presented, and therefore fairly included therein." *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (internal quotation marks omitted); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996).

The centrality of §271(a) is reinforced by the attention it receives throughout Limelight's brief, which contains repeated assertions about what constitutes infringement under §271(a). *E.g.*, Br. 1 ("[T]o establish direct infringement under §271(a), the patent owner must prove that the accused infringer performed all the steps of the claimed method, either personally or through another acting under his direction or control."); *see also id.* 18 ("[T]he conduct by Limelight and its customers does not constitute direct infringement … under §271(a)."); *id.* 16, 22-23, 31. The government goes even further by *advocating* that §271(a) has "limitations … in addressing cases like this one" (Br. 13) and that Limelight may "avoid liability altogether" because, in the government's view, "traditional principles of vicarious liability would not support attributing customers' voluntary actions to the vendor for purposes of direct-infringement liability" (*id.* 14). And, as Limelight is at pains to point out (Br. 8), this case was litigated throughout under §271(a).

The issues of liability under §271(a) and (b) are therefore inextricably intertwined—indeed, the §271(a) issue is logically prior to the §271(b) issue. This Court should not undertake an unduly narrow review of Limelight's potential liability under §271(b) that rests on an erroneous assumption about §271(a). *See Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 382 (1995) ("When a question is … both prior to the clearly presented question and dependent upon many of the same factual inquiries, refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous, a risk that ought to be avoided.").

Even if Limelight's question presented were not expressly premised on assumptions regarding §271(a), consideration of Limelight's liability under that provision would still be appropriate, as several amici recognize. *E.g.*, ABA Br. 7-8; IBM Br. 25-29; IPO Br. 15-19. Indirect infringement "is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Sony Corp. of Am.* v. *Universal City Stu-*

*dios, Inc.*, 464 U.S. 417, 435 (1984). Thus, in the copyright context, this Court has held that "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn" and that "[r]easoned analysis of [a contributory infringement claim] necessarily entails consideration of arguments and case law which may also be forwarded under the other labels." *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005) (internal quotation marks omitted); *see also Sony*, 464 U.S. at 435 n.17. The same reasoning applies here.

If this Court decides the §271(a) question as the law directs and as the jury was instructed (Pet. App. 185a-186a; JA236-237), the decision will fully resolve this case and others. *See U.S. Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) ("[A] court may consider an issue 'antecedent to … and ultimately dispositive of' the dispute before it." (quoting *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990))). Accordingly, liability under §271(a) is a "prior question" that this Court can and should decide before addressing §271(b). *Lebron*, 513 U.S. at 381 (emphasis omitted).

### B. Section 271(a) Permits Joint Liability For Direct Infringement Under A Theory Of Direction, Control, Or Concerted Action

1. The Federal Circuit has created an inflexible "single entity" rule under §271(a), whereby "direct infringement requires a single party to perform every step of a claimed method" and "'arms-length cooperation' will not give rise to direct infringement by any party." *Muniauction, Inc.* v. *Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008). This judicially created rule dates back only a few years and has become significant-

ly more rigid in successive cases, culminating in the panel decision in this case, which imposed a *per se* rule of no §271(a) liability except in cases involving a formal agency relationship or contractual obligation to perform claimed steps. Pet. App. 109a-112a.

Any "gap" in infringement liability on the facts of this case (*see* U.S. Br. 14) is not a gap in the *statute*, but a gap that the Federal Circuit created with its narrow "single entity" rule. When the statute is properly interpreted, there is no "gap" in §271(a) liability at all.

Section 271(a) provides that "*whoever* without authority … uses … any patented invention … infringes the patent." 35 U.S.C. §271(a) (emphasis added). The word "whoever" is not limited to a single entity. The Dictionary Act directs that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. §1. The Dictionary Act also specifies that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Id.*; *see also American Heritage College Dictionary* 1540 (3d ed. 1997) (defining "whoever" as "[w]hatever person or *persons*" (emphasis added)).

Other Patent Act provisions also use "whoever" to refer to multiple actors. For example, the statute repeatedly uses "whoever" to refer to inventors who may obtain patents, including *joint* inventors. *E.g.*, 35 U.S.C. §101 ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter … may obtain a patent therefor[.]"); *id.* §161 (same for plant patents); *id.* §171 (same for design patents). Because multiple inventors may jointly hold a patent, *id.* §116(a), the term "whoever" necessarily includes multiple actors. It follows that the same word, when used in §271(a), also covers multiple parties that together "use[]" an invention without authorization. *See Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

Limelight does not address §271(a)'s use of the word "whoever"; it simply asserts that "performance of less than all the steps of a method … does not constitute direct infringement." Pet. Br. 22-23; *see also* U.S. Br. 11 ("use" of patented invention requires performance of all steps). But the requirement that all claim steps be performed has never been disputed. The dispute is over *who* must perform those steps in order to trigger liability for direct infringement. Rather than address the actual statutory term that answers that question—"whoever"—Limelight and the government rewrite the statute, under the guise of paraphrase, to substitute singular terms like "one," "he," "the accused infringer," "a defendant," a "person," or "a party." Pet. Br. 22, 24; U.S. Br. 8, 11, 12, 16. They never explain why an invention is not "use[d]" (U.S. Br. 11)—or a patentee's "exclusive rights" are not "invade[d]" (Pet. Br. 22)—when all steps of the patented method are performed by "whoever," including two parties acting in concert. In fact, just as two parties jointly invent a patented method when, in collaboration, one invents some steps and the other invents the rest, 35 U.S.C. §101 ("[w]hoever invents"), two parties jointly "use[]" a patented method when, in collaboration, one performs some steps and the other performs the rest, *id.* §271(a) ("whoever … uses").

2. Common law principles against which Congress legislated also support recognizing joint liability under §271(a). "[W]here Congress uses a common-law term in a statute, we assume the 'term … comes with a common law meaning,'" *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011), and "'[t]he common law … ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose,'" *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983).

Here, common law tort principles are highly probative. Patent infringement, "whether direct or contributory, is essentially a tort." *Carbice Corp. of Am.* v. *American Patents Dev. Corp.*, 283 U.S. 27, 33, *supplemented on reh'g by* 283 U.S. 420 (1931). This Court has accordingly relied on tort analogies in interpreting the Patent Act. *E.g.*, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 500-501 (1964) ("*Aro II*") (noting that "a contributory infringer is a species of joint-tortfeasor" and discussing common law tort principles).

The government concedes that "in enacting the Patent Act, Congress 'legislate[d] against a legal background of ordinary tort-related vicarious liability rules and consequently intend[ed] its legislation to incorporate those rules.'" U.S. Br. 12 (quoting *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003)). But without citing any authority (*id.*), the government assumes that the Federal Circuit's narrow "single entity" rule is consistent with those background principles when, in fact, it is not.

