

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**

---

**REPLY BRIEF FOR PETITIONER**

---

ALEXANDER F. MACKINNON  
KIRKLAND & ELLIS LLP  
333 South Hope Street  
Los Angeles, CA 90071  
(213) 680-8400

DION MESSER  
GENERAL COUNSEL –  
INTELLECTUAL PROPERTY  
LIMELIGHT NETWORKS, INC.  
222 South Mill Avenue  
8th Floor  
Tempe, AZ 85281  
(602) 850-4833

AARON M. PANNER  
*Counsel of Record*  
JOHN CHRISTOPHER  
ROZENDAAL  
GREGORY G. RAPAWY  
MICHAEL E. JOFFRE  
KELLOGG, HUBER, HANSEN,  
TODD, EVANS & FIGEL,  
P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
(apanner@khhte.com)

April 22, 2014

---

---

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner's Rule 29.6 Statement was set forth at page iii of its opening brief; petitioner amends that statement to report that, as of March 31, 2014, Goldman, Sachs & Co. owned 30.75% of the shares of Limelight, and that ownership interest has not materially changed.

## TABLE OF CONTENTS

|   | Page |
|---|------|
| CORPORATE DISCLOSURE STATEMENT .....  | i    |
| TABLE OF AUTHORITIES .....  | iv   |
| ARGUMENT .....  | 3    |
| I. THE FEDERAL CIRCUIT’S DECISION<br>SHOULD BE REVERSED .....   | 3    |
| A. The Statute’s Text and Structure<br>Resolve the Question Presented.....  | 4    |
| B. This Court’s Decisions Recognize That<br>There Can Be No Indirect Infringe-<br>ment Without Direct Infringement<br>Under § 271(a) .....          | 5    |
| C. Criminal- and Tort-Law Analogies<br>Do Not Support the Decision Below.....   | 7    |
| D. Pre-1952 Cases Do Not Support the<br>Decision Below .....  | 8    |
| II. AKAMAÏ’S DIRECT-INFRINGEMENT<br>ARGUMENTS ARE NOT PROPERLY<br>BEFORE THIS COURT AND LACK<br>MERIT .....   | 9    |
| A. Because Akamai’s Cross-Petition Has<br>Not Been Granted, Akamai’s Claims<br>of Direct Infringement Are Not Prop-<br>erly Before This Court ..... | 9    |
| B. Expanding Liability for Direct<br>Infringement Under § 271(a) Would<br>Conflict with the Statutory Scheme.....                                   | 11   |
| III. EXPANDING “DIVIDED INFRINGE-<br>MENT” LIABILITY WOULD ENCOUR-<br>AGE BURDENSOME LITIGATION<br>WITHOUT PROMOTING INNOVA-<br>TION .....          | 19   |

|  |    |
|--|----|
| A. Expansion of Divided Infringement Liability Promotes Unpredictable Litigation While Undermining Patents' Notice Function..... | 19 |
| B. Rejection of Akamai's Proposed Expansion of the Patent Laws Would Not Affect Incentives To Innovate .....                     | 21 |
| CONCLUSION.....  | 23 |

## TABLE OF AUTHORITIES

|   | Page       |
|---|------------|
| <b>CASES</b>  |            |
| <i>Aguirre v. Turner Constr. Co.</i> , 501 F.3d 825<br>(7th Cir. 2007).....   | 14         |
| <i>Akamai Techs., Inc. v. Cable &amp; Wireless Internet<br/>Servs., Inc.</i> , 344 F.3d 1186 (Fed. Cir. 2003) ..... | 2          |
| <i>Armstrong v. Emerson Radio &amp; Phonograph<br/>Corp.</i> , 179 F. Supp. 95 (S.D.N.Y. 1959) .....                | 22         |
| <i>Aro Mfg. Co. v. Convertible Top Replacement<br/>Co.</i> , 365 U.S. 336 (1961) .....                              | 3, 5, 6, 8 |
| <i>AT&amp;T Co. v. Winback &amp; Conserve Program,<br/>Inc.</i> , 42 F.3d 1421 (3d Cir. 1994).....                  | 14         |
| <i>Beck v. Prupis</i> , 529 U.S. 494 (2000) .....   | 17         |
| <i>Blair v. Westinghouse Elec. Corp.</i> , 291 F. Supp.<br>664 (D.D.C. 1968) .....                                  | 12         |
| <i>Brooklyn Navy Yard Asbestos Litig., In re</i> ,<br>971 F.2d 831 (2d Cir. 1992).....                              | 17         |
| <i>Central Bank of Denver, N.A. v. First Interstate<br/>Bank of Denver, N.A.</i> , 511 U.S. 164 (1994).....         | 18         |
| <i>Clark v. Capital Credit &amp; Collection Servs.,<br/>Inc.</i> , 460 F.3d 1162 (9th Cir. 2006) .....              | 14         |
| <i>Deepsouth Packing Co. v. Laitram Corp.</i> ,<br>406 U.S. 518 (1972) .....  | 5, 6, 21   |
| <i>Depositors Ins. Co. v. Wal-Mart Stores, Inc.</i> ,<br>506 F.3d 1092 (8th Cir. 2007) .....                        | 14         |
| <i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388<br>(2006) .....   | 13         |
| <i>Florida Prepaid Postsecondary Educ. Expense<br/>Bd. v. College Sav. Bank</i> , 527 U.S. 627 (1999).....          | 12         |

