Split Federal Circuit Panel Rules that Direct Infringement by Multiple Parties Requires Agency Relationship, Contractual Arrangement, or Joint Enterprise

On May 13, 2015, a three-judge panel of the Federal Circuit issued its long-awaited opinion on remand in *Akamai Techs., Inc. v. Limelight Networks, Inc.* This decision came in the wake of the Federal Circuit's *en banc* decision and Supreme Court review in the same case. In August 2012, the *en banc* court had held that the predicate act of infringement for induced liability under § 271(b) did not need to qualify as direct infringement under § 271(a). In June 2014, the Supreme Court unanimously rejected that analysis of § 271(b) as "fundamentally misunderstand[ing] what it means to infringe a method patent." *Limelight Networks, Inc v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2117 (2014).

On remand, the Federal Circuit addressed liability for direct infringement of a method claim under § 271(a). *Akamai Techs., Inc. v. Limelight Networks, Inc.*, Nos. 2009-1372, 2009-1380, 2009-1416, 2009-1417, slip op. at 8. The majority opinion, authored by Judge Linn and joined by Judge Prost, held that under principles of vicarious liability, such direct infringement occurs only when all of the claimed steps are performed by or attributed to a single entity (*i.e.*, the single-entity rule). *Id.* at 15-16. According to the majority, vicarious liability includes principal-agent relationships, contractual arrangements beyond those typically found in arms-length seller-customer agreements, and joint enterprises. *Id.* at 18-19.

The majority rejected the argument by Akamai and the dissent that § 271(a) incorporates joint tortfeasor liability. *Id.* at 9. The majority explained that § 271(b) and (c) define the *only* situations "in which individuals not completing an infringing act under § 271(a) could nevertheless be liable." *Id.* at 11-12. It stated that adopting joint tortfeasor liability under § 271(a) would render § 271(b) and (c) redundant. *Id.* at 13-15. The majority also expressed concern that including joint tortfeasors in § 271(a) would expose unwitting customers to liability. *Id.* at 23-24.

On the facts of the case, because Limelight's customers did not perform the claimed method steps as agents for Limelight or under contractual obligation to Limelight, the Court held that Limelight is not vicariously liable for those customers' actions. *Id.* at 26-28. Consequently, it affirmed the District Court's post-trial grant of judgment as a matter of law of no infringement. *Id.* at 27-28.

Judge Moore dissented, arguing that the majority "divorces patent law from mainstream legal principles by refusing to accept that § 271(a) includes joint tortfeasor liability" and stating that the majority "creates a gaping hole in what for centuries has been recognized as an actionable form of infringement." *Akamai Techs., Inc.*, dissent slip op. at 1. She stated that the single entity rule "is a recent judicial creation" and that the majority's opinion "is inconsistent with the common law, the plain language of the Patent Act, and centuries of patent law . . ." *Id.* at 2, 4. Looking to the text of § 271(a) itself, Judge Moore noted that the plain language of "whoever" includes any person or persons, and that because "whoever" is used elsewhere in the Patent Act to refer to multiple persons, it should be construed in the same way in § 271(a). *Id.* at 9-10.

The dissent concluded with the statement that "to do either what the majority proposes or what I propose requires en banc action, as it is admittedly at odds with binding precedent." *Id.* at 31.

This decision highlights the continuing and vigorous differences of opinion among members of the bench and bar about the basic concept of joint or divided infringement. Moreover, the majority's reference to "joint enterprise" as a potential basis for liability under § 271(a) hints at the possibility of further evolution of the doctrine. These circumstances raise the question of if and when the *en banc* Federal Circuit and the U.S. Supreme Court will revisit this issue.

For further information, please contact your usual Ropes & Gray attorney or one of the Ropes & Gray attorneys listed below.

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