At common law, a person was "subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences." *Restatement of Agency* §212 (1933). This rule "is not dependent upon the law of agency but results from the general rule, stated in the Restatement of Torts, that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result." *Id.* §212 cmt. a. It "is equally applicable to situations not involving an agency relationship." *Id.*; *see also Restatement (Second) of Torts* §877 cmt. a (1979) ("[O]ne who accomplishes a particular consequence is as responsible for it when accomplished through directions to another as when accomplished by himself. … [The rule] is independent of the existence of liability upon this [master/servant] ground."). For example, in *Haynie* v. *Jones*, 127 S.W.2d 105, 108 (Mo. Ct. App. 1939), the defendant was subject to "direction and control" liability for his friend's negligent driving where the defendant's father owned the car and the defendant was "in the front seat and assisting in and directing its driving."

The law has also long recognized joint liability for torts committed by multiple defendants acting in concert. "The original meaning of a 'joint tort' was that of vicarious liability for concerted action." Prosser, *Handbook of the Law of Torts* §109 (1941); *see also Restatement (Second) of Torts* §876(a) (a person is liable when he "does a tortious act in concert with the other or pursuant to a common design"); Harper, *A Treatise on the Law of Torts* §302 (1933) (joint liability when there is "concert of action," meaning "two or more persons actually participate in the wrongful action in pursuance of a common plan or design"); 2 Dobbs et al., *The Law of Torts* §435 (2d ed. 2011) (joint liability for "[t]hose who cooperate, tacitly or expressly, in particular conduct to pursue a common illegal design" (footnote omitted)).

Contrary to the Federal Circuit's *per se* rule (Pet. App. 111a-113a), the common law did not restrict joint liability for concerted action to cases in which one party was another's agent or contractual obligor. Rather, a "common plan or design" was sufficient. Harper §302; *see also* Prosser §109 ("common purpose, with mutual aid in carrying it out"). Thus, two people were jointly liable when "there was evidence which tended to show that they acted in concert, and to accomplish a common object" even though they "did not participate directly in all of the … acts of the other." *Price* v. *Price*, 60 N.W. 202, 205 (Iowa 1894). And even without a "prearranged plan," joint liability arose when "one person act[ed] to produce injury with full knowledge that others [we]re acting in a similar manner and that his conduct w[ould] contribute to produce a single harm." Harper §302. For example, in *Warren* v. *Parkhurst*, 92 N.Y.S. 725, 725-726 (N.Y. Sup. Ct. 1904), twenty-six mill owners were sued for "discharging sewage and other foul matters into the creek" where "if but one of the defendants was discharging into the stream, the use might not be unreasonable" and "no liability would arise." The suit could be maintained because "while each defendant acts separately, he [wa]s acting at the same time in the same manner as the other defendants, *knowing* that the contributions by himself and the others … w[ould] result necessarily in the destruction of the plaintiff's property." *Id.* at 727 (emphasis added).

Courts also imposed liability for harm done by multiple actors, even though each act alone was not a tort. *See* Prosser §47 ("[A]cts which individually would be innocent may be tortious if they thus combine to cause damage."); *see also infra* pp. 44-45. Provided a defendant "knows … that his conduct may concur with that of others to cause damage," he may be held jointly liable. Prosser §47; *see also Folsom* v. *Apple River Log-Driving Co.*, 41 Wis. 602, 610 (1877) (liability for flooding due partially to defendant's dam was not excused by the existence of another obstruction that contributed to the flood, where defendant "had notice beforehand of such obstruction, and of the fact that its effect, together with the company's use of the water beyond its natural flow, would be to flo[od] the plaintiff's land").

As applied in the §271(a) context, these common law principles ensure that unwitting actors are not held liable. Only those entities who direct or control others or know that each step of the patented method will be performed through their concerted action will be liable based on the totality of the acts performed in concert. Thus, concerns about "being forced to speculate about the conduct of independent third parties" (CTIA Br. 14), the unknown "activities of other actors along a supply chain" (Cargill Br. 24), configurations of a network that are "not known" (Google Br. 14), and the other hypotheticals advanced by Limelight's amici are inapposite. The common law's calibrated approach, as applied to §271(a), protects actors who do not know that a patented method is being performed.[4]

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[4] This does not mean that direct infringement acquires an intent element. *See* IPO Br. 13-15. Rather, knowledge is the common law's test for determining whether a defendant is responsible for the acts of *others* combined with its own acts. Once that knowledge is shown, then the combined conduct is evaluated for its tortious character—which, in the case of direct infringement under §271(a), is done by comparing the accused conduct to the asserted patent claims on a strict liability basis. *See Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2065 n.2 (2011).

3. These joint liability principles were applied in patent cases predating the 1952 Patent Act. *See Warner-Jenkinson Co.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17, 26 (1997) ("[P]re-1952 precedent survived the passage of the 1952 Act."). Before becoming President and Chief Justice, then-Judge William Howard Taft explained that joint liability for patent infringement was consistent with common law tort principles and essential to fulfilling the purpose of the patent laws:

> An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, either by actual participation therein or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting, before the latter can be held liable. When that is present, however, the joint liability of both the principal and the accomplice has been invariably enforced. If this healthful rule is not to apply to trespass upon patent property, then, indeed, the protection which is promised by the constitution and laws of the United States to inventors is a poor sham.

*Thomson-Houston Elec. Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (6th Cir. 1897); *see also York & Md. Line R.R. Co.* v. *Winans*, 58 U.S. (17 How.) 30, 40 (1854) (a railroad company that owned rails on which a different company operated infringing cars for both companies' profit was "a principal, cooperating with another corporation, in the infliction of a wrong, and … directly responsible for the resulting damage"); *Wallace* v. *Holmes*, 29 F. Cas. 74, 80 (C.C.D. Conn. 1871) (imposing joint liability where the parties "engaged in a common purpose to infringe the patent, and actually, by their concerted action, produc[ed] that result"); *New Jersey Patent Co.* v. *Schaeffer*, 159 F. 171, 173 (C.C.E.D. Pa. 1908) ("Where an infringement of a patent is brought about by concert of action between a defendant and complainants' licensee, all engaged directly and intentionally become joint infringers."); *Jackson* v. *Nagle*, 47 F. 703, 704 (C.C.N.D. Cal. 1891) (contractor and subcontractors were liable as "joint infringers" of a method claim where "a portion of the work was done by … the contractor, and other portions by the subcontractors").

