Nos. 12-786, 12-800

IN THE

# Supreme Court of the United States

LIMELIGHT NETWORKS, INC.,

*Petitioner,*

*v.*

AKAMAI TECHNOLOGIES, INC. AND THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY,

*Respondent.*

EPIC SYSTEMS CORP.,

*Petitioner,*

*v.*

MCKESSON TECHNOLOGIES, INC.

*Respondent.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF OF *AMICI CURIAE* ALTERA CORPORATION, HTC CORPORATION, HTC AMERICA, INC., SMUGMUG, INC. AND WEATHERFORD INTERNATIONAL IN SUPPORT OF PETITIONERS


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**TABLE OF CONTENTS**

*Page*

TABLE OF CONTENTS. . . . . . . . . . . . . . . . . . . . . . . . . . i

TABLE OF CITED AUTHORITIES . . . . . . . . . . . . . . ii

STATEMENT OF INTEREST OF *AMICI CURIAE*. .1

SUMMARY OF ARGUMENT. . . . . . . . . . . . . . . . . . . . .2

ARGUMENT IN SUPPORT OF PETITIONERS . . . .4

I. *AKAMAI* UNDERMINES THE IMPORTANT PUBLIC NOTICE FUNCTION OF CLAIMS AND ENCOURAGES ABUSIVE INFRINGEMENT CLAIMS . . . . . . . . . . . . . . .5

A. Supreme Court and Federal Circuit Decisions Identify Public Notice as an Important Function of Patent Claims . . . . .5

B. Public Notice is Important in the Real World. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .7

C. The Intent Component of Inducement Liability is an Illusory Shield Against Litigation Gamesmanship, Abuse and Inequity. . . . . . . . . . . . . . . . . . . . . . . . . .10

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .14

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Aro Mfg. Co. v. Convertible Top Replacement, Co.*, 365 U.S. 336 (1961) . . . . . . . . . . . . . . . . . . . . . . . . . . . .14

*Epic Systems Corp. v. McKesson Technologies, Inc.*, No. 12-800 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2, 8

*In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323 (Fed. Cir. 2012) . . . . . . . . . . . . . . . . . . . .11

*Intellect Wireless Inc. v. Sharp Corp.*, No. 10 C 6763, 2012 U.S. Dist. LEXIS 31669, (N.D. IL. March 9, 2012) . . . . . . . . . . . . . . . . . . . . .11, 12

*IPXL Holdings, LLC v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005) . . . . . . . . . . . . . . . .6, 7, 13

*Kinetic Concepts, Inc. v. Blue Sky Medical Group, Inc.*, 554 F.3d 1010 (Fed. Cir. 2009) . . . . . . . . . . . . . . . . . . . .12

*Limelight Networks, Inc., v. Akamai Technologies, Inc.*, No. 12-786. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2

*Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). . . . . . . . . . . . . . . . . . . . . . . . . . .6, 13

*Page*

*McClain v. Ortmayer*,
141 U.S. 419 (1891). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

*Merrill v. Yeomans*,
94 U.S. 568 (1877) . . . . . . . . . . . . . . . . . . . . . . . . . . . .5, 6

*Symantec Corp. v. Veeam Software Corp.*,
2012 U.S. Dist. LEXIS 75729 (N.D. CA.
May 31, 2012) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .11

*Walker Digital, LLC v. Facebook, Inc.*,
CIV. 11-313-SLR, 2012 WL 1129370
(D. Del. April 4, 2012) . . . . . . . . . . . . . . . . . . . . . . . . . .11

*Warner-Jenkinson Co. v.*
*Hilton Davis Chemical Co.*,
520 U.S. 17 (1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

*White v. Dunbar*,
119 U.S. 47 (1886) . . . . . . . . . . . . . . . . . . . . . . . . . . . .5, 6

**STATUTES AND OTHER AUTHORITIES**

35 U.S.C. § 271 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4

35 U.S.C. § 271(a) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2

35 U.S.C. § 271(b). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2, 13

35 U.S.C. § 271(c) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .13, 14

*Page*

Supreme Court Rule 37.6 . . . . . . . . . . . . . . . . . . . . . . . . . . .1

E. Kintner & J. Lahr, *An Intellectual Property Law Primer* 61 (2d ed. 1982) . . . . . . . . . .7, 9

Mark A. Lemley *et al.*, *Divided Infringement Claims*, 33 AIPLA Q.J. 255 (2005) . . . . . . . . . . . . . . . . .9

## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Altera Corporation is a publicly traded company headquartered in San Jose, California. Altera, founded in 1983, is the pioneer of programmable logic solutions, enabling system and semiconductor companies to rapidly and cost effectively innovate, differentiate, and win in their markets. HTC Corporation is a publicly traded company headquartered in Taiwan. Its U.S. subsidiary, HTC America, Inc., is based in Bellevue, Washington. HTC produces powerful smartphones that continually push the boundaries of innovation to provide true mobile freedom. SmugMug, Inc. is a privately-held family business located in Mountain View, California that provides customers (both amateur and professional photographers) a platform for uploading photographs to a virtual gallery. Weatherford International is a publicly traded company with locations around the world. It is one of the largest global providers of advanced products and services that span the drilling, evaluation, completion, production and intervention cycles of oil and natural gas wells.

*Amici* are innovative leaders in a variety of technology fields. They pursue patent protection for their technology, endeavor to respect the intellectual property rights of

1. In accordance with Supreme Court Rule 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici* or their counsel made any such monetary contribution. Each of the parties have been given at least 10 days notice of *amici*s' intention to file. All of the parties have filed blanket waivers except Donald Dunner whose consent is being submitted herewith.

others, and support a strong patent system in which patent claims truly serve their important public notice function by allowing a business to ascertain whether any planned product or service is within or outside of claim boundaries. Each of the *amici* can reasonably evaluate the business risks associated with its current or planned products or services, but that task becomes speculative and unfair if it also needs to assess risk as its products or services flow downstream to unrelated and multiple third parties. Simply stated, *Akamai* has significantly undermined the notice function of claims and substantially impacted the ability of *amici* to make reasoned business decisions. *Amici* have a strong interest in having the Court restore the business predictability that existed prior to *Akamai*. *Amici* thus file their brief in both *Limelight Networks, Inc., v. Akamai Technologies, Inc.*, No. 12-786, and *Epic Systems Corp. v. McKesson Technologies, Inc.*, No. 12-800.

## SUMMARY OF ARGUMENT

The per curiam majority opinion in *Akamai* made a fundamental and improper revision to patent law, eliminating the statutory requirement that inducement infringement liability can only be triggered under §271(b) if an actor is liable for direct infringement under §271(a). Under *Akamai,* so long as multiple actors, each independently performing steps in the public domain, cumulatively perform all of the steps in a method patent claim, a third party can be liable for inducement infringement. *Akamai* is premised on the perceived "unfairness" of allowing a hypothetically "guilty" party to escape liability by intentionally dividing the steps of a method claim with or among innocent third party actors. *Akamai*, however, ignores the existing ways to hold a guilty party responsible without unfairly punishing businesses which have relied on the public notice function of patent claims. Slip Op. at 26-27 (Linn, J., dissenting).

The majority in *Akamai* seemingly offer the "intent" component of induced infringement under §271(b) as a shield for an innocent actor which fairly acts, blissfully unaware of any patent issue. Slip Op. at 14. Yet, the intent component provides no practical protection in view of even pre-*Akamai* decisions holding that service of a complaint for induced infringement is sufficient to provide the requisite knowledge of the asserted infringement, and thus meeting the intent threshold.

Parties with no pre-suit awareness of a patent, and long selling a product or offering a service that does not itself infringe a method claim, now find themselves defending against accusations that they are liable for inducing infringement—merely for not ceasing their longstanding business conduct when they were sued. This is the post-*Akamai* reality even though such parties began the accused activity in good faith and promptly responded to complaint-based infringement accusations by pursing good faith defenses of patent invalidity and/or non-infringement. The resulting costs (both monetary and business distraction) to protect existing investments made in good faith are an unfair penalty on the business community. The knowledge of these known costs is also a powerful negotiating weapon, particularly in patent infringement suits brought by patent plaintiffs with no assets other than the asserted patent (commonly known as "non-practicing entities").

Petitioners Limelight and Epic Systems fairly explain the fatal legal flaws in the majority *Akamai* opinion, and *amici* will not repeat those arguments. Suffice it to note that in dramatically and impermissibly changing the law, *Akamai* has shifted enormous risk onto businesses (and hence the public)—all because a few patent owners have had litigation-induced second thoughts about the claims they sought and obtained from the Patent & Trademark Office. Businesses, including *amici*, are left to speculate at their peril about how their products or services might be used by multiple third parties outside of an agency relationship. *Akamai* significantly undermines the ability of businesses to make informed business decisions as to whether to invest in new products or services. The holding in *Akamai* reflects bad public policy and interferes with predictable competition, in addition to being contrary to proper construction of 35 U.S.C. § 271.

