

No. 12-786

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In The  
Supreme Court of the United States

LIMELIGHT NETWORKS, INC.,  
*Petitioner,*

v.

AKAMAI TECHNOLOGIES, INC., *ET AL.*,  
*Respondents.*

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*On Writ of Certiorari to the United States Court of Appeals for  
the Federal Circuit*

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**BRIEF OF CTIA—THE WIRELESS ASSOCIATION  
AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONER**

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## **QUESTION PRESENTED**

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 person has committed direct infringement under § 271(a).

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**BRIEF OF CTIA—THE WIRELESS  
ASSOCIATION AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

CTIA—The Wireless Association is an international nonprofit organization that represents the

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<sup>1</sup> This brief is filed with the written consent of all parties through either universal or individual letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

wireless communications industry.<sup>2</sup> CTIA’s members include hundreds of network providers, suppliers, manufacturers, providers of data services and products, and countless other contributors to the wireless ecosystem that facilitate access to information across the Country. CTIA regularly appears before the Court in cases presenting issues of importance to the wireless industry. *See, e.g., Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010).

CTIA submits this brief to alert the Court to the inhibiting effects the Federal Circuit’s “inducement-only” liability rule will have on American innovation and growth, including in the fast-growing wireless telecommunications sector about which CTIA can speak with particular expertise. The Federal Circuit’s elimination of a bright-line defense to induced infringement claims will subject CTIA’s members to unwarranted litigation and threats of liability for activities that have long been considered innocent and non-infringing under the Patent Act, 35 U.S.C. §§ 1 *et seq.* In CTIA’s view, the Federal Circuit’s decision provides all the wrong incentives going forward: encouraging baseless litigation and worst practices in patent-claim drafting.

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<sup>2</sup> CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association. In 2004, the name was changed to CTIA—The Wireless Association®.

**STATEMENT****A. The Rapid Growth Of Wireless Innovation.**

The United States has one of the most advanced and well-developed wireless telecommunications networks in the world. By October 2012, approximately 312 million Americans, or 99.9% of the total U.S. population, had access to high-speed mobile wireless service provided by at least one national wireless carrier, and 97% of the population could choose from at least three providers for their wireless needs. FCC, SIXTEENTH ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES ¶ 45 (2013) (“Sixteenth FCC Report”).

The wireless services that underpin this Country’s innovation economy have exploded in recent years. Wireless subscriber connections now out-number the U.S. population.<sup>3</sup> “[M]obile data

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<sup>3</sup> See CTIA, *For the First Time in CTIA Survey History, There Were More Wireless Subscriber Connections than the U.S. Population* (Nov. 25, 2013), <http://www.ctia.org/resource-library/facts-and-infographics/archive/more-wireless-subscriber-connections-than-us-population>. In 2012, wireless subscribers used more than 2.3 trillion minutes of talk time, transmitted more than 2.1 trillion text messages, and transferred more than 1.4 trillion megabytes of data. CTIA, *Wireless Quick Facts* (Nov. 2013) (“CTIA Quick Facts”), available at [www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts](http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts). For comparison, the amount of data transferred over wireless networks in 2012 is more than 6,600 times the estimated data equivalent of the Library of Congress’s print collection in 2000. See Mike

traffic \*\*\* has more than doubled each year for the past four years,” and roughly two-thirds of all Internet traffic is carried wirelessly. Sixteenth FCC Report at 12, ¶ 370.<sup>4</sup> By the first half of 2012, 34% of all households in the United States had converted to wireless only, and 60% of all adults in the country aged 25-29 relied exclusively on wireless technology for voice and data communications. *Id.* ¶ 367.

This staggering and unprecedented level of connectivity is made possible largely by the increasing prevalence of portable wireless devices that allow access to the Internet at the touch of a button. 120 million Americans (or roughly 56% of wireless consumers) now use one (or more) of the 297 different smartphone devices available in the U.S. market. Sixteenth FCC Report at 22. These devices are produced by scores of manufacturers in a competitive market and are available through a variety of wireless service providers across the Country. COMSCORE, 2013 MOBILE FUTURE IN FOCUS 7 (2013) (“Focus Report”).<sup>5</sup> The use of tablet computers is also on the rise, with over 50 million

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Ashenfelder, *Transferring “Libraries of Congress” of Data*, LIBRARY OF CONGRESS, July 11, 2011, available at [blogs.loc.gov/digitalpreservation/2011/07/transferring-libraries-of-congress-of-data](http://blogs.loc.gov/digitalpreservation/2011/07/transferring-libraries-of-congress-of-data).

<sup>4</sup> See CTIA, *Wi-Fi and Broadband Network Connected Devices Will Account for 68 Percent of All Internet Traffic – INFO-GRAPHIC* (Nov. 25, 2013), available at [www.ctia.org/resource-library/facts-and-infographics/archive/wi-fi-broadband-devices-internet-traffic-infographic](http://www.ctia.org/resource-library/facts-and-infographics/archive/wi-fi-broadband-devices-internet-traffic-infographic).