|   |              |
|---|--------------|
| <i>Genesis Healthcare Corp. v. Symczyk</i> , 133 S. Ct. 1523 (2013).....                      | 9            |
| <i>Gleason v. Seaboard Air Line Ry. Co.</i> , 278 U.S. 349 (1929) .....                       | 14           |
| <i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 131 S. Ct. 2060 (2011) .....                | 6, 7, 12, 17 |
| <i>Golden Hour Data Sys., Inc. v. emsCharts, Inc.</i> , 614 F.3d 1367 (Fed. Cir. 2010).....   | 15           |
| <i>Hunnicuttt v. Wright</i> , 986 F.2d 119 (5th Cir. 1993).....                               | 14           |
| <i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982) .....                     | 16           |
| <i>Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.</i> , 510 U.S. 27 (1993) ..... | 10           |
| <i>Jackson v. Nagel</i> , 47 F. 703 (C.C.N.D. Cal. 1891).....                                 | 19           |
| <i>Janus Capital Group, Inc. v. First Derivative Traders</i> , 131 S. Ct. 2296 (2011) .....   | 14           |
| <i>Laperriere v. Venta Ins. Group, Inc.</i> , 526 F.3d 715 (11th Cir. 2008).....              | 14           |
| <i>Maruho Co. v. Miles, Inc.</i> , 13 F.3d 6 (1st Cir. 1993).....                             | 14           |
| <i>Matthews v. Skates</i> , 16 F. Cas. 1133 (C.C.S.D. Ala. 1860) (No. 9,291).....             | 12           |
| <i>Mercoid Corp. v. Mid-Continent Inv. Co.</i> , 320 U.S. 661 (1944) .....                    | 3, 8         |
| <i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....          | 18           |
| <i>Meyer v. Holley</i> , 537 U.S. 280 (2003) .....  | 13, 14       |
| <i>Missouri v. Jenkins</i> , 495 U.S. 33 (1990).....  | 10           |

|  |      |
|--|------|
| <i>Morley Constr. Co. v. Maryland Cas. Co.</i> ,<br>300 U.S. 185 (1937) .....  | 9    |
| <i>National Archives &amp; Records Admin. v. Favish</i> ,<br>541 U.S. 157 (2004) .....   | 20   |
| <i>New Jersey Patent Co. v. Schaeffer</i> , 159 F. 171<br>(C.C.E.D. Pa. 1908), <i>aff'd</i> , 178 F. 276 (3d<br>Cir. 1909) ..... | 18   |
| <i>Northwest Airlines, Inc. v. County of Kent</i> ,<br>510 U.S. 355 (1994) .....   | 1, 9 |
| <i>Ohio v. Robinette</i> , 519 U.S. 33 (1996) .....  | 10   |
| <i>Parker v. Hulme</i> , 18 F. Cas. 1138 (C.C.E.D. Pa.<br>1849) (No. 10,740).....  | 12   |
| <i>Pittman v. Grayson</i> , 149 F.3d 111 (2d Cir. 1998) .....  | 16   |
| <i>Rio Mar Assocs., LP v. UHS of Puerto Rico,<br/>Inc.</i> , 522 F.3d 159 (1st Cir. 2008).....                                   | 14   |
| <i>Rosemond v. United States</i> , 134 S. Ct. 1240<br>(2014) .....   | 7, 8 |
| <i>RSA Data Sec., Inc. v. Cylink Corp.</i> , Civ. No.<br>96-20094SW, 1996 WL 107272 (N.D. Cal.<br>Mar. 4, 1996).....             | 22   |
| <i>Sony Corp. of Am. v. Universal City Studios,<br/>Inc.</i> , 464 U.S. 417 (1984) .....   | 18   |
| <i>Thompson v. N.T. Bushnell Co.</i> , 96 F. 238<br>(2d Cir. 1899) .....   | 12   |
| <i>Thomson-Houston Elec. Co. v. Ohio Brass Co.</i> ,<br>80 F. 712 (6th Cir. 1897) .....  | 18   |
| <i>Thurber Corp. v. Fairchild Motor Corp.</i> ,<br>269 F.2d 841 (5th Cir. 1959) .....  | 12   |
| <i>Toledo Plate &amp; Window Glass Co. v. Kawneer<br/>Mfg. Co.</i> , 237 F. 364 (6th Cir. 1916).....                             | 12   |

|   |    |
|---|----|
| <i>United States v. Ron Pair Enters., Inc.</i> , 489 U.S.<br>235 (1989) .....             | 8  |
| <i>Wallace v. Holmes</i> , 29 F. Cas. 74 (C.C.D. Conn.<br>1871) (No. 17,100).....         | 18 |
| <i>Williams v. Taylor</i> , 529 U.S. 362 (2000) .....                                     | 5  |
| <i>Yazoo &amp; M.V.R.R. Co. v. Thomas</i> , 132 U.S. 174<br>(1889) .....                  | 5  |
| <i>York &amp; Maryland Line R.R. Co. v. Winans</i> ,<br>58 U.S. (17 How.) 30 (1854) ..... | 19 |

## STATUTES AND RULES

|   |   |
|---|---|
| Copyright Act of 1976, 17 U.S.C. § 101 <i>et seq.</i> ..... | 18  |
| Patent Act (35 U.S.C.):                                     |   |
| 35 U.S.C. § 154(a) .....                                    | 3, 4  |
| 35 U.S.C. § 154(a)(1).....                                  | 4   |
| 35 U.S.C. § 271 .....                                       | 3, 5, 11, 18, 19                                      |
| 35 U.S.C. § 271(a) .....                                    | 1, 2, 3, 4, 5, 6, 8, 9,<br>10, 11, 12, 13, 17, 18, 20 |
| 35 U.S.C. § 271(b) .....                                    | 1, 3, 4, 5, 6, 7, 8,<br>10, 11, 12, 17, 18, 20        |
| 35 U.S.C. § 271(c) .....                                    | 12, 17, 18  |
| 35 U.S.C. § 281 .....                                       | 1, 3, 4, 5  |
| 35 U.S.C. § 282 .....                                       | 5   |
| 35 U.S.C. § 282(a)(1).....                                  | 5   |
| Patent Act of 1790, ch. 7, § 4, 1 Stat. 109, 111 .....      | 12  |
| 18 U.S.C. § 2(b) .....                                      | 7   |
| Sup. Ct. R. 14.1(a).....                                    | 10  |