## ARGUMENT IN SUPPORT OF PETITIONERS

The *en banc* decision of the Federal Circuit undermines the notice function of claims by imposing inducement liability even in the absence of any direct infringement liability. Moreover, the "intent" component of inducement is an illusory shield for an innocent actor accused of induced infringement for unrelated multi-actor conduct. In creating new law to protect a few patent owners from intentional claim drafting decisions, the Federal Circuit has interfered with the ability of businesses to make reasoned investment decisions and also subjected businesses to unpredictable lawsuits based on independent third-party activity.

## I. *AKAMAI* UNDERMINES THE IMPORTANT PUBLIC NOTICE FUNCTION OF CLAIMS AND ENCOURAGES ABUSIVE INFRINGEMENT CLAIMS

### A. Supreme Court and Federal Circuit Decisions Identify Public Notice as an Important Function of Patent Claims

This Court has recognized the important public notice function of patent claims since the 1800s. In *Merrill v. Yeomans*, 94 U.S. 568 (1877), in the course of construing the one claim in issue, the Court announced:

> The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague descriptions. **The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights.** The genius of the inventor, constantly making improvements in existing patents,—a process which gives to the patent system its greatest value,—should not be restrained by vague and indefinite descriptions of claims in existing patents from the salutary and necessary right of improving on that which has already been invented.

*Id*. at 573 (emphasis added). Nine years later, the Court reiterated the important public interest served by the requirement of precisely defined claims. *See White v. Dunbar*, 119 U.S. 47 (1886). The *White* Court observed that "[t]he claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; **and it is unjust to the public**, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms." *Id.* at 52 (emphasis added); *accord McClain v. Ortmayer*, 141 U.S. 419, 424 (1891) (object of statutory language obligating inventors to "particularly point out and distinctly claim" is "to secure to [the patentee] all to which he is entitled, **but to apprise the public of what is still open to them**") (emphasis added).

This important public policy continues to be reflected in more recent decisions. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), identified "the importance of uniformity in the treatment of a given patent among the reasons for allocating all issues of construction to the court." *Id.* at 390. As support for this premise, the *Markman* Court quoted *Merrill* for the public notice role served by claims, stating that otherwise, "[t[he public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights." *Id.* (alterations in original) (quoting *Merrill*, 94 U.S. at 573); *see also Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 30 (1997) (expressing confidence that "the doctrine [of equivalents] will not vitiate the central functions of the patent claims themselves.").

Indeed, the Federal Circuit has recognized that one important reason for this public policy is so that a business can determine from the patent claims its potential for liability. *See, e.g., IPXL Holdings, LLC v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005) (a claim combining two separate statutory classes of invention "is not sufficiently precise to provide competitors with an accurate determination of the 'metes and bounds' of protection involved," because "a manufacturer or seller of the claimed apparatus would not know from the claim whether **it might also be liable** . . . **because a buyer or user** of the apparatus later performs the claimed method of using the apparatus.") (Emphasis added.) Concern for this important policy, although directly implicated, is absent from the majority opinion in *Akamai*.

### B. Public Notice is Important in the Real World

One critical purpose of the public notice function of claims is so that a business about to invest significant resources in a new product or service can reasonably deal with the patent landscape as part of an overall risk-reward evaluation. *IPXL Holdings,* 430 F.3d at 1384. Indeed, this is a routine and longstanding business practice.[2] Such an analysis is difficult even when it is limited to the manufacturer's own conduct.[3] Imposing on a business the additional obligation to speculate correctly about potential future uses by a third-party buyer or user is unreasonable and unfair. *Cf. id.* The policy implicated by this facet of public notice is illuminated by a simple question: Who

2. "[B]efore a manufacturer takes steps to put a new product on the market or otherwise undertakes the expense of using in-plant technology for commercial purposes, a search will frequently be made to determine whether there may be an infringement of a U.S. patent or patents." E. Kintner & J. Lahr, *An Intellectual Property Law Primer* 61 (2d ed. 1982).