<sup>5</sup> Available at [www.comscore.com/Insights/Presentations\\_and\\_Whitepapers/2013/2013\\_Mobile\\_Future\\_in\\_Focus](http://www.comscore.com/Insights/Presentations_and_Whitepapers/2013/2013_Mobile_Future_in_Focus).

such devices now in use only three years after they first appeared on the U.S. market. *Id.* at 7.

Smartphones and tablets are far more than mere telephones or even portable computers. Because of their seamless connection to the Nation's vast high-speed wireless network, they create a portal through which consumers can freely and instantaneously communicate with others (through traditional voice service, video chat, and various forms of electronic messaging), access the Internet, play games, obtain information on demand, and enjoy individually tailored digital content anywhere in the Country. *See* FCC, FIFTEENTH ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES ¶ 5 (2011) ("Fifteenth FCC Report").

Much of this content is delivered to devices through mobile applications, or "apps," which draw on a device's existing capabilities to provide content or perform various functions that might not be available on the device itself. By 2012, consumers could download over 1 million different apps to their wireless devices. These apps provide functions ranging from weather and traffic reports, web searching, and news and information gathering to e-mail and messaging, social networking, global positioning, photo sharing, and music and video streaming. *See* Sixteenth FCC Report at 229 Table

54. Mobile application downloads are expected to grow to more than 268 billion by 2017.<sup>6</sup>

Unsurprisingly, this rapid proliferation of wireless networking services, mobile wireless devices, and mobile applications has made the wireless telecommunications industry one of the fastest growing, most innovative, and highly productive segments of the United States' economy. "Wireless economic contributions have grown faster (16%) than the rest of the economy (3%)." CTIA, *THE WIRELESS INDUSTRY FACTS: AN INDEPENDENT REVIEW 1* (2010).<sup>7</sup> Annual wireless revenue of \$185 billion in 2012, is more than three-fold revenue in 2007. CTIA Quick Facts; *see also* Fifteenth FCC Report at 13-14; Sixteenth FCC Report at 15.

The wireless industry employs more than 3.8 million Americans (2.6% of the U.S. workforce) and is worth more than the "publishing, agriculture, hotels and lodging, air transportation, motion picture and recording and motor vehicle manufacturing industr[ies]." CTIA Quick Facts. The mobile application segment of the industry alone is valued at \$10 billion and employs 519,000 Americans in development and related roles. *Id.* And with the recent spectrum expansions approved by the FCC's National Broadband Plan, *see* Fifteenth FCC Report

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<sup>6</sup> CTIA, *Mobile App Downloads Will Grow To More Than 268 Billion* (Jan. 22, 2014), <http://www.ctia.org/resource-library/facts-and-infographics/archive/mobile-app-downloads-grow-2017>

<sup>7</sup> Available at [http://files.ctia.org/pdf/082010\\_Independent\\_Assessment\\_of\\_Wireless\\_Industry.pdf](http://files.ctia.org/pdf/082010_Independent_Assessment_of_Wireless_Industry.pdf)

at 31, it is estimated that by 2020, the wireless telecommunications industry will increase the U.S. GDP by \$87 billion, generate an additional \$23.4 billion in government revenue and \$13.1 billion in wireless applications and content sales, and produce at least 350,000 new American jobs. CTIA Quick Facts.

**B. Continued Growth Of The Wireless Ecosystem Depends On Clear And Fair Patent Rules.**

Strong and transparent intellectual property rights, enforced by clear and fair rules of the game, allow the technology sharing that creates this “mobile wireless ecosystem,” where wireless network service providers connect consumers with developers, manufacturers, and programmers by offering “mobile voice, messaging, and/or data services using their own network facilities.” Fifteenth FCC Report ¶ 26.

Wireless service providers offer the platforms and workable standards that allow the myriad components of the wireless ecosystem—such as network infrastructure, mobile devices, and user applications—to interconnect and deliver information to the end user. By doing so, wireless providers essentially create hubs for innovation. They develop and implement published standards and protocols to encourage interoperability between each segment of the ecosystem, and provide capital and guidance to foster seamless nationwide coverage. Such contributions encourage independent network designers, device manufacturers, and software application and content developers to interact collaboratively, and

(subject to industry standards) design, test, and implement new technologies. These cooperative, yet inherently competitive, interactions ultimately redound to consumers' benefit by yielding enhanced services at lower costs.