## OTHER MATERIALS

|  |        |
|--|--------|
| <i>Black's Law Dictionary</i> (3d ed. 1933).....   | 5      |
| <i>Black's Law Dictionary</i> (9th ed. 2009) .....   | 4      |
| E. Wyndham Hulme, <i>On the History of Patent Law in the Seventeenth and Eighteenth Centuries</i> , 18 L.Q.R. 280 (1902) ..... | 12     |
| W. Page Keeton et al., <i>Prosser and Keeton on the Law of Torts</i> (5th ed. 1984) .....                                      | 8      |
| Janice M. Mueller, <i>Patent Law</i> (3d ed. 2009) .....   | 18     |
| Restatement of Agency (1933).....  | 15, 16 |
| Restatement (Second) of Torts (1979) .....   | 8, 16  |
| Restatement (Third) of Agency (2006) .....   | 14     |
| 1A Norman J. Singer, <i>Statutes and Statutory Construction</i> (7th ed. 2009) .....   | 5      |
| U.S. Patent No. 4,200,770 (Apr. 29, 1980).....   | 22     |

This Court granted certiorari to decide whether the Federal Circuit misconstrued the Patent Act by holding that a patentee may sue for indirect infringement under § 271(b) when no party has directly infringed under § 271(a). Akamai (like the Federal Circuit) relies on a convoluted theory under which the term “infringement” in § 271(b) refers not just to conduct that “infringes” under § 271(a), but also to a hitherto unknown category of non-actionable direct infringement whose only apparent purpose is to support secondary liability under § 271(b). Not only is this an unnatural reading of the text, but it is also contrary to § 281, which provides that, when there is “infringement,” the infringer (or infringers) can be sued. There is no such thing as conduct that constitutes direct “infringement” but that is not actionable; the absence of any direct infringer in this case highlights why the decision below is irreconcilable with the statute.

Akamai seeks to deflect attention from the question presented by challenging the court of appeals’ rejection of its direct-infringement claims under § 271(a), but that issue is not properly before this Court. The district court overturned a jury verdict on this issue, and the Federal Circuit affirmed that determination: because its cross-petition has not been granted, Akamai may not seek “to alter the judgment below” by seeking reversal on that point. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994). In any event, Akamai’s effort to extend § 271(a) to reach conduct by multiple actors – none of whom practices the patented method – based on an undefined “fact-intensive standard,” Br. 35, is inconsistent with the bedrock principle that liability for direct infringement is strict, with settled princi-

ples of tort law, and with Patent Act provisions governing indirect liability. Liability for strict-liability torts based on another's conduct is limited to vicarious liability – that is, situations in which the defendant has the legal right to direct or control the third party's conduct. By contrast, Akamai cites conduct-attribution rules derived from the law governing intentional or negligent torts; they cannot be applied to § 271(a) without disregarding the strict-liability nature of direct infringement and radically broadening direct-infringement liability.

Akamai asserts that Limelight is not “innocent,” its conduct “more culpable” than that of typical inducers, Br. 51 (emphasis omitted), but Akamai's rhetoric is inconsistent not only with its doctrinal arguments but also with the facts. Akamai neither claimed nor proved willful infringement or intentional inducement at trial. Quite the opposite: it relied solely on a claim of strict liability under § 271(a), asking for and receiving a jury instruction that “infringement . . . can occur even if the person who is said to infringe doesn't know that he or she is infringing, doesn't even know about the patent.”<sup>1</sup> Akamai defends its proposed rule on the grounds of an intent that it never established at trial.<sup>2</sup>

---

<sup>1</sup> A818 (19:13-16). Akamai also made no attempt to prove willful infringement.

<sup>2</sup> Akamai relied exclusively on § 271(a) not because any prior Federal Circuit case compelled it, *cf.* Resp. Br. 15, but because, if Akamai had claimed bad intent, evidence concerning the invalidity of the '703 patent would have been placed before the jury. *See* Dist. Ct. Dkt. #238. The jury would have learned that what Akamai describes as the core of its invention, *see* Resp. Br. 6, was invented by someone else. *See Akamai Techs., Inc. v. Cable & Wireless Internet Servs., Inc.*, 344 F.3d 1186, 1194-95 (Fed. Cir. 2003).

The country’s most innovative companies oppose the Federal Circuit’s expansion of “divided infringement” liability because of its corrosive effects on innovation and investment; 10 of 11 Federal Circuit judges rejected Akamai’s even more radical proposal to expand direct-infringement liability. A new “divided infringement” tort is not required to protect incentives to innovate; moreover, method claims can and should be drafted from the point of view of a single actor to provide clear notice to the public. In any event, any determination that liability should be imposed for conduct falling outside the statutory categories established in § 271 is for Congress.

## ARGUMENT

### I. THE FEDERAL CIRCUIT’S DECISION SHOULD BE REVERSED

Section 271(b) restricts liability to one who “actively induces infringement of a patent.” The term “infringement” is naturally read to mean conduct (1) that violates a patentee’s exclusive rights under § 154(a); (2) that fits within the definition provided by § 271(a), or a specific statutory extension; and (3) for which the patentee has a “remedy” under § 281. Pet. Br. 20-26. Unless there is someone who can “be amerced as an infringer,” no one else can “be amerced for contributing to” – or, here, inducing – a “non-existent infringement.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961) (“*Aro I*”) (quoting *Mercoind Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 674 (1944) (Roberts, J., dissenting)). The court below erred in holding otherwise.

Akamai concedes (at 37) that infringement “mean[s] an encroachment upon, invasion of, or violation of a right”; the exclusive right to use under § 154(a). And

it concedes (at 38) that “[s]ection 271(a) mirrors this grant of rights” by rendering unauthorized use an infringement. But Akamai nevertheless maintains that a patentee’s exclusive-use rights under § 154(a) can somehow be infringed even though no one can be held liable for unauthorized use under § 271(a). Infringement, Akamai says (at 37), means “harm inflicted upon a rights-holder, irrespective of how or by whom and whether any one person is liable.” But the assertion is inconsistent with the Patent Act, this Court’s cases, and background legal principles, none of which recognizes a category of non-actionable invasions of an exclusive property right.