Similarly, leading pre-1952 patent treatises by Robinson and Walker, which this Court has often consulted, recognized joint liability for patent infringement beyond the narrow confines of the Federal Circuit's "single entity" rule. Robinson's 1890 treatise taught that "[a]n act of infringement is committed by … acting in complicity with others under any cover or pretense the practical effect of which is an invasion of the monopoly created by the patent. All who perform or who unite in the performance of an act of infringement, by any of these methods, may be sued jointly or severally at the option of the plaintiff[.]" *The Law of Patents for Useful Inventions* §946 (1890) (footnote omitted). And Walker confirmed that "[w]here several persons cooperate in any infringement, all those persons are liable therefor as contributors thereto. In that, as in all cases of torts for which several persons are liable, all may be sued jointly, or any of them may be sued alone." *Text-Book of the Patent Laws of the United States of America* §406 (4th ed. 1904) (footnote omitted).

Several patent cases decided shortly before the Federal Circuit adopted its "single entity" rule continued to follow these principles. *E.g.*, *On Demand Mach.*

*Corp.* v. *Ingram Indus., Inc.*, 442 F.3d 1331, 1345 (Fed. Cir. 2006) ("discern[ing] no flaw" with jury instruction that "'[w]here the infringement is the result of the participation and combined action(s) of one or more persons or entities, they are joint infringers'"); *Hill* v. *Amazon.com, Inc.*, 2006 WL 151911, at *2 (E.D. Tex. Jan. 19, 2006) ("[A]lthough proof of an agency relationship or concerted activity would be sufficient to impose liability … such a showing is not invariably required.").

Thus, Akamai is not arguing that the scope of infringement liability "is wider … than courts had previously thought." *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 531 (1972). Rather, Akamai simply seeks restoration of the correct interpretation of joint liability under §271(a), consistent with the Patent Act's text and the common law, which was upended when the Federal Circuit adopted its unjustified "single entity" rule in *Muniauction* and the panel decision in this case.[5]

### C. Recognizing Joint Liability Under §271(a) Furthers The Patent Act's Purposes; A Rigid "Single Entity" Rule Does Not

Beyond its inconsistency with the Patent Act's text and common law principles, the Federal Circuit's inflexible "single entity" rule undermines the very pur-

[5] Notably, the Federal Circuit panel in this case leapt from uncontroversial statements that an unconditional contractual obligation or agency relationship "may" trigger joint liability to a *per se* rule that "there can *only* be joint infringement" in those two circumstances. Pet. App. 111a-112a (emphasis added). The panel cited no authority, and certainly no statutory or common law basis, for its conclusion that those two scenarios are the *only ones* where joint liability is appropriate.

pose of the Patent Act, as it encourages and rewards gamesmanship with no concomitant benefit.

Under the Federal Circuit's current view of §271(a), two or more parties seeking to capitalize on another's patented method may join forces and agree to divide up the steps of the method, as long as they are not in a formal agency relationship and their scheme is not memorialized as an unconditional contractual obligation. The Federal Circuit thus acknowledged that its rule will permit multiple parties engaged in "'arms-length cooperation'" "to perform every step of a claimed method" to avoid liability. *Muniauction*, 532 F.3d at 1329.

Following *Muniauction*, the Federal Circuit approved a judgment of no liability in a case in which two companies formed a "strategic partnership" and "collaborated to sell … two programs as a unit" that, in combination, practiced all steps of a patented method. *Golden Hour Data Sys., Inc.* v. *emsCharts, Inc.*, 614 F.3d 1367, 1371 (Fed. Cir. 2010). Consistent with that "absurd conclusion" (ABA Br. 8a), industry publications now recommend structuring a contract to make clear "that it is the result of an arm's length negotiation" and to "specifically disclaim any agency relationship" in order to avoid infringement liability. Gray, *Contract Clauses Offer Protection in Infringement Suits*, 25 In-HouseTexas 7, 8 (Jan. 11, 2010); *see also* ABA Br. 9a ("[M]any companies are modifying their standard contracts with the express goal of taking advantage of this loophole.").

The result of the Federal Circuit's rigid "single entity" rule is accordingly that method patents may be practiced with impunity by multiple parties acting in concert—a situation that gives method claims "little value," *Wallace*, 29 F. Cas. at 80, and leaves them "a poor sham," *Thomson-Houston*, 80 F. at 721 (Taft, J.). Absent clear textual direction, this Court does not typically interpret statutes in a manner that renders them ineffective or easily circumvented. Under the Federal Circuit's rule, however, Congress's express recognition that a "new and useful process" is worthy of patent protection, 35 U.S.C. §101, is significantly undercut, because it is "relatively easy for an entity to structure its business dealings" to avoid any liability, even if its business model (like Limelight's) relies on the performance of every step of a patented method. ABA Br. 8; *see also* Robinson, *No "Direction" Home: An Alternative Approach to Joint Infringement*, 62 Am. U. L. Rev. 59, 100 (2012) ("[A] rule based solely on the relationship between relevant actors creates a legal loophole … [that] is a roadmap for perceptive entities, allowing them to reap the benefit of a patent that cannot be enforced.").

Limelight's suggestion (Br. 42) that its outsourcing of one or two claim steps to content providers constitutes "improv[ing] on" or "invent[ing] around" the patented method only confirms the extremity of its position. Limelight has not developed an "'alternative device[] or method[] … that [is] sufficiently different'" from Akamai's. *Id.* Instead, Limelight's service depends on the performance of *exactly* the steps claimed in the patent-in-suit. Limelight simply seeks to benefit from the rigid "single entity" rule that the Federal Circuit declared in 2007 and then narrowed after this case went to verdict.[6]

[6] Given that the "single entity" rule is of recent vintage, claims of disrupting "'settled expectations'" or reliance on "previously-established law" (U.S. Br. 31-32) carry no weight. Relatedly,

Notwithstanding contrary assertions (*e.g.*, U.S. Br. 31; Microsoft Br. 3), this Court can and should correct that rule without waiting for Congress. The narrow "single entity" rule is not the product of legislative judgment, but of an erroneous, recent interpretation by panels of the Federal Circuit. This Court has not hesitated to correct such errors in the past. *E.g.*, *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005). Indeed, this Court need not develop new doctrine under §271(a), but merely declare the end of the brief interregnum of *Muniauction* and the panel decision in this case. Although Congress can certainly act if it disagrees and wants to narrow §271(a)'s text and deviate from the common law, Congress already spoke when it enacted non-limiting language ("whoever … uses") against a backdrop of common law liability for direction, control, or concerted action. The proper way to defer to Congress's policymaking role is to enforce that provision as written and to hold Limelight liable.[7]

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the notion that patent claims requiring more than one actor were previously "prohibited" or "unenforceable" (Google Br. 24) is bizarre. Claims requiring multiple actors have been long known, and the only settled expectations that have been upset are those of inventors whose rights have been undermined by the Federal Circuit's newly minted "single entity" rule. *See infra* pp. 53-54.