Wireless providers rely upon the backdrop of clear patent rules in their role as innovation facilitators. It is precisely this role as facilitators of technology sharing that places wireless service providers smack in the middle of a web of “densely overlapping patent rights held by multiple patent owners,” *i.e.*, a “patent thicket.” FTC, *THE EVOLVING IP MARKET-PLACE*, 56 (2011) (“FTC Report”).<sup>8</sup> The typical smartphone, for example, “incorporate[s] technologies from digital cameras, global positioning systems, and wireless communication,” and thus may use between “50,000 and 250,000 patented technologies” in performing what consumers now view as routine functions. U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO-13-465, INTELLECTUAL PROPERTY, ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY* 31 (2013) (“GAO Report”).<sup>9</sup>

Companies must “hack [their] way through” the patent thicket in order to commercialize new technologies. CARL SHAPIRO, *INNOVATION POLICY AND THE ECONOMY* 120 (Adam B. Jaffe, *et al.*, eds., 2001); see Stacie L. Greskowiak, *Joint Patent Infringement*

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<sup>8</sup> Available at <http://www.ftc.gov/reports/evolving-ip-market-place-aligning-patent-notice-remedies-competition>.

<sup>9</sup> Available at <http://www.gao.gov/products/gao-13-465>.

*After BMC: The Demise of Process Patents*, 41 LOY. U. CHI. L.J. 351, 402 (2010) (noting that the use “of multiple entities to carry out a process” is common in the “technology, communication, and medical industries”). But given the speed of technological innovation and the number of potential technologies involved, there is “often no economically feasible way, prior to making sunk investments, to identify and obtain rights to all the relevant patented technologies” that might be used over wireless networks. See Deborah Platt Majoras, FTC Chairwoman, A Government Perspective on IP And Antitrust Law 7 (June 21, 2006);<sup>10</sup> see also GAO Report at 30 (“[T]he sheer volume of patents makes searching for relevant patents before developing new products particularly difficult, especially for products that combine many patented technologies.”).

Yet the stakes for failing to do the impossible—*i.e.*, to navigate this thicket successfully—have never been higher. The number of patent infringement suits, including those filed by “patent assertion entities,” has increased substantially in recent years. FTC Report at 58-60; see also EXECUTIVE OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 5 (2013) (“White House Report”);<sup>11</sup> GAO Report at 17 n.36. And more than 5,000 patent infringement actions were filed in 2013 alone—“the highest number ever recorded.” PRICEWATERHOUSE-

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<sup>10</sup> Available at [www.ftc.gov/speeches/majoras/060621aai-ip.pdf](http://www.ftc.gov/speeches/majoras/060621aai-ip.pdf)

<sup>11</sup> Available at [http://www.whitehouse.gov/sites/default/files/docs/patent\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf).

COOPERS, 2013 PATENT LITIGATION STUDY 6 (2013) (“PWC Report”).<sup>12</sup>

Patent suits “typically take several years to complete, if appealed, may be remanded more than once, and can cost several million dollars.” S. Rep. No. 110-259, at 3-4 (2008). *See also* PWC Report at 20-21 (majority of patent cases reach trial within 3 years, with a median time to trial of approximately 2.5 years). Defense costs, even in unsuccessful suits, reach millions for a single patent infringement suit. GAO Report at 26; PWC Report at 5, 12; AIPLA, 2013 REPORT OF THE ECONOMIC SURVEY (2013) (noting that the average cost of defending a patent infringement suit through the end of discovery is between \$530,000 and \$3.6 million, and typically exceeds \$5 million when the suit proceeds through trial).

Such exorbitant defense costs “can take a particular toll on small and upstart businesses,” where “patent holders may be able to \*\*\* threaten litigation and to bully competitors, especially those that cannot bear the costs of a drawn out, fact-intensive patent litigation.” *Bilski v. Kappos*, 130 S. Ct. 3218, 3257 (2010) (Stevens, J., concurring). Forty percent of targeted “technology company startups,” for example, “reported a ‘significant’ operational impact (e.g., change in business, exit from the market, delay in milestone, change in product, etc.) due to the suit or threat thereof.” White House Report at 10. When damages are awarded, total

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<sup>12</sup> Available at [www.pwc.com/us/en/forensic-services/publications/2013-patent-litigation-study.jhtml](http://www.pwc.com/us/en/forensic-services/publications/2013-patent-litigation-study.jhtml).

costs skyrocket. And in telecommunications patent cases, where plaintiffs often pursue the carrier “hubs” and base damages awards on total carrier revenue, damages awards tend to be “significantly higher” than those in other industries. PWC Report at 5, 15 (noting that the median damage award in telecommunications patent infringement cases is in excess of \$30 million—over six times higher than the cross-industry median of \$4.9 million).

Worse still, when patent assertion entities are involved, litigation costs are often asymmetrical. Such entities “typically have few documents and witnesses, so they may propound extremely burdensome discovery \*\*\* without fearing that they will be on the receiving end of corresponding burdens.” H. Rep. No. 113-279, at 31 (2013). These lopsided litigation burdens often lead to premature settlements “driven by the economics of litigation rather than the merits of the case,” *id.* at 19—“even when the defendant has good reason to believe that it would have prevailed at trial,” *id.* at 21. *See* John Allison, *et al.*, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 707-709 (2011) (patent assertion entities have a 90% success rate in obtaining what are believed to be nuisance settlement payments); *see also* White House Report at 6 (similar). In short, companies face a “Hobson’s choice: defend the litigation, which will cost literally millions of dollars, or settle for a smaller, but not insignificant, amount of money. If you do settle, then the company develops a reputation for being an easy target, which just invites more extortion attempts[.]” H. Rep. No. 113-279, at 33.