**A. The Statute’s Text and Structure Resolve the Question Presented**

The Patent Act does not recognize any category of infringement that is non-actionable when committed directly but becomes actionable when induced. The rights conveyed by § 154(a) are “right[s] to *exclude others* from making, using, offering for sale, or selling the invention.” 35 U.S.C. § 154(a)(1) (emphasis added). Conduct from which the patentee has no “right to exclude others,” *id.*, does not violate the patentee’s rights under § 154(a). Limelight has shown (at 22-23), and Akamai does not dispute, that § 154(a) gives Akamai no right to exclude anyone from using some but not all the steps of Akamai’s patented method. It follows that one who uses some but not all the steps of Akamai’s method is not committing an act of “infringement” and is not liable under § 271(a); inducement of such conduct gives rise to no liability under § 271(b).<sup>3</sup> That is confirmed by § 281, which

---

<sup>3</sup> The dictionaries Akamai cites (at 37) tie “infringement” to the scope of the “exclusive rights of a patent,” *Black’s Law Dictionary* 851 (9th ed. 2009), or to an invasion of “the rights

provides that a “patentee shall have remedy by civil action for infringement.” If those words are to receive their natural meaning, “infringement” cannot include acts for which the patentee has no remedy.<sup>4</sup>

Akamai argues (at 39) that § 282 points to a different result by mentioning both “[n]oninfringement” and “absence of liability for infringement” as defenses to an action for infringement, which (it claims) implies that in some cases there must be infringement but no liability. But § 271 itself distinguishes between conduct that “infringes” (§ 271(a)) and conduct that gives rise to “liab[ility] as an infringer” (e.g., § 271(b)). Section 282(a)(1) logically refers to both: an accused indirect infringer could plead absence of liability for another’s infringement, even if the patent was directly infringed by another.

**B. This Court’s Decisions Recognize That There Can Be No Indirect Infringement Without Direct Infringement Under § 271(a)**

Both *Aro I* and *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), hold that “if there is no *direct* infringement of a patent there can be no

---

secured by patents,” *Black’s Law Dictionary* 961 (3d ed. 1933). They do not support a definition of “infringement” that includes conduct the patentee has no right to prevent.

<sup>4</sup> Akamai argues (at 40 n.10), based on a snippet of legislative history, that § 281 was “intended as a preamble.” But a preamble precedes the enacting clause and therefore “is no part of the act.” *Yazoo & M.V.R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889); see 1A Norman J. Singer, *Statutes and Statutory Construction* § 20:3 (7th ed. 2009). Section 281 is part of the Patent Act and implicates the “cardinal principle of statutory construction that [courts] must “give effect, if possible, to every clause and word of a statute.”” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citations omitted).

[indirect] infringement.” *Aro I*, 365 U.S. at 341; *see Deepsouth*, 406 U.S. at 526; *see also* Pet. Br. 27-32. Akamai calls this Court’s statements “dicta,” Br. 45, but the link between direct and indirect infringement underlay the results in both cases. *See* Pet. Br. 27-28. Moreover, the Court’s reasoning reflects the understanding that direct infringement and indirect infringement are statutorily distinct categories and that the existence of the latter depends on the existence of the former.

Akamai also attempts to distinguish *Aro I* and *Deepsouth* on their facts, arguing (at 46) that “direct infringement” occurs so long as “the *acts* that invade the patentee’s exclusive rights” are “performed, regardless [of] whether by one or more parties.” Insofar as Akamai believes that direct infringement of method claims can occur even if no one performs all the necessary steps, that view is incorrect. *See infra* Part II.B. And, if Akamai means to say that non-actionable conduct can invade a patentee’s rights, that notion is a contradiction in terms: where a party does not perform *all* the steps of a method claim, it is not performing any “act[] that invade[s] the patentee’s exclusive rights.”<sup>5</sup>

*Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), addresses intent rather than conduct, but it framed the requirement “that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement” as

---

<sup>5</sup> If Akamai were correct that there can be common-law “infringement” outside the bounds of § 271(a), infringement could include the *extraterritorial* use of a patented device, because § 271(b) – unlike § 271(a) – contains no territorial limitations. *See* Ten IP Law Professors Br. 9-12. *Deepsouth* rejected that result.

part of its “hold[ing].” *Id.* at 2068. The reasoning supporting that holding recognizes that “‘contributory infringement’” – in the pre-Patent-Act, common-law sense – was tied to “the aiding and abetting of direct infringement *by another party.*” *Id.* at 2067 (emphasis added). Here, as elsewhere, this Court treated it as obvious that “direct infringement” means conduct by which someone infringes a patent.

### **C. Criminal- and Tort-Law Analogies Do Not Support the Decision Below**

As Limelight showed (at 33-37), and as the enforcer of the criminal laws agrees, *see* U.S. Br. 25-27, criminal- and tort-law analogies offer no support for Akamai’s position. Although Akamai relies on *Rosemond v. United States*, 134 S. Ct. 1240 (2014), in that case, unlike here, there was an underlying offense for the defendant to aid and abet. Indeed, the question before the Court in *Rosemond* was whether the putative aider and abettor needed to have the requisite state of mind with respect to all elements of the underlying offense, a question that assumes the existence of the offense. Here, Akamai contends that it can impose liability on Limelight for assisting a violation that did not take place at all.<sup>6</sup> Akamai focuses (at 44) on *Rosemond*’s statement 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’ would free neither party from liability.” 134 S. Ct. at 1247. That statement,

---

<sup>6</sup> In relying (at 44-45) on cases recognizing criminal liability under 18 U.S.C. § 2(b) where a guilty principal makes use of an innocent agent, Akamai ignores the textual differences between § 2(b) and § 271(b) – which foreclose any contention that Congress intended to impose such innocent-agent liability through § 271(b). *See* Pet. Br. 35-36 & nn.16-17.



however, presupposes that the defendants are “confederates” who have agreed to carry out a wrongful act. Akamai’s argument thus presumes that the acts give rise to liability under § 271(a). But the Federal Circuit extended indirect liability under § 271(b) to a case where no one could be liable under § 271(a). *Rosemond* offers no support for such an extension.<sup>7</sup>

#### **D. Pre-1952 Cases Do Not Support the Decision Below**

Akamai’s reliance (at 40-41) on “the common law understanding of indirect infringement” adds nothing to the opinion below. Like the Federal Circuit majority, Akamai ignores this Court’s cases giving statutory text priority over sparse and uncertain pre-statutory cases, *see* Pet. Br. 39-40 (citing, *e.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)); identifies (at 41) only two cases from one Circuit to show a purportedly settled common-law understanding; and fails to address the dissents by Justices Roberts and Frankfurter in *Mercoïd*, which *Aro I* approved and which are inconsistent with Akamai’s rendition of pre-Patent-Act law, *see* Pet. Br. 40.

