CAFC Broadens Scope of Induced Infringement

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In an important en banc decision today, the CAFC **reversed** its line of decisions limiting patent infringement liability for method claims to situations where all steps of the method claim are performed by a single legal entity (or such an entity and its agents). *Akamai Tech v. Limelight Networks* (Fed. Cir. 8/31/2012)(en banc, per curiam). The change in the law provides that *induced infringement* can be found even when all steps of the method claim are not performed by a single legal entity.

This case has important ramifications for broad classes of issued patents and ongoing law suits in fields ranging from medical devices to Internet applications. This en banc decision was close, with six judges joining in the majority decision and five judges dissenting. Accordingly, there is a reasonable chance that the Supreme Court will review this case. However, I think that the majority's reasoning is sound, and therefore it is likely that the Supreme Court would affirm.

The CAFC opinion stated the issue as follows:

> When a single actor commits all the elements of infringement, that actor is liable for direct infringement under 35 U.S.C. § 271(a). When a single actor induces another actor to commit all the elements of infringement, the first actor is liable for induced infringement under 35 U.S.C. § 271(b). But when the acts necessary to give rise to liability for direct infringement are shared between two or more actors, doctrinal problems arise. In the two cases before us, we address the question whether a defendant may be held liable for induced infringement if the defendant has performed some of the steps of a claimed method and has induced other parties to commit the remaining steps (as in the *Akamai* case), or if the defendant has induced other parties to collectively perform all the steps of the claimed method, but no single party has performed all of the steps itself (as in the *McKesson* case).

The Court then went on to hold:

> Much of the briefing in these cases has been directed to the

> question whether direct infringement can be found when no single entity performs all of the claimed steps of the patent. It is not necessary for us to resolve that issue today because we find that these cases and cases like them can be resolved through an application of the doctrine of induced infringement. In doing so, we reconsider and overrule the 2007 decision of this court in which we held that in order for a party to be liable for induced infringement, some other single entity must be liable for direct infringement. *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007). To be clear, **we hold that all the steps of a claimed method must be performed in order to find induced infringement, but that it is not necessary to prove that all the steps were committed by a single entity**. [Bold added for emphasis.]

Consequently, prior opinions of counsel relying upon distributed infringement to avoid liability may no longer be tenable. Moreover, patents thought to be un-infringable due to method claims requiring distributed infringement may now be infringable.

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