Even when an infringement suit is unsuccessful and a nuisance settlement is avoided, the prospect of additional litigation can have a chilling effect on innovation that can “persist for years.” White House Report at 10. The resulting reticence to enter or reenter the innovation marketplace dampens not only innovation but also economic growth more broadly, e.g., through “reduced income for workers whose pay is lower because they are unable to work with more productive new processes” and “lost value to consumers who are not able to buy innovative products.” *Id.*

Because “the most litigated patents are far more likely to be software and telecommunications patents,”<sup>13</sup> the continued success of these high-tech industries that underpin the American innovation economy depends on a “fair, efficient, and reliable patent system.” H. Rep. No. 113-279, at 17. That entails clear and calibrated rules that strike a balance between protecting legitimate patent rights and “stimulat[ing] the investment in innovation that is necessary in today’s technologically complex world to create the new products and processes that will lead to better lives for Americans.” *Id.* The Federal Circuit’s new “inducement-only” rule skews that balance, effectively placing a thumb on the scale in favor of “technically valid but valueless [patent]

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<sup>13</sup> John R. Allison, *et al.*, *Extreme Value or Trolls on Top? The Characteristics of the Most Litigated Patents*, 158 U. PA. L. REV. 1, 18 (2009) (“34% of the most litigated patents are in the [tele]communications industry.”).

claims” (Pet. App. 74a (Linn, J., dissenting)) at the expense of American innovation and growth.

### SUMMARY OF ARGUMENT

Wireless technology has become an engine of American innovation and economic growth. But the novel “inducement only” liability rule threatens the wireless sector’s continued vitality. The Federal Circuit’s departure from the text of the Patent Act and settled precedent makes interdependent network-based technologies, such as the wireless ecosystem, particularly vulnerable to innovation-killing infringement claims.

The simplest wireless transaction involves hundreds if not thousands of patented technologies and connects a vast array of different actors—from content and application providers to end users—with wireless network providers at the hub. The Federal Circuit’s rule enables holders of imprecise method claims to pick and choose their defendant—in this context, almost certainly a wireless provider—by cobbling together the conduct of multiple actors into an indirect infringement claim, despite the absence of any direct infringement. Such suits will only add to the heavy toll of spurious patent litigation on our technology economy and the wireless industry in particular. Because knowledge of others’ conduct is easy to allege but hard to disprove, wireless network providers and other defendants will become embroiled in litigation of divided infringement claims that, under the pre-*Akamai* regime, would have been readily dismissed without costly discovery or threat of liability.

The “inducement only” rule also encourages the drafting of non-unitary claims to the detriment of a patent claim’s essential notice function. The practice of unitary claims drafting—in which a patent claim is limited to conduct performed by a single entity—allows a single actor to determine if it will be liable for infringement based on its own conduct, rather than being forced to speculate about the conduct of independent third parties over which it has no control. That certainty provides the “fair warning” and incentives for innovation that well-drafted patent claims are intended to produce. But if infringement liability is no longer cabined to the conduct of single actor, patentees will have every incentive to draft their claims to capture the widest possible universe of potential actors, rather than focus their efforts on best capturing the innovative elements of their invention. Wireless providers, even though they lack knowledge or control over independent actors, are particularly exposed to indirect infringement claims based on weak or imprecise method patents.

### ARGUMENT

Under the Federal Circuit’s new “inducement only” rule, patent holders can recover for “divided” infringement of method patents under 35 U.S.C. § 271(b), even though no person could be held liable for directly “infring[ing] the patent” under 35 U.S.C. § 271(a). Disregarding this Court’s longstanding rule that liability for indirect infringement is dependent on an act that “would in itself constitute a direct infringement under [Section] 271(a),” *see Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961), a sharply divided en banc court held that

as long as some collection of independent actors collectively undertakes all the steps of the patented method, the alleged inducer “shall be liable as an infringer” if he knowingly “cause[d], urge[d], encourage[d], or aid[ed]” those actions. Pet. App. 7a, 8a (quoting *Arris Group, Inc. v. British Telecomm’ns, PLC*, 639 F.3d 1368, 1379 n.13 (Fed. Cir. 2011)).

Petitioner and others, including the Solicitor General, explain well why the Federal Circuit’s “sweeping change to the nation’s patent policy” (Pet. App. 80a (Linn, J., dissenting)) is inconsistent with the text, structure, and history of the Patent Act, and cannot be squared with this Court’s precedent. CTIA agrees with petitioner’s analysis, and does not repeat it below. Rather, CTIA writes separately to convey to the Court the substantial consequences of this ill-considered and ill-supported rule—namely, increased nuisance litigation that hinders innovation, and the creation of incentives for drafting imprecise non-unitary claims that undermine a patent claim’s essential notice function—from the perspective of the wireless telecommunications industry.