---

<sup>7</sup> Akamai cites (at 44) § 877 of the Restatement (Second) of Torts (1979), but § 877 is addressed to liability for “the *tortious* conduct of another,” not to a situation where the induced conduct would not, standing alone, be tortious. *See* Pet. Br. 36-37; *see also infra* p.16. Akamai also quotes Prosser and Keeton discussing the situation where “individually . . . innocent [acts] . . . combine to cause [tortious] damage,” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 52, at 354 (5th ed. 1984), but the quote addresses circumstances – such as multiple polluters fouling a stream – where others’ actions provide the context in which to apply “the standard of reasonable conduct.” *Id.*; *see infra* p.17.

## II. AKAMAÏ'S DIRECT-INFRINGEMENT ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT AND LACK MERIT

### A. Because Akamai's Cross-Petition Has Not Been Granted, Akamai's Claims of Direct Infringement Are Not Properly Before This Court

The scope of liability for direct infringement under § 271(a) is not properly before the Court because Akamai's conditional cross-petition, which seeks to present this issue, has not been granted. Before the district court, Akamai disclaimed indirect infringement and pressed only a claim of strict liability under § 271(a). After a jury verdict in Akamai's favor, the district court granted Limelight's motion for judgment. App. 194a. The panel, App. 116a-117a, and then the nearly unanimous *en banc* Federal Circuit, App. 30a, 98a, affirmed that aspect of the district court's judgment, remanding to the district court solely "for further proceedings on the theory of induced infringement," App. 30a.

Akamai seeks reversal of the portion of the judgment against it – that is, to have "[t]he jury verdict of direct infringement . . . reinstated." Br. 56. But "[a] cross-petition is required" before a respondent may advance arguments to this Court that would "alter the judgment below." *Northwest Airlines*, 510 U.S. at 364-65 (declining to reach a question that would allow the respondent to prevail on an "issue on which it was a judgment loser" in the court of appeals); *see, e.g., Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013); *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (Cardozo, J.); *see also* Pet. 20 (No. 12-960) (arguing that granting the cross-petition "would *allow* the Court to address

[Akamai’s] predicate assertion . . . [of] direct infringement under § 271(a)”) (emphasis added). Akamai’s request that this Court “reinstate[]” the jury verdict runs afoul of that rule – and of Rule 14.1(a), which limits this Court’s review to “questions set out in the petition, or fairly included therein.”<sup>8</sup>

Akamai’s argument that the § 271(a) question is “a predicate to an intelligent resolution of the question presented,” Br. 19 (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)) – also pressed in support of its cross-petition, Pet. 20 (No. 12-960) – is incorrect. First, such an argument has never provided justification for altering a judgment in favor of a respondent when no cross-petition had been granted: no case Akamai cites (at 19-21) involved a respondent asking for more relief than an affirmance. Second, the premise is wrong: this Court can review the *en banc* court’s ruling on the scope of § 271(b) on its own terms, without addressing the court’s construction of § 271(a). See Opp. Cross-Pet. 8 (No. 12-960); U.S. Cert. Br. 22 n.9. Third, this Court frequently limits its review to cert-worthy legal issues, accepting but not deciding lower courts’ resolution of predicate questions; that practice conserves the Court’s resources. See Opp. Cross-Pet. 8-9 (No. 12-960); see also *Missouri v. Jenkins*, 495 U.S. 33, 53 (1990); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (per curiam) (stressing that “[f]aithful application” of Rule 14.1(a) “inform[s] those

---

<sup>8</sup> Reinstatement of the jury verdict would not be available even if Akamai’s cross-petition were granted. Among other things, the Federal Circuit expressly did not address Limelight’s “alternative ground for affirmance” based on Akamai’s failure to present “evidence that Limelight or its customers actually performed the tagging limitation as properly construed.” App. 117a.

who seek review here that we continue to strongly ‘disapprove the practice of smuggling additional questions into a case after we grant certiorari’”) (citation omitted).

Limelight, having respected the scope of the Court’s grant of certiorari, could be prejudiced if Akamai were permitted to present its § 271(a) arguments. The United States and most *amici* supporting reversal have likewise addressed the question presented without defending the lower court’s interpretation of § 271(a). *Cf.* U.S. Cert. Br. 21-23 (noting that the Federal Circuit’s approach to “joint infringement” is “sound”). Akamai’s proposed expansion of § 271(a) would work at least as radical – and ill-advised – a change in the law as the Federal Circuit’s expansion of § 271(b). This Court should not contemplate that possibility without comprehensive presentation from the parties, the government, and interested *amici*.

**B. Expanding Liability for Direct Infringement Under § 271(a) Would Conflict With the Statutory Scheme**

Congress codified the provisions governing liability for infringement in § 271 against a long-settled understanding that the unauthorized making, using, or selling of an invention – direct infringement – gives rise to strict liability. Rules governing attribution of conduct for purposes of liability under § 271(a) are therefore those that apply to strict-liability torts – that is, vicarious liability based on the legal right to control a third party’s actions. *See* App. 92a-96a (Linn, J., dissenting) (discussing application of “traditional principles of vicarious liability” to claims under § 271(a)). Akamai’s reliance on conduct-attribution rules derived from the law governing

intentional or negligence torts ignores that basic principle. The conclusion that Congress did not intend to authorize common-law expansion beyond traditional vicarious-liability rules is confirmed by the codification of distinct bases for *indirect* liability in § 271(b) and (c) – which require proof of culpable intent.

