THE AFTERMATH OF AKAMAI

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ABSTRACT

In Akamai Technologies, Inc. v. Limelight Networks, Inc. (decided in August of 2012) the Federal Circuit, sitting en banc, narrowly held that to successfully enforce a patent when more than one party performs all of the steps of a claimed method, the patentee must show that one of the alleged infringers induced the infringement of the other party. However, the opinion failed to answer many of the questions the Federal Circuit asked the parties to brief. For example, the majority passed on the opportunity to clarify the law of joint infringement as it applied to liability for direct infringement under 35 U.S.C. § 271(a). Instead, the Federal Circuit simply acknowledged that doctrinal problems arise “when the acts necessary to give rise to liability for direct infringement are shared between two or more actors.” In sum, the court overruled its decisions in BMC and Muniauction and established a new test under inducement for when more than one party performs steps in a method claim. Judges in the minority issued two dissenting opinions. In one dissent, Judge Linn, joined by three other judges, argued for the preservation of the direction or control test and asserted that the test provides for a finding of liability where there is a joint enterprise. In the second dissent, Judge Newman, writing for herself, argued that there should be liability for infringement whenever one or more parties perform the steps of a claimed method. Some commentators have claimed that the 6-5 decision of the Federal Circuit did more harm than good. As a result, where inducement is not present, parties could potentially use and benefit from new interactive technologies without liability for patent infringement. Several commentators have suggested that patentees can avoid this fate by drafting better claims. Unfortunately, given today’s advances in technology and the ability of method claims to better define an invention, even expert claim drafting cannot protect a patentee from an unauthorized use of their innovative method.

Instead of judicially narrowing loopholes with respect to joint infringement, they should be closed and the law should be clarified. This article analyzes the development of joint infringement theory, including the Federal Circuit’s recent rehearing of it’s own decisions and district court cases that have applied the new rule under Akamai. This article shows that the Federal Circuit’s development of joint infringement case law is ripe for legislative intervention. Further, I argue that the fractured opinion in Akamai provides a basic template for the creation of a new contributory infringement provision for method claims. The goal of this approach is to increase the likelihood that the law will protect deserving interactive methods from infringement.