**I. THE FEDERAL CIRCUIT'S RULING WILL EXPOSE INNOVATION INDUSTRIES TO ADDITIONAL AND UNWARRANTED LIABILITY RISK.**

**A. The Inducement-Only Rule Exacerbates The Problem Of Abusive Patent Suits And Leaves Wireless Providers Particularly Vulnerable.**

“The harm inflicted on American innovation and manufacturing by various abusive patent-enforcement practices has been widely known and acknowledged for most of the last decade.” H. Rep. No. 113-279, at 17. As explained above (pp. 9-12, *supra*), patent infringement suits are now filed more frequently, take longer to resolve, and are more expensive than ever before. And given the resources of wireless carriers together with the technology-rich environment, telecommunications patents are among the most litigated in this rising tide of lawsuits.<sup>14</sup> The “flaws in the system \*\*\* have become [so] unbearable” and impose such a “drag on the innovation that the patent system is supposed to foster,” S. Rep. No. 110-259, at 2, 3, that Congress recently has acted to reform patent law in an attempt to curb

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<sup>14</sup> See Roger Parloff, *RPX: Taking On The Patent Trolls*, FORTUNE, February 27, 2014, <http://money.cnn.com/2014/02/27/news/companies/rpx-patent-trolls.pr.fortune/index.html> (telecommunication companies among the top targets of patent infringement actions brought by non-practicing entities in 2013).

meritless patent litigation. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

The Federal Circuit’s decision only exacerbates the problem. Prior to this case, it was well settled that a defendant could not be held liable in an infringement suit for the actions of multiple independent parties, unless those actions were carried out under the defendant’s direction or control. *See BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1380 (Fed. Cir. 2007); *Muniauction, Inc. v. Thompson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008). That rule provided innovators (including network providers) reasonable assurance that, where they did not dictate the infringing conduct, divided infringement claims could be resolved efficiently. If a plaintiff failed to show direct infringement by a single defendant, or could not demonstrate that a single actor exercised direction and control over all the collectively infringing actions of multiple actors, then such claims could be disposed of before the onset of costly discovery or trial. *See, e.g., IpVenture, Inc. v. Cellco P’ship*, No. C 10-04755 JSW, 2011 WL 207978, at \*3 (N.D. Cal. Jan. 21, 2011) (dismissing inducement claim against Sprint and AT&T because “Plaintiff has failed to allege a third party who directly infringes the patent”).

Under the Federal Circuit’s unprecedented inducement-only rule, however, patent plaintiffs have no such threshold to surmount. Instead, companies are now potentially on the hook for induced infringement if plaintiffs allege that they in any way “aid” or “cause” any number of independent third parties to perform steps—each innocent in its own right—that

would have constituted direct infringement *if (and only if)* they all had been performed by a single person. See Mark D. Janis, *et al.*, *Patent Law's Audience*, 97 MINN. L. REV. 72, 119-120 (2012) (post-*Akamai*, “many future [divided infringement] cases \*\*\* will be framed as inducement cases”); Nathaniel Grow, *Joint Patent Infringement Following Akamai*, 51 AM. BUS. L.J. 71, 71 (2014) (“Following *Akamai*, parties are increasingly likely to rely on inducement liability when targeting acts of joint infringement \*\*\* and will be able to prevail in cases featuring a much more tenuous relationship between the joint infringers than would be permitted in a direct infringement case”).

As a result, activities that have long been deemed innocent and non-infringing now run the risk of ensnaring innovative industries in potentially crippling litigation. In alleging infringement of method patents, patent holders may now aggregate one party's innocent and non-infringing conduct with an unbounded set of other innocent and non-infringing acts by other independent actors. Under the Federal Circuit's new rule, two (or more) rights create a wrong.

By necessity, the actions of independent members of the wireless ecosystem are entwined through a vast array of overlapping technologies, with wireless network providers serving at the hub, all of which coalesce thousands of times a day in phone calls, e-mails, text messages, and internet searches performed on a wireless device. The very technology sharing that lies at the heart of the wireless sector and that drives American innovation

also presents a target-rich environment for patent holders who view infringement claims more as “lottery tickets” than a means by which to protect inventions or further innovation. White House Report at 6, 8. Because they facilitate connections between consumers, developers, and manufacturers of a variety of technologies within the wireless ecosystem, and because they have the means to pay, wireless service providers are particularly susceptible to the threat of onerous infringement litigation sure to arise from the Federal Circuit’s inducement-only rule.

To be sure, such claims might ultimately fail for inability to prove a purported inducer’s “knowledge” and “intent” for liability under § 271(b), *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011). But such scienter requirements are “easy to allege and hard to disprove.” *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). Despite the conceded lack of any direct infringement, that means defendants will have to endure lengthy and burdensome discovery, and possibly even trial, to ferret out a purported inducer’s subjective “knowledge” and “intent.” *Global-Tech*, 131 S. Ct. at 2068; see *Harlow v. Fitzgerald*, 457 U.S. 800, 816-817 (1982) (noting that “questions of subjective intent \*\*\* rarely can be decided by summary judgment”); 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 2732.1 (3d ed. 2012) (in patent suits, “questions of motive or intent \*\*\* frequently prevent summary judgment from being entered, since these

issues involve subjective questions regarding state of mind that only can be decided after a full trial”).