1. A defendant directly infringes if, without authority, it “uses . . . any patented invention[] within the United States.” 35 U.S.C. § 271(a). A claim of direct infringement does not require proof of intent or knowledge: liability is strict. *See Global-Tech*, 131 S. Ct. at 2065 n.2; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999). That understanding has deep roots: the principle was present in English law,<sup>9</sup> and the Patent Act of 1790 imposed liability for infringement without fault. *See Patent Act of 1790*, ch. 7, § 4, 1 Stat. 109, 111. Early American cases repeatedly reaffirmed the principle,<sup>10</sup> and it has remained a constant, both before and after the current codification in 1952.<sup>11</sup> Akamai itself pursued (exclusively) a strict-liability claim, obtaining a jury instruction that

---

<sup>9</sup> See Lord Mansfield’s charge to the jury in *Liardet v. Johnson* (K.B. 1778), as quoted in E. Wyndham Hulme, *On the History of Patent Law in the Seventeenth and Eighteenth Centuries*, 18 L.Q.R. 280, 285 (1902).

<sup>10</sup> *See Matthews v. Skates*, 16 F. Cas. 1133, 1135 (C.C.S.D. Ala. 1860); *Parker v. Hulme*, 18 F. Cas. 1138, 1143 (C.C.E.D. Pa. 1849).

<sup>11</sup> *See, e.g., Blair v. Westinghouse Elec. Corp.*, 291 F. Supp. 664, 670 (D.D.C. 1968); *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841, 849 (5th Cir. 1959); *Toledo Plate & Window Glass Co. v. Kawneer Mfg. Co.*, 237 F. 364, 369 (6th Cir. 1916); *Thompson v. N.T. Bushnell Co.*, 96 F. 238, 243 (2d Cir. 1899).

direct infringement does not depend on the infringer’s knowledge of the patent or intent.<sup>12</sup>

Congress’s codification of a strict-liability tort in § 271(a) indicates that it “intend[ed]” for “ordinary tort-related vicarious liability rules” to apply. *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006). Unless a defendant has performed each step of the patented method, it has not used the invention, and it has not directly infringed. *See* Pet. Br. 22-23; Resp. Br. 38. Accordingly, the claim that multiple parties together carried out all steps of a patented method but that none carried out all of them fails to allege direct infringement *so long as* there is no basis for attributing the conduct of one party to the others.

Tort law draws a sharp distinction between attribution of conduct based on vicarious liability and doctrines that extend tort liability for another’s conduct based on fault. “Pure vicarious liability” is

---

<sup>12</sup> The evidence at trial was inconsistent with any claim of bad intent. *First*, because Limelight does not use the sole technique for “tagging” that is described in Akamai’s patent (an alternative ground for affirmance that the court of appeals did not need to reach, *see* App. 117a) and because its content delivery network (“CDN”) architecture is fundamentally different from the architecture described in the patent (for example, it includes no “intelligent DNS,” but relies on ordinary Internet routing, *see* Pet. Br. 4-5), Limelight is no copyist. That is confirmed by the fact that Akamai attempted to acquire Limelight and sued (without warning) only *after* Limelight insisted on remaining independent. *Id.* at 6. *Second*, when a particular customer uses Limelight’s CDN, Limelight may have no idea whether the customer is redirecting requests for any embedded object, because much of the content that Limelight delivers – games, videos, music – is not displayed within a web page. Akamai’s patent applies only to delivery of embedded objects. *See* JA64 (Abstract), 77 (relevant claims). *See also supra* n.2.

“based on the actions of the other party regardless of any allegation of culpability on the party held vicariously liable.” *Laperriere v. Venta Ins. Group, Inc.*, 526 F.3d 715, 722 (11th Cir. 2008) (per curiam).<sup>13</sup> Such pure vicarious liability does not arise *except* in circumstances where the defendant has the legal right to direct or control the conduct of the third party. See *Meyer*, 537 U.S. at 286 (“[t]he Restatement [(Second) of Agency] § 1 specifies that the relevant principal/agency relationship demands . . . [*inter alia*] control (or the right to direct or control)”); *Maruho*, 13 F.3d at 11 (“[t]he theories of vicarious liability . . . all require [plaintiff] to show that [defendant] had the legal right to control” the tortious conduct); cf. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (“Without control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.”).<sup>14</sup> Only in such circumstances is it proper to treat such conduct as that of the defendant.

When the conditions for vicarious liability are met, multiple persons *can*, together, directly infringe

---

<sup>13</sup> See also *Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929); *Rio Mar Assocs., LP v. UHS of Puerto Rico, Inc.*, 522 F.3d 159, 165 (1st Cir. 2008) (distinguishing “vicarious liability” from “joint tortfeasor liability”); *Aguirre v. Turner Constr. Co.*, 501 F.3d 825, 828-29 (7th Cir. 2007) (same); *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1431 (3d Cir. 1994); *Maruho Co. v. Miles, Inc.*, 13 F.3d 6, 11 (1st Cir. 1993) (Breyer, C.J.) (discussing potential bases for vicarious liability where defendant is “without fault”); *Hunnicut v. Wright*, 986 F.2d 119, 123 (5th Cir. 1993).

<sup>14</sup> See also *Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092, 1097 (8th Cir. 2007); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173 (9th Cir. 2006); Restatement (Third) of Agency § 1.01 (2006); see also *id.* § 7.04.

a patent. *See* U.S. Cert. Br. 21.<sup>15</sup> Legal relationships giving rise to vicarious liability without fault – agency, partnership, joint venture<sup>16</sup> – are settled and relatively predictable. *See also* IBM Br. 28 (urging Court to limit “joint direct-infringement liability” to “established, concrete, legally significant relationships,” such as partnership and joint venture “properly and rigorously defined,” to avoid “unpredictable liability”). Limelight, however, has no legal ability to control content providers’ actions through any legally significant relationship or contractual obligation. Accordingly, as the *en banc* majority, the four dissenters, the panel, and the district court all determined, Akamai failed to establish vicarious liability.