3. "Patent attorneys probably have nightmares about such topics as these . . . ." *Id.*

should bear the burden of risk when no one party commits, and thus is liable for, direct infringement—the patentee, who had an opportunity to craft the claim in a way to cover single-actor liability, or the public (*viz.*, competitors)? The analysis of the relative burdens imposed on the public and the patentee in this context dictates the answer to that policy question.[4]

It often happens that a company sells a product, or offers a service, which by itself does not infringe, to third parties for their own unrestricted use or resale. *Amici* offer four real world examples, involving (1) "smartphones," (2) integrated circuits, (3) modern "cloud" computing services, and (4) chemicals. In the case of "smartphones," third parties often develop (or acquire) and offer their own "apps" to "smartphone" end users. The end users, in turn, independently select which (if any) of these "apps" to add to their "smartphones." Integrated circuits sometimes are sold in an unprogrammed state and are subsequently configured by third-party users of the devices. Other integrated circuits are sold pre-programmed to perform a spectrum of generic functions and are incorporated into larger systems by third-party customers. Many companies in the computing services field offer generic services such as data processing, data storage and/or retrieval, and data transmission. Other companies (*e.g.*, end users) write software programs that may perform tasks ranging from behind-the-scene computer management to manipulation of specific data,

4. Several *amici* involved in the *en banc* decision, including most of those on this brief, showed the Federal Circuit how easily the *Akamai* and *McKesson* claims could have been transformed to capture single actor liability.

using the infrastructure or generic services offered by the computing services provider. Third-party purchasers of chemicals often maintain their planned uses of the materials, and/or the details of such uses, as trade secrets. *See, e.g.,* E. Kintner & J. Lahr, *An Intellectual Property Law Primer* 139-41 (2d ed. 1982). As a result, suppliers often will not have information on which they can determine whether the third-party purchaser's use may implicate the supplier in a claim for infringement.

In each instance, *amici* and other service providers or vendors cannot reasonably assess their risk of being sued for infringement based on unknown or independent conduct of multiple third parties which need not communicate to the service provider or vendor the details of their uses of the product or services. Yet that is exactly the unquantifiable new burden imposed on *amici* and others by the holding in *Akamai*. Simply stated, it is unfairly burdensome to impose upon *amici*, or upon any vendor or service provider, the burden of predicting when, and under what circumstances, its non-infringing conduct might be transformed into infringing conduct as an unintended consequence of an arms-length transaction with one or more independent actors.

By contrast, only minimal burden is imposed on a patentee to draft claims in such a way that they do not implicate divided infringement. A patentee can ordinarily structure a claim to create infringement liability for single-party conduct—if that is the patentee's real goal. *See Mark A. Lemley et al., Divided Infringement Claims*, 33 AIPLA Q.J. 255, 272-75 (2005). The majority in *Akamai*, however, simply ignored this least-burdensome solution. The answer to the question posed above is clear:

Patent owners have a simple and cost-efficient way to avoid the need for the convoluted, unpredictable and legally inappropriate infringement theory created by the *Akamai* majority.

The *Akamai* majority apparently believed that the intent component of inducement infringement liability would protect innocent businesses against the increased legal exposure their new law created. As explained below, even pre-*Akamai* Federal Circuit decisions, ignored by the panel majority, show that such protection is illusory.

### C. The Intent Component of Inducement Liability is an Illusory Shield Against Litigation Gamesmanship, Abuse and Inequity

The majority opinion contrasts inducement and direct infringement liability. In pertinent part, it explains that unlike direct infringement, induced infringement is not a strict liability tort. The accused inducer must act with knowledge that the induced acts constitute patent infringement. Slip Op. at 14. This intent component is the apparent linchpin for the majority's subsequent reliance on the aiding and abetting provision in the Federal Criminal Code, Slip Op. at 21-23, and on the rule imposing liability of inducement of a tort by a party unaware that its act is injurious. *Id.* at 24. In short, the majority's perceived safety net is premised on the assumption that only those with specific intent to infringe a patent can be potentially liable for inducement infringement. Conversely, those lacking the requisite bad intent allegedly are not at risk for inducement infringement liability.

