No. 15-993

IN THE

Supreme Court of the United States

LIMELIGHT NETWORKS, INC.,

Petitioner,

v.

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

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Federal Circuit

**BRIEF OF ASKELADDEN, L.L.C.
AS AMICUS CURIAE IN SUPPORT OF
PETITIONER LIMELIGHT NETWORKS, INC.**

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INTEREST OF AMICUS CURIAE

Askeladden L.L.C. is an education, information and advocacy organization dedicated to improving the understanding, use and reliability of patents pertinent to financial services and related industries.[1] Askeladden seeks to improve the U.S. patent system by, among other things, submitting amicus curiae briefs on important legal issues.

Askeladden is a wholly-owned subsidiary of The Clearing House Payments Company L.L.C. ("The Payments Company"). The Payments Company is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Payments Company owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on

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[1] Pursuant to Supreme Court Rule 37.6, Askeladden affirms that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amicus* or its counsel made such a monetary contribution. All parties have consented to the filing of this brief in letters filed with the Clerk of this Court.

financial regulation that supports a safe, sound and competitive banking system.

Askeladden has a strong interest in the question presented in this case. In *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014), this Court held that a party cannot be held liable for inducing infringement when no one has directly infringed the patent. The Payments Company filed a brief as amicus curiae in support of the position this Court adopted, emphasizing that the Federal Circuit's expansion of liability for inducing infringement placed banks and other entities that deal with customers via smartphones and laptops at an unfair risk of being sued for patent infringement. The brief explained that banks have no control over the devices their customers use and no knowledge of the patents that the banks and their customers may be alleged to infringe.

This Court's decision in *Limelight Networks* eliminated the risks of unjustified liability for induced infringement. On remand, however, the Federal Circuit has expanded liability for *direct* infringement in a way that reintroduces those risks. *See* Pet. App. 24a–31a. Under the Federal Circuit's new decision, banks now face a risk of liability for patent infringement even if they do not intend to infringe, have no knowledge of the patent alleged to be infringed, and do not control the actions of their customers that constitute part of the alleged infringement. Underlining these risks, the Federal Circuit's opinion calls into question its prior decision in *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007), a case in which a company that processes financial transactions prevailed because it did not perform every step of a patented method and did not control the actions of third parties who carried out other steps of the method.

While Askeladden agrees that it is appropriate to apply established principles of vicarious liability to direct infringement under 35 U.S.C. § 271(a), the Federal Circuit has gone beyond those established principles. The uncertainty created by the Federal Circuit's decision, coupled with the enormous expense of patent litigation, will make it more difficult for financial institutions to interact with their customers through new technologies, even for basic banking activities such as paying a bill online. Because the Federal Circuit's new decision, like its earlier decision in this case, lacks support in the text of the Patent Act or established legal principles, Askeladden urges the Court to grant the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit's decision on remand reintroduces the problems created by its earlier decision in this case. The Federal Circuit's decision to expand the scope of liability for direct infringement is not supported by established principles of vicarious liability. The Federal Circuit's new decision, like its earlier decision, also lacks support in the text of the Patent Act. Patent infringement is a tort, and Congress generally intended "ordinary background tort principles," rather than "an unusual modification" of those principles, to apply. *Meyer v. Holley*, 537 U.S. 280, 286 (2003). The Federal Circuit's expansion of liability for direct infringement not only departs from background tort principles, but also undermines the careful distinctions that Congress drew between direct liability under 35 U.S.C. § 271(a) and indirect liability under §§ 271(b) and (c).

The Federal Circuit's decision on remand, like its earlier decision, is based on inappropriate policy considerations. Altering the scope of patent enforceability is a task for Congress, not the courts. *See, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980). Even if the courts were authorized to engage in policymaking of this kind, the Federal Circuit's decision creates more problems than it solves, by exposing businesses to claims for direct infringement based on the conduct of consumers and other third parties whom they do not control.

The Federal Circuit's current decision, like its earlier decision, will impede technological innovation in the electronic banking sector. Banks generally lack knowledge of the particular hardware devices and software that their customers use, let alone which of many thousands of patents the customers' hardware or software might infringe. The Federal Circuit's decision nevertheless subjects banks to a risk that they will be sued for patent infringement. Because banks have no way to determine whether the interaction of the bank's products with any systems, hardware, programs, or carriers their customers may be using results in patent infringement, banks are left with a choice between risking exposure to infringement claims or cutting back on the electronic banking services they provide to their customers.

