

IP Alert: Supreme Court Hears Arguments Regarding Induced Infringement in *Limelight*

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Supreme Court Hears Arguments Regarding Induced Infringement in *Limelight*

by H. Wayne Porter

On April 30, 2014, the U.S. Supreme Court heard arguments in *Limelight Networks, Inc. v. Akamai Technologies, Inc.* The issue in this case is whether there can be liability for induced infringement if no party is liable for direct infringement. Akamai's claimed method involved placing web content on a set of replicated servers and modifying a content provider's web page to instruct browsers to retrieve content from those servers. Akamai sued Limelight alleging direct and indirect infringement. Limelight maintained a network of servers, but Limelight did not itself modify the content providers' web pages. In effect, Limelight's customers performed one of the claim steps and Limelight performed other steps. Akamai proceeded to trial on direct infringement only. The trial judge ultimately granted judgment as a matter of law because the claim steps were performed by multiple parties and because Limelight did not direct and control the actions of the content providers.

In an en banc decision, the Court of Appeals for the Federal Circuit Court declined to revisit the law of "divided infringement" as it pertains to liability for direct infringement under 35 U.S.C. § 271(a). As a result, the Federal Circuit upheld Limelight's non-liability for direct infringement under § 271(a). Under the law which the Federal Circuit did not revisit, there is no liability under § 271(a) for direct infringement of a method claim when an accused infringer performs some claim steps and another party performs the other steps unless that other party is the agent of the accused

infringer or acting under the accused infringer's direction or control. However, the Federal Circuit further held that Limelight could be liable under 35 U.S.C. § 271(b) for induced infringement. This was a significant change in the law. Previously, a patentee relying on § 271(b) had to show that an accused party actively induced a single entity (or a single entity and one or more agents or other directed or controlled parties) to perform all of the method steps.

Limelight and Akamai both filed petitions for certiorari. The Supreme Court granted Limelight's petition, but Akamai's petition remains pending. Briefs were filed and oral arguments were heard on April 30, 2014, in connection with Limelight's petition. The following was presented as the question on appeal: "whether the Federal Circuit erred in holding that a defendant may be liable for inducing patent infringement under 35 U.S.C. § 271(b) even though no one has committed direct infringement under § 271(a)." In its brief, Akamai argued that Limelight's liability under § 271(a) was also fairly included in the question presented and urged the Court to address § 271(a) liability. Limelight disputed that § 271(a) liability was properly before the Court.

During the oral arguments, at least some members of the Court seemed concerned that the issues may go beyond the Federal Circuit's extension of § 271(b) liability.

On one hand, at least some of the justices seemed to have trouble with the Federal Circuit decision. Justices Scalia and Kagan both made comments suggesting concern over whether the Federal Circuit's decision is contrary to the language of § 271(b). Justice Breyer expressed discomfort with changing patent law that had been in place for a number of years.

On the other hand, some of the Justices' comments suggested that the issues run deeper. For example, Chief Justice Roberts suggested that Limelight's position makes it easy to avoid patent infringement, commenting that "[a]ll you've got to do is find one step in the process and essentially outsource it . . . or make it attractive for someone else to perform." After Limelight's counsel argued that such problems could be addressed through claim drafting, Justice Scalia expressed skepticism. In the same comment where she noted the strength of an argument against the Federal Circuit's extension of liability under § 271(b), Justice Kagan also pointed out that the decision was an attempt to avoid what the Federal Circuit thought to be an end-run around the patent laws. Justice Kagan asked whether a decision reversing the Federal Circuit's decision regarding § 271(b) would have relevance if the Federal Circuit is then able to revisit the standard for liability under § 271(a). Justice Alito repeatedly asked whether there is any policy reason supporting a finding of non-infringement on the facts of Limelight's case, and also questioned whether a decision by the Court regarding § 271(b) has any significance unless the Federal Circuit is right about § 271(a).

Ultimately, resolution of this case may depend on whether the Court addresses § 271(a). If the Court believes that § 271(a) must be addressed, the Court may grant Akamai's petition, receive further briefing and hear additional argument next term before deciding. Counsel for Akamai suggested this as a possible approach. Although that approach might be somewhat unusual procedurally, several Justices expressed concern with addressing § 271(a) on the current briefing. If the Court does not address § 271(a), however, the Court may be willing to simply reverse or

affirm the Federal Circuit decision expanding liability under § 271(b), and to further indicate that it is the responsibility of Congress to fix any perceived problems or gaps in the law.

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