As a result, the Federal Circuit has all but assured that defendants, including those certain to ultimately prevail on the merits, will no longer be able to resolve such cases “early, on a quick summary judgment motion or even a Rule 12(b)(6) motion.” Mark A. Lemley, *et al.*, *Divided Infringement Claims*, 33 AIPLA Q.J. 255, 279-284 (2005). That only increases the pressure to settle even meritless claims—no secret to plaintiffs that look to exploit their patent rights. *See, e.g.*, James Bessen & Michael J. Muerer, *The Direct Cost from NPE Disputes*, 99 CORNELL L. REV. 387 (2014).

Even when defendants elect to fight it out and proceed to trial, pre-litigation tactics common in patent infringement suits can manipulate *Global-Tech*’s knowledge requirement. Some patent holders, especially certain patent assertion entities, routinely send companies demand letters and then attempt to spin receipt of such letters into evidence of a culpable mental state. *See* White House Report at 6 (noting that “conservative estimates” place the number of demand letters sent “last year alone at a minimum of 60,000 and more likely at 100,000,” and that “one [non-practicing entity] sent 8,000 notice letters” to various businesses “seeking compensation” for use of equipment that allegedly infringed on one of its patents). Several courts—including the Federal Circuit—have held that a defendant’s conduct after the receipt of such a letter (intentional or not) can

serve as a sufficient indicator of knowledge or intent for willful infringement liability.<sup>15</sup>

More concretely, a wireless provider's mere receipt of a demand letter advising it of the purportedly collectively infringing conduct of intermediaries or end users that it has no ability to control exposes the provider to liability. By making it possible—and attractive—to target the hub of the wireless ecosystem, the Federal Circuit's new rule threatens to mire in endless and expensive litigation the very collaboration and interoperability that makes the wireless ecosystem successful.

**B. Evidence Since The Federal Circuit's Decision Confirms These Concerns.**

These sorts of concerns are by no means hypothetical. The post-*Akamai* reformulation of futile direct infringement cases involving multiple

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<sup>15</sup> See, e.g., *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1339 (Fed. Cir. 2004) (affirming finding of willful patent infringement where defendant failed to take remedial action following receipt of plaintiff's demand letter); *Telecomm Innovations, LLC v. Ricoh Co.*, Civ. No. 12-1277-SLR, 2013 WL 4017096, at \*2-4 (D. Del. Aug. 6, 2013) (finding intent adequately pleaded based on decision to continue providing allegedly infringing device after notice); *L.A. Printex Indus., Inc. v. Lia Lee, Inc.*, No. CV 08-1836 ODW (PJWx), 2009 WL 789877, at \*7 (C.D. Cal. Mar. 23, 2009) (granting plaintiff's summary judgment motion in willful copyright infringement claim where infringing product was still being sold after defendant's receipt of demand letter).

independent actors into induced infringement cases is well underway in the lower courts.

Plaintiffs who cannot make a showing of direct infringement have already sought—often successfully—to amend their complaints to add a claim of indirect infringement. *See, e.g., Bascom Research LLC v. Facebook, Inc.*, No. C 12-6293 SI, 2013 WL 968210 (N.D. Cal. Mar. 12, 2013) (granting leave to amend complaints in light of *Akamai* five months after filing of original complaint); *Prism Technologies, LLC v. McAfee, Inc.*, No. 8:10CV220, 2012 WL 5385210 (D. Neb. Nov. 1, 2012) (permitting plaintiff to file third amended complaint more than two years into litigation and two months before trial to allege new induced infringement claims under *Akamai*); Order, *Transunion Intelligence LLC v. Search America, Inc.*, No. 11-cv-1075 PJS/FLN (D. Minn. Nov. 7, 2012), ECF No. 136 (granting leave to amend complaint 31 months after original complaint filed to allege induced infringement); *cf. Apple Inc. v. Samsung Elecs. Co.*, No. 12-CV-0630-LHK (PSG), 2013 WL 3246094 (N.D. Cal. June 26, 2013) (denying motion to amend complaint to allege induced infringement under *Akamai* in part because *Akamai* claims were not raised in prior amendments post-dating *Akamai* decision).

Other courts have reconsidered grants of summary judgment altogether, *see, e.g., Civix-DDI, LLC v. Hotels.com, LP*, No. 05 C 6869, 2012 WL 5383268 (N.D. Ill. Nov. 1, 2012); denied motions for summary judgment outright, *Cassidian Communications, Inc. v. microDATA GIS, Inc.*, No. 2:12-cv-00162-JRG, 2013 WL 6491477 (E.D. Tex. Dec. 10,

2013); or denied motions to dismiss, *Driessen v. Sony Music Entm't*, No. 2:09-CV-0140-CW, 2012 WL 5293039 (D. Utah Oct. 23, 2012).