[7] This case is markedly different from *Deepsouth*, where the statute expressly answered the question at issue by providing that infringing conduct must occur "within the United States." 35 U.S.C. §271(a); *Deepsouth*, 406 U.S. at 527 ("The statute makes it clear that it is not an infringement to make or use a patented product outside of the United States."). Here, by contrast, *no* statutory language supports the Federal Circuit's "single entity" rule. *See supra* pp. 22-23.

*Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007), is likewise inapposite, as there is no extraterritoriality issue in this case, and the accused conduct *does* infringe the patent "[u]nder a con-

### D. The Jury's Finding That Limelight Directed Or Controlled All Steps Of The Claimed Method Is Sufficient To Impose Liability Under §271(a)

To resolve this case, this Court need only clarify that—contrary to the Federal Circuit panel's narrow "single entity" rule—a party may "direct or control" another in circumstances other than formal agency and certain contractual relationships. *See* IPO Br. 4, 17. Such a holding would lead to reinstatement of the jury verdict in this case.

The district judge instructed the jury to evaluate the "interaction" between Limelight and its content provider customers to determine whether the content providers acted under Limelight's "'direct[ion] or control'" or "'entirely independently.'" Pet. App. 185a. Over thirteen trial days, the jury heard testimony about the detailed directions that Limelight gives content providers regarding how to perform some of the patented steps, and how Limelight assigns each content provider a "dedicated Technical Account Manager" to assist it in doing so. *Id.* 115a; JA216-218, 220, 227-228. The jury also learned that, to use Limelight's services, content providers are contractually *required* to perform the method steps as Limelight directs using the tag that Limelight has provided. JA231-232; *see also* JA132.

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ventional reading" of §271, *see id.* at 452, because the patented invention is being "use[d]" in the United States through the performance of all claim steps by Limelight and others acting at its direction or in concert with it. *See* Ten IP Professors Br. 13 n.3 (conceding that "the extraterritoriality issue … is not present in the case … at present" (emphasis omitted)).

Based on this and other evidence, the jury found that Limelight directly infringed, and the district judge initially denied JMOL, ruling that "there was evidence that not only was there a contractual relationship between Limelight and its customers, but that [Limelight] provided those customers with instructions explaining how to utilize its content delivery service." Pet. App. 186a. The judge held this sufficient to find Limelight liable under a "direction or control" theory. It was only after the Federal Circuit decided *Muniauction* that the judge reversed course, finding "no material difference between Limelight's interaction with its customers and that of [the defendant] in *Muniauction*." *Id.* 193a.

Thus, this Court need only clarify that, while a strict agency relationship or unconditional contractual obligation is certainly *sufficient* to impose joint infringement liability under §271(a), it is by no means *necessary*. Rather, "direction or control" should be a flexible, fact-intensive standard that includes situations in which one party instructs another on performing patented method steps and, as here, expects and needs the other to perform those steps to achieve a common aim. *Accord* ABA Br. 1; IPO Br. 17-18. As the district court held, Akamai sustained its burden under that correct, pre-*Muniauction* version of the direction or control test. Pet. App. 186a.

Akamai has also sustained its burden under a concerted action theory. Limelight "actually participate[d] in the wrongful action" by performing all the steps of Akamai's patented method together with its customers "in pursuance of a common plan," Harper §302, to achieve "efficient content delivery," Pet. App. 4a. And Limelight possessed the requisite knowledge that its customers performed the remaining steps of Akamai's method that Limelight did not itself perform (tagging and base page delivery). Indeed, it instructed them how and gave them the means to do just that. Pet. App. 115a; JA213-215, 221-226.

Accordingly, the judgment of direct infringement against Limelight should be reinstated. That outcome would resolve the case and obviate the need to reach §271(b), which this brief addresses in the alternative below.

## II. LIMELIGHT MAY BE HELD LIABLE FOR "ACTIVELY INDUC[ING] INFRINGEMENT" UNDER §271(b)

### A. A Defendant "Actively Induces Infringement" Of A Method Claim When It Causes The Performance Of All Claimed Steps In The United States, Whether Or Not The Steps Are Performed By A Single Entity

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. §271(b). Applying this provision, the en banc Federal Circuit recognized that "there can be no indirect infringement without direct infringement." Pet. App. 8a. But it correctly rejected the notion—which had crept into panel decisions—that "[r]equiring proof that there *has been* direct infringement as a predicate for induced infringement" requires that "a single party would be *liable* as a direct infringer." *Id.* 9a. The en banc court's ruling is consistent with §271(b)'s language and history, other provisions of the Patent Act, this Court's case law, and principles in analogous fields.[8]

[8] Thus, the en banc court did not "hold[] that there no longer is a requirement of a finding of §271(a) infringement as a predicate for inducement liability." Google Br. 6; *see also* Microsoft Br. 4, 8; IBM Br. 8-9; IPO Br. 13. Nor was there any "elimination of the 'all

Limelight's contrary reading of the statute depends on importing a nonstatutory requirement that the infringement induced under §271(b) be independently "actionable" under §271(a). *E.g.*, Pet. Br. 1, 2, 16, 20. But the statute is not so worded. Section 271(b) refers to inducing "infringement," not to inducing "actionable infringement" or "a single entity to infringe."

"Infringement," in the intellectual property context and elsewhere, has always meant an encroachment upon, invasion of, or violation of a right. *Black's Law Dictionary* 851 (9th ed. 2009) ("*Intellectual property.* An act that interferes with one of the exclusive rights of a patent[.]"); *see also Black's Law Dictionary* 961 (3d ed. 1933) ("A breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right. Used especially of invasions of the rights secured by patents[.]"); Black, *A Dictionary of Law* 622 (1891) (same); *American Heritage College Dictionary* 698 ("[a]n encroachment, as of a right or privilege"). In all of these definitions, infringement refers to harm inflicted upon a rights-holder, irrespective of how or by whom and whether any one person is liable.

Congress's reference to "infringement of a patent" in §271(b) thus encompasses any situation in which the patentee's exclusive right to its patented invention is violated by the invention's unauthorized practice in the United States. *Carbice*, 283 U.S. at 33 ("Infringement, whether direct or contributory, … implies invasion of some right of the patentee."). The Patent Act defines the "right" granted to the patentee as "the

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elements' … rule." Google Br. 6; *see also* U.S. Br. 11; IBM Br. 12. Rather, the court simply recognized that "infringement" occurs when "all elements" of the patented method are practiced in the United States, whether or not performed by a "single entity."

right to exclude others from making, using, offering for sale, or selling the invention throughout the United States." 35 U.S.C. §154(a)(1); *see also Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 455 (2007) (citing §154(a)(1) as setting forth the "exclusive rights in an invention within the United States" granted to a patentee).