2. Akamai relies exclusively on tort doctrines that impose liability for the conduct of others based on the defendant’s fault and that are therefore inapplicable to claims of direct infringement. Those doctrines do not and should not apply to claims of strict liability for direct infringement.

*First*, § 212 of the Restatement of Agency (1933) does not support attribution of another’s conduct without fault where a principal without tortious intent encourages another to engage in conduct that is innocent on its own. That section summarizes a

---

<sup>15</sup> Akamai gets no help from the statute’s use of the word “whoever.” No one disagrees that the term can refer to multiple persons *if* they infringe.

<sup>16</sup> Because co-venturers are vicariously liable for each others’ conduct, *Golden Hour Data Systems, Inc. v. emsCharts, Inc.*, 614 F.3d 1367, 1371 (Fed. Cir. 2010), may have been decided incorrectly under the Federal Circuit’s existing standard, as the dissent below (which included the author of the *Golden Hour* opinion) acknowledged. App. 95a (Linn, J., dissenting); *cf.* Resp. Br. 55.



principle of tort liability involving wrongful conduct of the principal, making clear that fault is *necessary* for secondary liability. *See id.*, cmt. c, illus. 6 (no liability for principal if agent knows of circumstances rendering conduct tortious but principal does not). Section 877(a) of the Restatement (Second) of Torts likewise applies only in cases of “tortious conduct of another” and where the defendant “orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own.”

The basis for imposing indirect liability in such cases is “know[ledge of] the *wrongful nature* of the primary actor’s conduct.” *Pittman v. Grayson*, 149 F.3d 111, 123 (2d Cir. 1998) (emphasis added); *see also Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982) (liability for inducement to commit trademark infringement requires that defendant “know[] or ha[ve] reason to know” of infringement). Carrying out only part of a patented method is not wrongful; accordingly, knowing that another is carrying out only part of a patented method is not culpable knowledge. Furthermore, liability for direct infringement does not turn on culpable knowledge, and, as noted, Akamai at trial disclaimed any need to prove such knowledge.

*Second*, “acting in concert” does not give rise to liability without fault. Akamai quotes § 876(a) of the Restatement (Second) of Torts, but that provision does not apply “when the conduct of either the actor or the other is free from intent to do harm or negligence but involves strict liability” – as Akamai concedes is the case here. *See Resp. Br. 27 n.4*. Concerted-action (or co-conspirator) liability requires both (1) the commission of a tortious act by the

primary tortfeasor and (2) knowledge of the wrongful nature of the primary actor's conduct. *See, e.g., Beck v. Prupis*, 529 U.S. 494, 501 (2000); *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 841 (2d Cir. 1992) (“[C]oncert of action requires more than a supply relationship. It requires jointly undertaken tortious conduct.”). Guilty knowledge is not a basis for imposing otherwise non-existent direct-infringement liability; moreover, Akamai proved no such thing here.

*Third*, Akamai gets no mileage from cases involving liability for a defendant that violates a duty of care – for example, by discharging pollutants – in circumstances where, if others had not acted similarly, its actions would not have caused harm. Those cases reflect the common-sense proposition that, if an actor is required to exercise care, she must do so in light of the factual context. *See* Resp. Br. 27. That principle has no application to a strict-liability claim under § 271(a).

3. Akamai's proposed construction of § 271(a) is also impossible to square with the limitations on *indirect* infringement imposed by Congress under § 271(b) and (c). If Akamai were correct, then a defendant who encouraged another to carry out *all* the steps of a method – not just some of the steps – would be liable without fault under § 271(a). *See* Resp. Br. 27 n.4. Akamai's reading would thus swallow up § 271(b) and render pointless the culpable-knowledge requirement that this Court recognized in *Global-Tech*.<sup>17</sup>

---

<sup>17</sup> In addition, § 271(c) imposes no liability when a defendant supplies a component of an invention that has “substantial non-infringing use.” Limelight's service indisputably has uses that do not implicate Akamai's embedded-object-only patent. *See*

Akamai argues that the Patent Act, like the Copyright Act, leaves “lines between direct infringement, contributory infringement and vicarious liability [that] are not clearly drawn.” Br. 21 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005)). But the lines between different types of liability under the Copyright Act are judge-made. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434-35 (1984). Section 271 of the Patent Act draws the clear lines that Akamai claims are lacking. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (“[w]ith respect [to] . . . the scope of conduct prohibited by [a statute], the text of the statute controls”).

4. Akamai’s reliance on pre-1952 decisions involving indirect liability does not help it. *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 80 F. 712 (6th Cir. 1897), rejecting defendant’s argument that this Court had “do[ne] away altogether with the doctrine of contributory infringement,” *id.* at 721, explains why liability extends beyond direct infringers (now covered by § 271(a)) to contributory infringers (now covered by § 271(b) and (c)). *New Jersey Patent Co. v. Schaeffer*, 159 F. 171 (C.C.E.D. Pa. 1908), *aff’d*, 178 F. 276 (3d Cir. 1909), and *Wallace v. Holmes*, 29 F. Cas. 74 (C.C.D. Conn. 1871), were likewise about indirect infringement. See Janice M. Mueller, *Patent Law* 446 n.188 (3d ed. 2009). The Robinson and Walker treatises similarly focus on indirect infringement.

---

*supra* n.12. Akamai’s theory would allow plaintiffs to circumvent limitations on liability under that provision as well. See *Altera* Br. 13-14.

The other pre-1952 cases reflect vicarious liability. See *York & Maryland Line R.R. Co. v. Winans*, 58 U.S. (17 How.) 30, 38-40 (1854) (joint liability among companies that shared costs and profits of a venture for undivided infringing use); *Jackson v. Nagel*, 47 F. 703, 704 (C.C.N.D. Cal. 1891) (defendant and sub-contractor jointly liable for making infringing article). None of Akamai’s cases combined the conduct of two independent actors – neither of whom practices all the elements of an invention – to establish direct infringement.