Insofar as the *Akamai* majority perceived the "intent" component of inducement to be a fair and meaningful safeguard for innocent conduct, it is wrong. Consider the common situation where the first notice a business has of a patent is when it is served with a patent infringement complaint. One might reasonably believe that in the absence of pre-suit knowledge, this business could not be liable for inducement infringement – but one would be wrong in so thinking. Pre-*Akamai* cases held that complaints for inducement infringement stated valid causes of action even though the accused party's first notice of the patent (and thereby "knowledge") was not until service of the complaint. *See, e.g., In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 1342 (Fed. Cir. 2012); *accord Intellect Wireless Inc. v. Sharp Corp.*, No. 10 C 6763, 2012 U.S. Dist. LEXIS 31669, at *33 (N.D. IL. March 9, 2012); *Walker Digital, LLC v. Facebook, Inc.*, CIV. 11-313-SLR, 2012 WL 1129370, at *5 n.11 (D. Del. April 4, 2012); *Symantec Corp. v. Veeam Software Corp.*, 2012 U.S. Dist. LEXIS 75729, at *15 (N.D. CA. May 31, 2012).

Intent is an illusory shield if an innocent business suddenly becomes "guilty" because, when served with a complaint, the business does not immediately cease the allegedly improper activity, but instead engages counsel to conduct an investigation and mounts a good faith defense to protect the significant business investment already incurred against an inducement claim from out of nowhere. That *Akamai* consequence is unfair, hopefully unexpected by the majority, and creates new opportunities for litigation gamesmanship.

Business risk was manageable when inducement required that a single actor be liable for direct infringement. *Akamai* has multiplied the burdensome nature of the risk by expanding liability to encompass a party which had no knowledge of a patent prior to the filing of suit, where no entity is liable for direct infringement, and where the ultimate issue of intent is a fact not easily resolved on summary judgment. *See, e.g., Kinetic Concepts, Inc. v. Blue Sky Medical Group, Inc.*, 554 F.3d 1010, 1024-25 (Fed. Cir. 2009) (affirming denial of JMOL on intent); *Intellect Wireless,* 2012 U.S. Dist. LEXIS 31669 (E.D. IL. 2012) (granting summary judgment of no direct infringement, but denying summary judgment of no inducement infringement based on lack of intent evidenced by the defense in the case.)

Intent is not an appropriate dividing line given the ease with which it is pleaded in every case, and the *Akamai* majority badly skewed the risk-reward balance in discarding the longstanding requirement of direct liability as a condition precedent to inducement liability. The *Akamai* majority concocted this dramatic change to obviate an unsupported (and likely unsupportable) problem, namely that this change was needed because bad actors were intentionally dividing up method steps to avoid direct infringement.

*Akamai* inducement law also created opportunities for significant litigation mischief that will further burden businesses, all as a consequence of shifting the burden of poor claim drafting or intentional (but regretted) claim decisions from the patent owner to the public. This change allows patent plaintiffs, often shell entities holding no asset except the asserted patent, a unique opportunity to impose a toll on legitimate businesses that otherwise will be required to waste the cost of litigation, and divert executive time and other company resources, to mount an appropriate defense. In pertinent part, patent owners often propose in litigation unexpected (and ultimately unsupportable) claim construction positions. *Cf. Markman*, 517 U.S. at 384 (confirming claim construction is a question of law for the court.)

Eliminating the requirement that some entity is liable for directly infringing makes it that much more difficult to identify potential patent infringement risks before a business invests substantial resources in a new product or service. As the Federal Circuit elsewhere explained, in the real world, "a manufacturer or seller of [a] claimed apparatus would not know from the claim whether it might also be liable . . . because a buyer or user of the apparatus later performs the claimed method of using the apparatus." *IPXL Holdings*, 430 F.3d at 1384.

Moreover, patent owners have already begun to assert inducement liability under § 271(b) in lieu of contributory infringement under § 271(c) against sellers of a material or apparatus for use in practicing a patented process. Liability for contributory infringement under 35 U.S.C. § 271(c) only arises if the product being sold by the accused contributory infringer is "a material part of the invention," the accused party knows it "is especially made or especially adapted for use in an infringement of such patent," and if the product is "not a staple article or commodity of commerce suitable for substantial noninfringing use." *Id*. Furthermore, liability for contributory infringement requires that an actor be liable for direct infringement. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365

U.S. 336, 341 (1961). The new *Akamai* cause of action is already becoming popular, since it allows plaintiffs to avoid pleading and proving the extra requirements of § 271(c) and in the absence of any person liable for direct infringement. The intent component of inducement infringement provides no meaningful protection against litigation mischief.

## CONCLUSION

In view of the foregoing, *amici curiae* request that the petition for certiorari be granted and that the *en banc* decision in *Akamai* be vacated.

Respectfully submitted,

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