Section 271(a) mirrors this grant of rights. Indeed, §271(a) "[wa]s not actually necessary because the granting clause [§154(a)(1)] creates certain exclusive rights and infringement would be any violation of those rights." H.R. Rep. No. 82-1923, at 9 (1952); *accord* S. Rep. No. 82-1979, at 8 (1952).[9]

Thus, in the case of a method patent, infringement occurs when the invention is used through the performance of all its steps without authorization in the United States. *E.g.*, *Aro II*, 377 U.S. at 484 ("[I]t has often and clearly been held that unauthorized use, without more, constitutes infringement."); *see also* Robinson §925 ("The infringement of a patented art consists only in the performance of all the acts of which it is composed or their equivalents, in the manner and in the order in which they are claimed in the patent."). Indeed, this Court's first indirect infringement case focused on

[9] Judge Linn's dissent below (Pet. App. 74a; *see also* Clearing House Br. 7; Microsoft Br. 4-5) invoked an earlier sentence from the same paragraph of the House and Senate Reports, which states that §271(a) "is a declaration of what constitutes infringement." As noted in text, the reports hasten to add that §271(a) is unnecessary and that "infringement" is any violation of rights defined by §154(a)(1). Thus, in context, the statement about §271(a) declaring "what constitutes infringement" is a reference to the *acts* listed in both §271(a) and §154(a)(1) (including "us[e]"), not a statement that induced infringement requires *liability* under §271(a).

whether the defendants "intend[ed] to have [their device] used … to produce *the results* set forth in the [inventors'] patents." *American Cotton-Tie Co.* v. *Simmons*, 106 U.S. 89, 95 (1882) (emphasis added).

Performance of the claimed method is an "infringement" for purposes of §271(b), regardless of how many actors perform it, because performance violates the patentee's "right to exclude others from … using … the invention." 35 U.S.C. §154(a)(1). What matters is the "impact on the patentee" (Pet. App. 9a), namely that the invention to which it has an exclusive right has been "use[d]" in the United States.

Contrary to the en banc dissenters' assertion (Pet. App. 69a; *see also* Google Br. 8), this understanding of §271(b) does not give "infringement" a different meaning in §271(a) and (b). "Infringement" in both sections refers to conduct that invades the patentee's rights—here, the "use" of the claimed process without authorization in the United States. Indeed, it is Limelight that effectively amends the statutory grant to provide only "the right to exclude [*a single actor*] from … using … the invention," a limitation found nowhere in the statute.

Section 282 reinforces the understanding of "infringement" as an invasion of the patentee's exclusive right to practice its invention, rather than a reference to *liability* of a single actor for direct infringement. Section 282(b)(1) creates separate defenses for "[n]oninfringement" and "*absence of liability* for infringement." 35 U.S.C. §282(b)(1) (emphasis added). If, as Limelight suggests, infringement meant "actionable direct infringement," then the second provision would not only be redundant of the first, but also internally self-contradictory, since an absence of liability would mean no infringement to begin with.

Limelight argues (Br. 25-26) that post-1952 additions to §271 demonstrate that congressional action is required to extend infringement liability beyond Limelight's narrow interpretation of §271(b). But §271(e)(2), (f), and (g) were added to address *acts* that go beyond "making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States." 35 U.S.C. §154(a)(1); *see also* U.S. Br. 16 n.2 (noting that §271(e)(2) and (g) "provide that certain narrow categories of conduct that are not encompassed by Section 271(a) also constitute infringement"). Nothing in these provisions undermines the en banc Federal Circuit's holding that inducing infringement of a patented method simply means inducing the performance in the United States of every step of the method. Indeed, as the court noted, provisions like §271(e)(2) show that "the statute uses the term 'infringement' in a way that is not limited to the circumstances that give rise to liability under section 271(a)." Pet. App. 20a.[10]

Pre-1952 patent cases support this understanding of "infringement" as an invasion of rights, regardless of how many actors are involved. This Court has recog-

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[10] The government's invocation of §281 (Br. 17-18) fares no better. Section 281, which grants patentees a "remedy by civil action for infringement," was intended as a preamble to the section on remedies and, as the en banc court concluded (Pet. App. 21a), merely ensures the right to a jury trial under the Seventh Amendment. *See* H.R. Rep. No. 82-1923, at 10, 29; Federico, *Commentary on the New Patent Act*, *reprinted in* 75 J. Pat. & Trademark Off. Soc'y 161, 215 (1993); *see generally* 35 U.S.C. ch.29, §§281-299 ("Remedies for Infringement of Patent, and Other Actions").

nized that pre-1952 law is particularly relevant to interpreting §271(b), as "[t]he section was designed to codify in statutory form principles of contributory infringement which had been part of our law for about 80 years." *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2065-2066 (2011) (internal quotation marks omitted); *see also* H.R. Rep. No. 82-1923, at 5 (statute incorporates "*the judicial doctrine* of contributory infringement in §271" (emphasis added)).

Pre-1952 patent law established that "[t]o use in part with intent that others shall complete the operation … is likewise an infringement." Robinson §904; *see also Solva Waterproof Glue Co.* v. *Perkins Glue Co.*, 251 F. 64, 73-74 (7th Cir. 1918) (defendant who performed part of a patented process with the intent that its customers perform the remaining step was liable because "one who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination is guilty of contributory infringement"); *Peerless Equip. Co.* v. *W.H. Miner, Inc.*, 93 F.2d 98, 105 (7th Cir. 1937) (holding defendant "guilty of contributory infringement of each of the process claims," even though when the defendant "deliver[ed] its gears to the purchaser the final step in each of the process claims ha[d] not been taken," because the defendant also knew that railroad purchasers of its products would "complet[e] the final step of the process").[11]

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[11] The government misses the point in arguing that there is no "indication that Congress knew of and intended to codify the Seventh Circuit's decisions." U.S. Br. 30. Those decisions, like early patent treatises such as Robinson, reflect the common law understanding of indirect infringement. "Absent contrary direction from Congress, [courts] begin [their] interpretation of statutory language with the general presumption that a statutory term

An unauthorized use of Akamai's patented method indisputably occurred in this case when Limelight and its customers together practiced all the claimed steps in the United States. The jury so found (JA236-237), and—despite Limelight's efforts to create a factbound dispute on the point (Br. 7 n.4)—that finding is amply supported by substantial evidence. Pet. App. 106a-108a; *supra* p. 10 n.1. Since Akamai's exclusive rights were invaded, its patent was infringed, and Limelight may be held liable under §271(b) so long as it "actively induce[d]" that "infringement." As the en banc Federal Circuit noted,

> It would be a bizarre result to hold someone liable for inducing another to perform all of the steps of a method claim but to hold harmless one who goes further by actually performing some of the steps himself. The party who actually participates in performing the infringing method is, if anything, more culpable than one who does not perform any steps.