The Federal Circuit's vague standard will encourage plaintiffs to pursue direct infringement claims, and the high cost of patent litigation will create pressure for banks to settle even weak claims (which will, in turn, encourage the filing of even more such claims).

For these reasons, this Court should grant review and hold that the Federal Circuit's new decision, like its earlier decision, is not compatible with the statutory text or judicial precedent. If there is a hole in the Patent Act that needs to be patched, that task should be undertaken by Congress rather than the courts.

ARGUMENT

I. The Federal Circuit's Expansion of Liability for Direct Infringement Conflicts with Established Legal Principles and the Relevant Statutory Language.

On remand from this Court, the Federal Circuit has issued a decision that expands liability for direct infringement. The Federal Circuit's latest decision reintroduces the same risks of expensive and meritless patent litigation that arose from its earlier decision which this Court reversed. The Federal Circuit's new decision, like its prior decision, departs from established legal principles and relevant statutory text, and should thus be reversed.

A. The Federal Circuit's Expansion of Liability for Direct Infringement Is Inconsistent with Established Vicarious Liability Principles.

The Federal Circuit's new standard marks a significant departure from its prior decisions addressing liability for direct infringement of a patent. Until now, the Federal Circuit has consistently (and correctly) recognized that direct infringement is governed by established principles of vicarious liability. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007); *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008). For a multistep method patent, where liability for direct infringement under § 271(a) is limited "to those who practice each and every element of the claimed invention," *BMC Res., Inc.*, 498 F.3d at 1381,[2] this means that vicarious liability extends only to those who "control or direct each step of the patented process" if some acts are done by third parties, *id.* at 1380; *see also* Restatement (Third) of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); Restatement (Second) of Torts § 315 (1965) ("There is no duty so to control

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[2] This rule has been established for more than a century. *See Wallace v. Holmes*, 29 F. Cas. 74, 80 (C.C.D. Conn. 1871) ("[W]here a patent is for a combination merely, it is not infringed by one who uses one or more of the parts, but not all, to produce the same results. . . . This rule is well settled . . . .").

the conduct of a third person . . . unless . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct . . . .").

The Federal Circuit's opinion on remand refers to "general principles of vicarious liability," Pet. App. 25a, but departs from those principles by holding that liability for direct infringement can be imposed "when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance." Pet. App. 26a. The Federal Circuit added further ambiguity to this already ambiguous pronouncement by stating that "[g]oing forward, principles of attribution are to be considered in the context of the particular facts presented." *Id.* at 28a.

Under the Federal Circuit's new standard, an entity may be liable for the conduct of third parties that it does not control, even though it would not be liable for the third parties' conduct under established principles of vicarious liability. The Federal Circuit's expanded standard provides insufficient guidance to businesses and district courts. "Receipt of a benefit" could be understood to cover nearly any provider-customer transaction in which the customer receives goods or services. How are courts to determine what aspects of a transaction do or do not qualify as a sufficient "benefit" to trigger the Federal Circuit's new vicarious liability test? And the nebulous phrase "establishes the manner or timing of that performance" might be construed to cover a wide range of conduct involving a customer and provider. The Federal Circuit's approach thus leaves banks and other companies that engage in electronic commerce little basis to evaluate the risk of patent litigation.

The Federal Circuit's "*cf.*" citation to this Court's decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), does not support its decision. The Federal Circuit cited *Grokster* for the proposition that a party "infringes vicariously by profiting from direct infringement if that actor has the right and ability to stop or limit the infringement." Pet. App. 26a (internal quotation marks omitted). The Court used this language in discussing the decision in *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963). In *Shapiro, Bernstein*, however, the alleged infringer was held liable because it had the legal right and ability to supervise the direct infringer. The Federal Circuit did not account for this important distinction; the standard it pronounced in this case does not limit direct infringement to cases where the accused party "has the right and ability to stop or limit the infringement." Moreover, both *Grokster* and *Shapiro, Bernstein* presented questions of a *copyright* infringement. That is significant because the standards for patent infringement, including indirect infringement, are codified in 35 U.S.C. § 271, while the standards for copyright infringement are not codified. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–45 (1984) ("The Copyright Act does not expressly render anyone liable for infringement committed by another."). Indeed, the issue in this case — divided infringement of a method claim by multiple actors — has no corollary in the copyright context. For these reasons, this Court's decision in *Grokster* does not support the Federal Circuit's expansion of vicarious liability for direct patent infringement.