Additionally, the Federal Circuit has reversed in light of *Akamai* at least two district court decisions granting summary judgment against patent holders. That gives plaintiffs a second bite at the patent infringement apple several years after filing suit. See *Aristocrat Technologies Austl. Pty Ltd. v. International Game Tech.*, 709 F.3d 1348 (Fed. Cir. 2013) (vacating judgment on indirect infringement claims in light of *Akamai* nearly seven years after filing of original complaint); *Move, Inc. v. Real Estate Alliance Ltd*, 709 F.3d 1117 (Fed. Cir. 2013) (vacating judgment six years after filing of original complaint).

## **II. THE “INDUCEMENT-ONLY” RULE UNDERMINES THE NOTICE FUNCTION OF PATENT CLAIMS BY REWARDING MULTI-ACTOR CLAIMS DRAFTING**

### **A. Unitary Claims Drafting Promotes Patent Law’s Critical Notice Function.**

Far from supporting sound patent policy or discouraging “evasion of the principles of patent infringement,” see Pet. App. 23a, the Federal Circuit’s novel “inducement-only” rule erects a barrier to the very innovation that the Patent Act is designed to encourage. See *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013).

The patent system is designed as a “carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances

in technology, in return for an exclusive monopoly for a limited period of time.” *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998). By defining the boundaries of the invention, the words comprising a patent claim serve an essential notice function. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373-374 (1996). Clear claims drafting delineates the contours of the monopoly grant and provides “fair warning \*\*\* of what will constitute infringement.” DONALD CHISUM, CHISUM ON PATENTS § 8.03[3] (1997); *see also* Pet. App. 96a (Linn, J., dissenting).

Clarity in claim scope likewise fosters innovation, as the decision to invest in new technology and its introduction into the marketplace depends on the ability to assess reliably what activities are covered by existing patent claims and what activities are not. *See State Indus. Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1235-1236 (Fed. Cir. 1985) (“One of the benefits of a patent system is its so-called ‘negative incentive’ to ‘design around’ a competitor’s products, even when they are patented, thus bringing a steady flow of innovations to the marketplace.”).

The practice of unitary claims drafting—in which a patent claim is limited to conduct performed by a single entity—enhances the notice function and thus promotes the benefits noted above. Specifically, a unitary claim allows a single actor to determine if it will be liable for infringement based on its own conduct, rather than being forced to speculate about the conduct of independent third parties over which it has no control. That added certainty provides the “fair warning” and incentives for innovation that well-drafted patent claims are intended to produce.

Because “divided” infringement claims were not actionable as either direct or indirect infringement under the pre-*Akamai* rule, that rule reinforced the practice of unitary claims drafting. In other words, patentees had significant incentive to draft claims as covering the conduct of a single entity even if the invention implicated cooperation of multiple entities. See ROBERT C. FABER, *FABER ON MECHANICS OF PATENT CLAIM DRAFTING* § 7:3, 7-7 (6th ed. 2012) (“Advice by this author for drafting a method claim remains as previously. Draft at least some of the method claims to focus on steps to be performed by a single entity.”); see also WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO PATENT DRAFTING MANUAL* 103-106 (2007) (encouraging unitary claims in order to provide a “consistent ‘point of view’” that “signals the set of parties which could directly infringe a patent claim” to ensure adequate protection of patent rights and ease of licensing). The pre-*Akamai* rule thus furthered the important patent policy goal of permitting a single actor to determine, based on the content of a patent claim, if its own conduct will infringe.

**B. The Inducement-Only Rule Hinders The Notice Function By Encouraging Multi-Actor Patent Claims.**

The Federal Circuit’s decision, however, risks undermining this important notice function. Because infringement liability is no longer cabined to the conduct of a single actor, patentees no longer have an incentive to avoid non-unitary claims that enumerate steps performed by multiple independent actors. Expanding the scope of induced infringement to

sweep in companies that merely “aid” or “cause” independent third parties to take individual actions—actions which practice a patented method only when aggregated—will encourage drafting of vaguer, multi-actor method claims. That, in turn, diminishes the ability of any single entity to predict whether its conduct will incur infringement liability (or at least an infringement suit).<sup>16</sup>

Specifically, patentees will have every incentive to draft their claims to capture the widest possible universe of potential actors, rather than focus their efforts on best capturing the innovative elements of their invention. Patentees will no doubt add steps directed to the activities of a broad spectrum of independent actors for no reason other than to preserve the ability to pick and choose their otherwise-innocent targets under the new “inducement-only” rule. See Brendyn M. Reinecke, *Akamai: Patent Claims Are Now Broader Than The Invention*, 2013 WIS. L. REV. 1231, 1239 (2013) (“The *Akamai* rule blurs the scope of patents by allowing the patentee to allocate steps in a method claim to various actors *post hoc*.”) (emphasis added).