Pet. App. 10a.

### B. Analogous Criminal And Tort Law Principles Likewise Hold Actors Liable For Inducing Harm, Irrespective Of The Inducee's Liability

Although Limelight urges this Court to disregard analogous criminal and tort law principles (Br. 32-33), this Court has recognized their relevance in interpreting §271(b). *See Global-Tech*, 131 S. Ct. at 2068-2071 (applying criminal law concept of "willful blindness"

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has its common-law meaning." *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 402 (2003).

under §271(b)); *supra* p. 24. Those background principles strongly support the en banc court's judgment.

The federal aiding and abetting statute provides that "[w]hoever … aids, abets, [or] induces" "an offense against the United States" is "punishable as a principal." 18 U.S.C. §2(a). As Limelight concedes (Br. 35 n.16), the drafters of §271(b) would have been aware of §2, which was revised by the same Congress. Indeed, the House and Senate reports described §271(b) as a form of aiding and abetting liability. H.R. Rep. No. 82-1923, at 9 ("Paragraph (b) [of §271] recites in broad terms that one who aids and abets an infringement is likewise an infringer."); S. Rep. No. 82-1979, at 8 (same).

Contrary to Limelight's argument (Br. 33-34 & n.14), this Court has recognized that criminal aiding and abetting under both §2(a) and common law does *not* depend on any one person being primarily liable for an offense. In *Rosemond* v. *United States*, 134 S. Ct. 1240, 2014 U.S. LEXIS 1787, at *16 n.6 (2014), this Court described a scenario in which four people participate in a kidnapping by individually performing the elements of the offense so that "[n]one would have personally completed … all elements of the offense." While no participant individually committed the kidnapping, "an offense against the United States" indisputably occurred, and "if [the participants] had the requisite intent[] *all would be liable* under §2" as aiders and abettors. *Id.* (emphasis added). The Court also quoted a leading treatise for the proposition that, at common law, "'[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] … all [were] principals as to the whole.'" *Id.* at *14 (quoting 1 Bishop, *Commentaries on the Criminal Law* §650 (7th ed. 1882)).

Just as the kidnapping example in *Rosemond* demonstrated the requisite "offense," the combined actions of Limelight and its customers amount to "infringement." Accordingly, all participants with "the requisite intent" are liable as inducers under §271(b). This common sense application means that "[t]he division of labor between two (or more) confederates thus has no significance: A strategy of 'you take that element, I'll take this one' … free[s] neither party from liability," because the offense is still committed, and both are culpable. *Rosemond*, 2014 U.S. LEXIS 1787, at *16.

Tort doctrines, which are likewise relevant here (*see supra* p. 24), are to the same effect. A defendant is liable for tortious conduct that he "orders or induces … if he knows or should know of circumstances that would make the conduct tortious if it were his own." *Restatement (Second) of Torts* §877(a); *see also* U.S. Br. 9 (inducer is liable for aiding "conduct that … would be a tort or offense if committed by the inducer"). Here, had Limelight performed the missing steps that it induced its customers to perform, it would have performed all the claim steps itself, thus rendering it liable for direct infringement.

Contrary to Limelight's argument that the "tortious" conduct being induced must itself give rise to liability (Br. 36), "acts which individually would be innocent may be tortious if they thus combine to cause damage." Keeton et al., *Prosser and Keeton on Torts* §52 (5th ed. 1984); *see also* Pet. App. 18a-19a. Indeed, interpreting similar language in 18 U.S.C. §2(b)—which states that a person who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal"—courts have held that "one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty." *United States* v. *Rapoport*, 545 F.2d 802, 806 (2d Cir. 1976) (internal quotation marks omitted); *see also United States* v. *Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983) (Section 2(b) "impose[s] criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary … has no criminal intent and hence is innocent"). When a defendant performs some of the patented steps itself and induces others to perform the rest, it is likewise liable for the combined conduct under §271(b). *See Restatement of Torts* §876 cmt. a (1939) ("[O]ne who accomplishes a particular consequence is as responsible for it when accomplished through directions to another as when accomplished by himself.").

### C. This Case Is Not Resolved By Dicta In Cases Involving Product Claims And No Invasion Of The Patentee's Exclusive Rights

Contrary to Limelight's assertion (Br. 27-32), nothing in this Court's decisions in *Deepsouth*, *Global-Tech*, or *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 336 (1961) ("*Aro I*"), undermines the en banc court's interpretation of §271(b). None of those cases addressed the issue here—namely, the attachment of inducement liability when the steps of a patented process are performed by more than one party. *See* U.S. Br. 21-22 (conceding *Aro I*, *Deepsouth*, and *Global-Tech* do not "address[] the specific question presented"). Limelight takes statements made in dicta out of their context and treats them like broad rules meant to govern all cases, rather than functions of the specific, distinguishable contexts in which they arose.

*See Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 355 (1988) ("The language … that petitioners cite, viewed in isolation, is admittedly far-reaching, but it loses its controlling force when read against the circumstances of that case."); *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 n.16 (1968) ("reliance on formulas extracted from their contexts rather than on pragmatic analysis" is inappropriate where "none of the cases cited here or below presented a factual situation resembling this case").

In *Aro I* and *Deepsouth*, there was no invasion of the patent owner's exclusive rights at all. Repair of a product in which the patent owner's rights are already exhausted, as occurred in *Aro I*, has long been held not to be an invasion of the patentee's rights. 365 U.S. at 343; *Wilson* v. *Simpson*, 50 U.S. (9 How.) 109, 125-126 (1850). Similarly, in *Deepsouth*, the Court found no invasion of the patentee's statutory rights—which are territorially limited by §154(a)(1) and §271(a)—because the patented combination was never "made" in the United States. 406 U.S. at 527-528, 531.

Here, by contrast, the claimed invention is a process that *is* being used within the United States, thus invading Akamai's statutorily protected rights. The question whether Limelight can escape that liability by sharing the performance of the claimed steps with its content provider customers was not decided in *Aro I* or *Deepsouth*. The statement in *Aro I*, 365 U.S. at 341, repeated in *Deepsouth*, 406 U.S. at 526, that "there can be no contributory infringement in the absence of a direct infringement," simply means that the *acts* that invade the patentee's exclusive rights and constitute direct infringement must be performed, regardless whether by one or more parties.

*Aro I*, *Deepsouth*, and *Global-Tech* are also distinguishable because they involved product claims, which are necessarily infringed by the single party that makes, uses, sells, or imports the claimed product. In such cases, whenever there is infringement of the patentee's exclusive rights under §154(a)(1), there will also always be a single direct infringer liable under §271(a) because "the party that adds the final element to the combination 'makes' the infringing product and thus is liable for direct infringement even if others make portions of the product." Pet. App. 25a.