B. The Federal Circuit's Expansion of Direct Infringement Liability Lacks Support in the Language of the Patent Act.

It has long been established that direct infringement of a patent under 35 U.S.C. § 271(a) is a strict liability offense. Direct infringement "require[s] no more than the unauthorized use of a patented invention," and therefore "knowledge or intent is irrelevant." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060, 2065 n.2 (2011). It is also well established that patent infringement is a tort. *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 33 (1931) ("Infringement, whether direct or contributory, is essentially a tort, and implies invasion of some right of the patentee."). Common law tort principles are assumed to apply to matters not expressly addressed by the statutory text. *See Meyer*, 537 U.S. at 286 (holding that Congress did not intend to permit "an unusual modification" of "*ordinary* background tort principles").

This Court has emphasized that common law principles generally apply to patent cases just as they apply to other cases. *See, e.g., eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) ("These familiar principles [governing injunctions] apply with equal force to disputes arising under the Patent Act."); *Global-Tech*, 131 S. Ct. at 2068–69 (looking to criminal law doctrine of "willful blindness" in determining appropriate standard for induced infringement liability). The Federal Circuit should not have departed from common law principles of vicarious liability here. As the government has recognized, courts should not "attempt to devise patent-specific rules of vicarious liability in order to bring such scenarios within the coverage of Section 271(a)." Brief for the United States as Amicus Curiae Supporting Petitioner, No. 12-786, at 13 (U.S. filed Mar. 3, 2014).

There is no indication that Congress intended to modify established principles of vicarious liability for direct infringement under § 271(a). To the contrary, the Federal Circuit's departure from those principles undermines the careful distinction Congress drew between direct and indirect infringement. Section 271(a) provides that "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent" is liable for direct infringement. 35 U.S.C. § 271(a). Congress separately addressed circumstances in which parties can be liable for conduct that does not satisfy the requirements of § 271(a) in subsections (b) through (g) of the statue. For example, subsections (b) and (c) identify situations in which a defendant can be held liable for the conduct of another. Having established this detailed framework, Congress is unlikely to have intended the courts to bypass it by developing patent-specific rules of vicarious liability under § 271(a). Under the Federal Circuit's approach, rather than showing that Congress's specific requirements for indirect infringement under §§ 271(b) or (c) are met, plaintiffs can simply argue that the defendant is liable under § 271(a) because it "condition[ed] participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method" and "establishe[d] the manner or timing of that performance." Pet. App. 26a.

II. The Federal Circuit's Decision Is Based on Inappropriate Policy Considerations.

The Federal Circuit's decision in this case represents its second attempt to close a perceived gap in the law that applies to method patents with interactive steps that could be performed by multiple actors. This policy concern was central to the Federal Circuit's first decision expanding liability for induced infringement. *See* Pet. App. 125a ("[W]e are persuaded that Congress did not intend to create a regime in which parties could knowingly sidestep infringement liability simply by arranging to divide the steps of a method claim between them."), *rev'd Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014). Once again, however, the Federal Circuit's cure is worse than the disease.

Under the Federal Circuit's new standard, infringement may be alleged based on the conduct of a third party, such as a customer, without alleging any intent to infringe or even any knowledge of the patent at issue. The Federal Circuit's concern about the enforceability of interactive method patents does not justify this expansion of liability. Altering the scope of enforceability of patents is a task for Congress. "The direction of Art. I [§ 8 of the Constitution] is that Congress shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress." *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972). This Court has repeatedly cautioned that courts should not encroach on Congress's role in determining patent policy. *See Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) ("Our task . . . is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted. Congress is free to amend § 101 . . . . But, until Congress takes such action, this Court must construe the language of § 101 as it is."); *Parker v. Flook*, 437 U.S. 584, 596 (1978) ("It is our duty to construe the patent statutes as they now read, in light of our prior precedents, and we must proceed cautiously when we are asked to extend patent rights into areas wholly unforeseen by Congress.").