### **III. EXPANDING “DIVIDED INFRINGEMENT” LIABILITY WOULD ENCOURAGE BURDENSOME LITIGATION WITHOUT PROMOTING INNOVATION**

Compromising existing limits on liability under § 271 to facilitate claims of “divided infringement” would foster investment-hindering litigation without adding incentives to innovation. Concerns about unpredictable litigation have led leading companies and trade associations from financial services, food and agriculture, consumer electronics, software, social media, electronic equipment, wireless communications, and Internet retailing to urge this Court to reverse. Yet *amici* also depend on patents to protect their investments in innovation – as does Limelight, which owns 90 patents and has many more pending. Neither *amici* nor Limelight want to create a “loop-hole.” Rejecting Akamai’s claims would not do so.

#### **A. Expansion of Divided Infringement Liability Promotes Unpredictable Litigation While Undermining Patents’ Notice Function**

1. Allowing patent plaintiffs to pursue “divided infringement” claims increases complexity and un-

predictability, promoting burdensome litigation – as borne out by the experience of *amici*. See Google Br. 14, 19 (listing cases); CTIA Br. 22-23 (same); Altera Br. 13 (“patent owners have already begun to assert inducement liability under § 271(b) in lieu of contributory infringement under § 271(c)"); Clearing House Br. 2 (“[f]inancial institutions are already facing an increased number of claims”); see also Cargill Br. 7 (warning of “consequences . . . far beyond the information-technology context”).

The obligation to prove specific intent under § 271(b), see Resp. Br. 51, provides no safeguard: “the intent requirement as it is applied” cannot “effectively cabin” indirect-infringement claims. Google Br. 20; see Pet. Br. 43-45; IBM Br. 21-22; Clearing House Br. 25-26; CTIA Br. 19 (“scienter requirements are “easy to allege and hard to disprove””) (quoting *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004)); Altera Br. 10-14.

The situation would be worse yet under Akamai’s expanded § 271(a). Although Akamai does little to flesh out its “flexible, fact-intensive standard,” Br. 35, requiring mere knowledge of another’s *conduct*, see *id.* at 27 & n.4, would provide no protection: customers, suppliers, and service providers frequently are aware of each others’ respective roles in particular processes (tellingly, Akamai insists (at 51) that it could have sued Limelight’s *customers* for direct infringement), and a patent owner can easily manufacture knowledge with a pre-suit notice. Small wonder that virtually every Federal Circuit judge rejected Akamai’s call for such an expansive and unpredictable regime.

2. The problems created by Akamai’s expanded liability regime would only intensify over time. *See* Cargill Br. 16-21. Instead of creating incentives to draw clear claims directed at the conduct of a single potential infringer, inventors will be encouraged to draft passive-voice method claims “to preserve the ability to pick and choose their otherwise-innocent targets.” CTIA Br. 26; *see also* IP Scholars Br. 12. That is inconsistent with the public’s right to have clear notice of what is claimed.

**B. Rejection of Akamai’s Proposed Expansion of the Patent Laws Would Not Affect Incentives To Innovate**

If there were a “gap” in the statute, it would be for Congress to fill, *Deepsouth*, 406 U.S. at 531; Microsoft Br. 2-11; moreover, because method claims can be drafted from the point of view of a single potential infringer, there is no *prospective* gap and no effect on incentives for innovation. *See* Pet. Br. 45-46; Google Br. 21-25; Clearing House Br. 19-21; IP Scholars Br. 9-11.

Akamai argues (at 55) that it would be more “straightforward” to claim “interactive” methods without the bother of describing steps to be carried out by a single potential infringer. But claims drafted to cover the conduct of multiple independent actors undermine notice, allow patentees to claim the exclusive right to more than they have invented, and create unpredictable liability. *See* EFF Br. 12-19; CTIA Br. 23-30; Altera Br. 5-10; IBM Br. 16.

Akamai argues (at 53) that “[m]any historic inventions other than Akamai’s were not only patented as methods, but as methods that had to be performed by *multiple* actors together.” But the two expired patents that they cite – one related to data encryp-

tion and one to FM radio – both included claims written from the point of view of a single potential infringer. See U.S. Patent No. 4,200,770<sup>18</sup> claims 1, 7; *Armstrong v. Emerson Radio & Phonograph Corp.*, 179 F. Supp. 95, 108 (S.D.N.Y. 1959) (construing claims 1 and 2 as describing systems). The principal claim of Akamai’s ’703 patent – claim 1 – is a system or apparatus claim (which includes a routine – that is, software – for modifying URLs). That claim is unenforceable not because it requires multiple actors, but because it has been held to be invalid. See *supra* n.2.

Although Akamai’s *amici* argue that certain types of patents – casino games, certain business methods, and drug-treatment techniques – are more difficult to draft from the point of view of a single infringer, *cf.* Pet. Br. 47-49, they offer no specific examples. The desire to relieve patent owners of the consequences of infelicitous drafting provides no justification for blurring the clear statutory lines and long-settled doctrinal principles that govern the issue before this Court.

---

<sup>18</sup> Whether the ’770 *patent* – as opposed to the underlying mathematics – was important is debatable. See *RSA Data Sec., Inc. v. Cylink Corp.*, Civ. No. 96-20094SW, 1996 WL 107272, at \*4 (N.D. Cal. Mar. 4, 1996) (denying preliminary injunction based on invalidity concerns).

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ALEXANDER F. MACKINNON  
KIRKLAND & ELLIS LLP  
333 South Hope Street  
Los Angeles, CA 90071  
(213) 680-8400

DION MESSER  
GENERAL COUNSEL –  
INTELLECTUAL PROPERTY  
LIMELIGHT NETWORKS, INC.  
222 South Mill Avenue  
8th Floor  
Tempe, AZ 85281  
(602) 850-4833

AARON M. PANNER  
*Counsel of Record*  
JOHN CHRISTOPHER  
ROZENDAAL  
GREGORY G. RAPAWY  
MICHAEL E. JOFFRE  
KELLOGG, HUBER, HANSEN,  
TODD, EVANS & FIGEL,  
P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
(apanner@khhte.com)

April 22, 2014