The product claim in *Aro I* was directed to a combination of components for a sealed convertible folding top, one component of which—the fabric—typically wore out more quickly than the other components. 365 U.S. at 337-338. As noted, the narrow question before this Court was whether car owners who had bought convertible tops from General Motors (which was licensed to make them) but repaired them with Aro's fabric were "making" the invention anew, thereby exposing Aro to liability for contributory infringement. "[T]he [*Aro I*] Court considered no other issue" but "that of repair versus reconstruction." *Aro II*, 377 U.S. at 480 n.1.

In setting the stage for its discussion, the Court made a general statement that "'if the purchaser and user could not be amerced as an infringer certainly one who sold to him … cannot be amerced for contributing to a non-existent infringement.'" *Aro I*, 365 U.S. at 341. Limelight appears to believe (Br. 27-28) that this language suggests that contributory infringement requires, in *every* case, that there be *liability* under §271(a). That is more weight than *Aro I* can bear. To the extent any statement in *Aro I* appears to predicate contributory liability on the existence of *liability* for direct infringement, it is fully explained by the context of that case, which turned on the "making" of a claimed *product* in the United States, for which there *necessarily* was liability under §271(a) for the single party that completed the claimed combination (in *Aro I*, the car owner).

The Court confronts a very different issue here, namely a claimed *process* that can be infringed through the collaboration of two parties in a way that, Limelight assumes (*but see supra* Part I), does not produce §271(a) liability for either of them. The Court should not take the language of *Aro I*, written in a very different context with different issues in mind, as addressing the issue Limelight presents here. *E.g.*, *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 688 (2012) (refusing to rely upon an "ambiguous comment … made without analysis in dicta" in a prior decision).

*Deepsouth*, which also involved a product claim, is even further afield. There, the Court did not confront a question of induced or contributory infringement, but rather the question whether a company that made all the parts of a claimed machine but shipped them for final assembly overseas could be liable for *direct infringement* under §271(a) for "making" the patented machine in the United States. *Deepsouth*, 406 U.S. at 527. *Deepsouth* thus does not speak to the question presented here, namely whether the performance of all the claimed steps in the United States qualifies as "infringement" that can serve as a predicate for inducement liability, or whether Limelight can avoid all liability by structuring its conduct in concert with content providers to ensure that no "single entity" performs all claim steps.

*Global-Tech* likewise cannot fairly be read to address the question presented here, much less support Limelight's answer. *Global-Tech*, like *Deepsouth* and *Aro I*, involved a product claim. The foreign defendants copied the patented fryer and sold copies to U.S. companies, who became *liable* for direct infringement when they imported the fryers into this country. *Global-Tech*, 131 S. Ct. at 2063-2064. And the defendants undoubtedly induced the infringement by selling the U.S. companies a product destined for the U.S. market that met all the claim limitations. This Court decided only whether inducement liability under §271(b) requires that the defendant "must know that the induced acts constitute patent infringement." *Id.* at 2063.

In that context, it made eminent sense for this Court to speak of a person "induc[ing] another to take some action" or "persuad[ing] another to engage in conduct that the inducer knows is infringement": that is what the defendants in *Global-Tech* did. 131 S. Ct. at 2065. The Court did not thereby rule that inducement liability can *never* arise if the infringement occurs through the combined actions of the inducer itself and an inducee. As in *Aro I* and *Deepsouth*, that issue simply could not have arisen with regard to the product claims at issue in *Global-Tech*, and it was certainly not implicated in the questions of *intent* that were before the Court. If anything, the statement in *Global-Tech* most relevant here is the recognition that "[d]irect infringement has long been understood to require no more than the unauthorized use of a patented invention"—a statement that fully supports Akamai's argument. 131 S. Ct. at 2065 n.2.

## III. LIMELIGHT'S AND ITS AMICI'S POLICY ARGUMENTS FAIL

Finally, Limelight and its amici adduce a variety of policy arguments that they believe support their desired outcome. *E.g.*, Pet. Br. 41-50. While some of these policy objectives are laudable, they are addressed by different statutory provisions, procedural rules, and judicial doctrines. The other issues Limelight and its amici raise are insubstantial and unsupported, and certainly do not justify the get-out-of-jail-free card that Limelight asks this Court to issue, under either §271(a) or (b). As the government concedes (Br. 9, 31), "sound patent policy" justifies holding Limelight liable.

1. Limelight's predictions of manufacturers facing "unpredictable liability" for the acts of "independent actors" (Br. 43) are baseless. As noted above (p. 27), joint liability under §271(a) for directing, controlling, or acting in concert does not extend to unwitting actors. Further, inducement liability under §271(b) reaches only those who *intentionally* seek to invade the patentee's exclusive rights. *See Global-Tech*, 131 S. Ct. at 2068; Pet. App. 7a n.1. An inducer must know not only of the relevant accused acts, but also that "the induced acts constitute patent infringement." *Global-Tech*, 131 S. Ct. at 2068. As in the copyright context, "[t]he inducement rule … premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful" purpose. *Grokster*, 545 U.S. at 937; *see also* Keeton et al. §8 (recognizing tort law's "definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong").

2. Limelight next asserts (Br. 44) that the Federal Circuit's rule could impose liability on "consumers." First of all, Limelight's content provider customers are not "consumers" in the traditional sense; they are companies like Microsoft, DirecTV, and ABC Radio (JA139, 177-178) that have their own legal divisions and are well-versed in patent law and in protecting themselves from infringement claims through, for example, indemnification agreements.

In any event, nothing would impose inducement liability for "innocent" conduct or for the acts of "independent" parties. *Cf.* Robinson, 62 Am. U. L. Rev. at 108 ("[I]nnocent actors were rarely involved in the [joint infringement] cases that have been litigated."). Third parties would be liable under §271(b) only if they acted with the requisite intent and under §271(a) only in the circumstances defined by the common law.

Any assertion here that Limelight was "innocent," or that its content providers were "independent," is indefensible and was rejected by the jury's finding that Limelight performed most of the claimed steps and "directed or controlled" the content providers' performance of the remaining steps. Indeed, as the government notes, "[t]here is no obvious policy reason not to impose liability on parties" like Limelight who themselves perform some steps of a patented method and are, "if anything, *more culpable* than the typical active inducers." U.S. Br. 31-32 (emphasis added); *see also* Pet. App. 9a-10a.

Similarly fanciful are assertions that Limelight "learn[ed] from, improve[d] on, [or] invent[ed] around" Akamai's invention (Br. 42) or that Limelight is engaged in "productive activity" that should freely continue (*id.* 44). Attempting to create a legal loophole to practice an existing invention in direct competition with the inventor without liability is not "design[ing] around a patent" (Microsoft Br. 10) and contributes nothing to the storehouse of knowledge.