Distorting the patent scheme to expand liability for interactive method patents, particularly those that are implemented by a computer, is unjustified because of the potential negative consequences of enforcement of such patents against innocent actors. Under the new standard, companies may face allegations of infringement for conduct of their customers when the company has no knowledge of or control over the customer's choice of hardware or software, and no knowledge of patents that may be implicated. The Federal Circuit's expansion of liability will have a chilling effect that may discourage banks and other businesses from developing new ways to communicate with their clients.

III. The Federal Circuit's Expansion of Liability for Direct Infringement Will Harm Financial Institutions and Their Customers.

When this case first came before this Court, Askeladden's parent corporation filed an amicus brief explaining that the Federal Circuit's expansion of liability for induced infringement placed banks and other entities that deal with customers via smartphones and laptops at risk of being sued for patent infringement even if they have no control over the devices their customers use and no knowledge of the patents they might be infringing. Brief of The Clearing House and The Financial Services Roundtable as Amici Curiae In Support of Petitioner Limelight Networks, Inc. and Reversal, No. 12-786 (March 2014). This Court's decision reversing the Federal Circuit removed that risk.

But the Federal Circuit's latest decision reintroduces the same risk in a different form, namely meritless direct infringement claims under § 271(a), rather than meritless induced infringement claims under § 271(b). The problem may be even worse now, because direct patent infringement is a strict liability offense. Thus, banks will not be able to defend against claims of direct patent infringement on the ground that they had no intent to infringe, no knowledge of patent infringement, and no reasonable means of acquiring such knowledge.

A. The Decision Will Impede Technological Innovation in the Electronic Banking Sector.

In the financial industry, customers increasingly interact with banks and financial institutions through electronic means. In 2014, 74% of Americans with a bank account interacted with financial institutions online, Board of Governors of the Federal Reserve System, *Consumers and Mobile Financial Services 2015*, at 9 (Mar. 2015), available at http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201503.pdf, and 39% of mobile phone users and 52% of smartphone users with bank accounts used mobile banking, *id*. at 10. Other reports indicate that "[o]nline banking now accounts for 53% of banking transactions, as compared with 14% for in-branch visits." Robin Sidel, *After Years of Growth, Banks Are Pruning Their Branches*, Wall St. J., Apr. 1, 2013, at A1.

Banks generally lack knowledge of the particular hardware devices and software their customers are using, let alone detailed knowledge about how those devices and software work and what patents they implicate. For example, a bank may create an application that allows access to its customer's banking account, for use on an "Android"-compliant device. The bank does not know whether its customers' devices are made by Samsung, LG, Sony, Motorola, or any other of multitude of hardware manufacturers that make Android-compliant phones. Nor does the bank know what other software the customer has installed on his or her smartphone. In this situation, banks have no way of knowing whether the operation of their electronic product offerings in conjunction with a user's device and software may implicate one or more of the thousands of patents issued for computer hardware and software. Nor can banks reasonably control what devices and software customers use with bank products. Yet the Federal Circuit's decision puts banks at risk in these circumstances, as long as a creative plaintiff can allege that a banking customer is performing a "step or steps of a patented method" through some activity on their device related to a banking app, and that they receive a "benefit" from the bank for doing so.

If allowed to stand, the Federal Circuit's decision opens the door to claims that banks are liable for interactions between their products and products manufactured by, sold to, and used by third parties. Those third parties include not only customers, but wireless service providers, mobile phone carriers, application developers, hardware manufacturers, software manufacturers, and operating system manufacturers, all of whom are involved in today's electronic transactions. Banks do not know, nor could they reasonably determine, which systems, hardware, programs, and carriers their customers are using, let alone whether interaction of bank products with any of these items risks exposure to allegations of patent infringement. They are thus left with a choice between risking exposure to infringement allegations or cutting back on valuable electronic banking services they provide to their customers.

In its earlier opinion expanding liability for induced infringement, the Federal Circuit emphasized that the specific intent requirement for induced infringement would minimize the undesirable consequences of its decision. Pet. App. 103a n.1 ("Because liability for inducement, unlike liability for direct infringement, requires specific intent to cause infringement, using inducement to reach joint infringement does not present the risk of extending liability to persons who may be unaware of the existence of a patent or even unaware that others are practicing some of the steps claimed in the patent."). Having been reversed by this Court, the Federal Circuit has now expanded liability again, only this time through direct infringement, which *lacks* a specific intent requirement. The undesirable consequences that the Federal Circuit recognized in its prior decision have been reintroduced, but this time without the safety valve of a *mens rea* requirement.