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<sup>16</sup> Method claims, of course, are already particularly vulnerable to vagueness and overbreadth. See *MySpace, Inc. v. GraphOn Corp.*, 672 F.3d 1250, 1269 n.4 (Fed. Cir. 2012) (noting that “[b]ecause technology companies are forced to spend enormous sums defending against vague and overbroad software and business method claims, they have far fewer dollars to expend on research and development”). The *Akamai* rule only worsens the problem.

Consider, for example, the following hypothetical claim to a method for delivering a law review article:

1. A method for wirelessly retrieving a law review article comprising:
  - inputting a citation;
  - transmitting the citation over a wireless communications network;
  - retrieving a law review article corresponding to the citation; and
  - providing the law review article over a wireless communications network.

As drafted, the steps of this method are directed to different actors—the “inputting” being done by a user; the “transmitting” being handled by a communications network provider, and the “retrieving” being done by an on-line repository; and the “providing” being done by a combination of the network provider and repository.

Under pre-*Akamai* law, nobody has infringed this claim (directly or indirectly) because none of the actors—the user, the network provider, or the on-line repository—has “utilized” “all steps or stages of the claimed process.” *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005). That result makes sense: a network provider should not be saddled with infringement liability just because a user and on-line repository have chosen to use its network to practice a part of a patented claim. Rather, the burden should fall on the claim drafter to capture infringing conduct, because the patentee

“specifically defines the boundaries of his or her exclusive rights [up front] in the claims appended to the patent,” and thus “is the least cost avoider of the problem of unenforceable patents due to joint infringement.” Pet. App. 96a (Linn, J., dissenting) (citing *BMC Res.*, 498 F.3d at 1381.); *cf. Sage Products, Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1425 (Fed. Cir. 1997) (“Given a choice of imposing the higher costs of careful prosecution on patentees, or imposing the costs of foreclosed business activity on the public at large, this court believes the costs are properly imposed on the group best positioned to determine whether or not a particular invention warrants investment at a higher level, that is, the patentees.”).

Under the new “inducement only” rule, however, the result and drafting incentives are the opposite. The focus shifts from describing the inventive elements as cleanly as possible to casting a net wide enough to capture some entity (or entities) with deep pockets. In the law-review example above, the non-infringing actions of the user, wireless network provider, and repository can be aggregated and attributed to any entity that “aid[ed]” or “cause[d]” those independent parties to act. Pet. App. 8a. The wireless network provider that receives a demand letter from the patent holder alleging infringement of the broadly drafted multi-actor claim for accessing an article could therefore find itself mired in litigation—even though it lacked any control over the conduct of the primarily responsible parties, *i.e.*, the independent user and repository.

The Federal Circuit’s effective endorsement and encouragement of imprecisely drafted claims that cast a wide net over multiple actors likely will be felt acutely in the telecommunications industry. Wireless service providers, an obvious potential target, typically do not have complete information about what any number of independent actors (*e.g.*, app developers, device makers, and users) are doing at any point in time. In such a context, the “notice” provided by a diffuse multi-actor claim is illusory: a wireless provider will not have perfect knowledge about—much less be able to control or prevent—the conduct of those other independent actors. The problem is doubly pronounced for method patents implicating wireless providers: even without the added indeterminacy of infringement by as-yet unidentified independent actors, method claims often lack “well-identified claim boundaries, with virtually no implementation details, and with few clues about the quality of claim implementation.” Robert E. Thomas, *Debugging Software Patents: Increasing Innovation and Reducing Uncertainty in the Judicial Reform of Software Patent Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 191, 217-218 (2008-09).

None of this means that patentees cannot reap the benefit of their inventive conduct under the pre-*Akamai* rule. In the example above, minor revisions to the claim elements would protect the core of the patentee’s inventive process while readily providing clear notice to potential competitors—not only as to which actions the claims cover, but also as to how any single actor can modify specific behavior to avoid infringement:

1a. A method for wirelessly retrieving a law review article comprising:

*receiving* a citation transmitted over a wireless communications network;

retrieving a law review article corresponding to the citation; and

providing the law review article over a wireless communications network.

So drafted, the unitary claim gives notice to relevant competitors—businesses that also store and disseminate law review articles—so they can order their actions without risking infringement.

In sum, by strengthening the notice and public-disclosure function underlying this Country’s patent system, unitary claims drafting “promote[s] the Progress of \*\*\* useful Arts,” U.S. CONST. Art. I, § 8, cl. 8. Tighter claims that are drafted more precisely to capture innovative methods, rather than broadly worded to ensnare the largest number of possible defendants, help technology users and potential innovators determine whether their actions will infringe an existing patent, and thereby stem the rising tide of excessive and unwarranted patent litigation. *See* White House Report at 1, 7 (noting Administration’s goal of “fostering clearer patents” as a means of decreasing litigation over “which products and processes are, in fact, protected by \*\*\* patent[s],” and promoting the “socially beneficial purpose of promoting technology transfer”). The Federal Circuit’s “inducement only” rule unnecessarily and unwisely undermines those goals.

**CONCLUSION**

For the foregoing reasons, the judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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