3. Limelight's amici also invoke fears of "abusive" litigation by "patent trolls" bent on extracting settlements and outsized damages awards. *E.g.*, Cargill Br. 5-6, 11-16, 20-21; CTIA Br. 16-21; Clearing House Br. 21, 26-28; Google Br. 15-17; Newegg Br. 20-22. Akamai shares these concerns, as it is also a "leading business[] and innovator[] in information technology" (Google Br. 1) that has become a target for nonpracticing entities. But the fact that *some* patent lawsuits are frivolous is not a reason to eliminate the rights of actual innovators like Akamai against actual infringers like Limelight. Abuses of the system can and should be addressed by existing means, including early summary judgment; exclusion of unjustified damages theories, *ResQNet.com, Inc.* v. *Lansa, Inc.*, 594 F.3d 860, 868-873 (Fed. Cir. 2010); limitations on injunctive relief for nonpracticing entities, *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388 (2006); and fee shifting, 35 U.S.C. §285.

Similarly, concerns over patents that do not sufficiently disclose or claim their invention or that "embody[] little if any technological innovation" (Pet. Br. 46-48) are amply addressed by vigilant enforcement of the requirements for patent eligibility, novelty, nonobviousness, definiteness, written description, and enablement. *See* 35 U.S.C. §§101, 102, 103, 112; *Alice Corp.* v. *CLS Bank Int'l*, No. 13-298 (to be argued Mar. 31, 2014); *Nautilus Inc.* v. *Biosig Instruments, Inc.*, No. 13-369 (to be argued Apr. 28, 2014); *KSR Int'l Co.* v. *Teleflex Inc.*, 550 U.S. 398 (2007). Here, the jury properly rejected Limelight's invalidity defenses, a result that is unchallenged on appeal.

4. Limelight's attempt to denigrate method patents as "add[ing] the least and impos[ing] the greatest costs" (Br. 47-49) is offensive and incorrect. Many historic inventions other than Akamai's were not only patented as methods, but as methods that had to be performed by *multiple* actors together.

For example, the Patent and Trademark Office recently inducted into its Inventors Hall of Fame the inventors of U.S. Patent No. 4,200,770 (issued Apr. 29, 1980), known as the Diffie-Hellman-Merkle patent, which disclosed a method of encrypting information that is now used in virtually every online credit card transaction. *See* National Inventors Hall of Fame, *National Inventors Hall of Fame Honors 2011 Inductees* (May 4, 2011), *available at* http://www.prnewswire.com/news-releases/national-inventors-hall-of-fame-honors-2011-inductees-121240094.html; *see also* Blackman, *Stanford Encryption Pioneer Who Risked Career Becomes Hamming Medalist* (Feb. 10, 2010), *available at* http://news.stanford.edu/news/2010/february8/hellman-encryption-medal-021010.html. The invention of the Diffie-Hellman-Merkle patent has been described as the "third major milestone in the evolution of [information] security" after the mid-twentieth century development of modern cryptography and the establishment of the U.S. National Security Agency. Sabett, *Security Online* §27:3, *in* 2 *Internet Law and Practice* (2013). Significantly, the patent relies on collaboration between a transmitter of information and a receiver. *See* U.S. Patent No. 4,200,770 claim 4 (claim for "generating a secure cipher key between a transmitter and receiver" requires, *inter alia*, "transmitting said transformed first signal from the transmitter to the receiver [and] transmitting transformed second signal from the receiver to the transmitter"). Limelight's argument would thus render the patent effectively unenforceable.

Similarly, a key innovation in the rise of FM radio—"a new technique … [that] made possible a substantial improvement in the faithfulness of reproduction of sound … and a marked reduction in noise and interference," *Armstrong* v. *Emerson Radio & Phonograph Corp.*, 179 F. Supp. 95, 96 (S.D.N.Y. 1959)—also required separate entities to perform the receiving and transmitting functions described in the patent's method claims. *See* U.S. Patent No. 1,941,069 (issued Dec. 26, 1933). The invention was soon "found in every FM broadcast receiver, in every television receiver, and [had] wide application to military, police, and other mobile services." *Armstrong*, 179 F. Supp. at 97. The result of the inventor's "great sacrifice, energy and perseverance, including the expenditure of substantial amounts of his own funds" "was to extend the practical range of radio communication." *Id.* This patent would also be essentially valueless under Limelight's rule.

5. Limelight's assertion that a skilled claim drafter could simply reformulate such claims to be performed by a single actor (Br. 45; *see also* EFF Br. 5-7; Google Br. 7, 21-25) is no answer. As the government concedes (Br. 33), "[s]ome inventions may not be susceptible to framing from the perspective of a single actor." Nor should inventors of cooperative methods be required to twist their claims through clever drafting to the point that the claims mask the true invention or claim it only obliquely.

"[I]n fields ranging from health diagnostics, medicine, financial services, and oil drilling, to the complex networks of today's information technology markets … many innovative patented methods, by their very nature, involve two or more actors." ABA Br. 5. For example, a primary goal of Akamai's invention was to permit highly desirable *cooperation* between content providers and content delivery networks. JA68. Unless this Court is prepared to say that such inventions are categorically ineligible for patent protection—a conclusion that would be wholly unjustified—the Court should not require that they be claimed in anything other than a straightforward manner. *See* Robinson, 62 Am. U. L. Rev. at 105-106 ("[D]rafting so-called better claims directed to a single infringer is not a cure-all. Some patents are by their nature interactive, and in order to properly claim the invention, the claims must be directed to or mention more than a single actor.").

Moreover, even where claims could be drafted to involve a single actor, the loophole Limelight advocates would allow determined infringers to avoid liability simply by dividing up the claim steps to take advantage of a rigid "single entity" rule. *See Golden Hour*, 614 F.3d at 1371; ABA Br. 10a ("Processes that *can be* divided easily among multiple actors *will be*, especially if parties know that dividing the steps among multiple actors will immunize them from any claims of patent infringement."). The stakes in this case thus extend well beyond questions of claim drafting or multiple-actor inventions; Limelight's theory threatens the enforceability of *all* patented methods for which the steps can be divided.

* * *

The Court should make no mistake: Akamai's invention transformed the Internet, the patent's scope and validity are now beyond dispute, and the combined conduct of Limelight and its customers "invades," "encroaches," and "trespasses" on Akamai's patent rights by performing, within the United States, the innovative process that Dr. Leighton and Mr. Lewin invented through genius and hard work. The only question is whether Limelight can get away with profiting from Akamai's invention simply by performing some steps itself and instructing other parties to perform the rest. Akamai respectfully submits that the answer is clearly no.

## CONCLUSION

The jury verdict of direct infringement should be reinstated. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.


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MARCH 2014

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