The Federal Circuit's decision may also impede technological development. Banks will be reluctant to pursue new technologies relating to electronic banking services out of fear of increasing patent litigation. Because, as discussed above, evaluation of the strength of divided patent infringement claims is nearly impossible under the Federal Circuit's new standard, banks may be forced to reduce the risk of patent infringement suits by decreasing technological innovation. *See* Executive Office of the President, *Patent Assertion and U.S. Innovation* 10 (June 2013) (noting that suits by non-practicing entities can "significantly reduce incremental innovation while litigation is ongoing" because any such innovation "could be viewed by courts as an evidence of 'willful infringement' if the plaintiff's patent is upheld, making the firm liable for treble damages"). In turn, banks and financial institutions may not be able to meet the expectations of a population that increasingly depends on mobile and electronic interactions.

B. The Decision Subjects Financial Institutions and Other Defendants to Higher Litigation Costs.

The Federal Circuit's decision creates a new, vague, patent-specific standard of vicarious liability. If this Court does not intervene, banks may face years of expensive litigation brought by plaintiffs seeking to exploit this uncertainty. Because the Federal Circuit's standard is not grounded in established legal principles, and is "to be considered in the context of the particular facts presented," Pet. App. 28a, it could take years to develop an established body of law sufficient to predict the likelihood of liability. In the meantime, banks may have difficulty convincing district courts to dismiss cases in the early stages of litigation.

To underline these risks, the Federal Circuit's decision calls into question the standard the Court relied on in *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007). *See* Pet. App. 27a n.3 ("To the extent our prior cases formed the predicate for the vacated panel decision, those decisions are also overruled."). The defendant in *BMC Resources*, a company that processed financial transactions for clients, prevailed at the summary judgment stage of the case because each step of the method was not performed by, or could not be attributed to, the defendant. *BMC Res, Inc.*, 498 F.3d at 1381–82. Now the Federal Circuit has ignored its own warning in *BMC Resources*: "expanding the rules governing direct infringement to reach independent conduct of multiple actors would subvert the statutory scheme for indirect infringement." 498 F.3d at 1381.

As a result of this uncertainty, banks will have difficulty allocating the risks for potential patent infringement liability. The number of patent cases filed has reached new heights in recent years. *See* PwC, *2015 Patent Litigation Study* (2015), *available at* https://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf (showing an all-time high of filed patent cases in 2013 with a decrease in 2014). According to a recent study, the average cost of patent litigation is $873,000 where the defendant's exposure is less than $1 million; $2,164,000 where the defendant's exposure is between $1 million and $10 million; $3,543,000 where the defendant's exposure is between $10 million and $25 million; and $6,341,000 where the exposure exceeds $25 million. *See* AIPLA, *2015 Report of the Economic Survey* 37, 40, I-105–I-108 (2015). Indeed, "in the majority of [non-practicing entity] cases, the legal cost of the defense exceeds [the] settlement or judgment amount." Executive Office of the President, *Patent Assertion and U.S. Innovation* at 9.

In light of the well-documented cost of litigating patent claims, and the uncertainty surrounding defeating a claim of direct infringement, patentees may be able to extract substantial settlements because financial institutions' alternatives—either subjecting themselves to expensive litigation with an uncertain result or forgoing various new technologies to serve customers' needs—are highly unattractive. *See* S. Rep. No. 110-259, at 4 (2008) ("[L]itigation concerns can encourage . . . premature settlements simply to avoid the high cost and uncertainty of patent litigation."); John R. Allison, *et al.*, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L.J. 677, 709 (2011) (concluding that "roughly 90%" of patent cases brought by non-practicing entities settle, and the vast majority of such cases "involve[] some sort of payment to the patent plaintiff" that "might represent not the acquisition of real legal rights but a nuisance settlement over a likely invalid patent"); *see also* Executive Office of the President, *Patent Assertion and U.S. Innovation* at 6 (explaining that in the face of suits by non-practicing entities, "many patent owners and users prefer to settle out of court for amounts that have not so much to do with the economic value of their patents or the probability that they have infringed," but rather with "the parties' relative opportunity costs of going to trial and attitudes towards risk").

CONCLUSION

For these reasons, and for those set out in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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