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**Joint / divided infringement**  
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Intellectual Property Law

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### Traditional law of direct infringement

- Direct infringement by a single entity
- Product making: end-of-the-line manufacturer
- Product use: entity that receives “beneficial use”
- Method: a single entity must perform all steps
  - Perform each step itself, or
  - Direct or control performance of steps by others
    - Agency relationship
    - Vicarious liability of infringer for other entity

### Traditional law of induced infringement

- Induced infringement:
  - There must be a single direct infringer
  - Inducer must have knowledge (or willful ignorance) about patent and direct infringement
  - Inducer must actively encourage the direct infringement
- Problem when claim requires performance by several separate entities

### Example of divided infringement

- Webpages with images download slowly
- Service provider contracts with web content providers (customer) to deliver images for their websites from service provider’s local servers
- Customers tag service provider’s images on their web pages
- When an Internet user requests the customer’s webpage, service provider delivers the images from service provider’s local servers
- Akamai V. Limelight (Fed. Cir. 8/2012)

### Limelight patent claim

- 19. A content delivery service, comprising:
  - Replicating a set of page objects across a wide area network of content servers managed by a domain other than a content provider domain;
  - For a given page normally served from the content provider domain, **tagging the embedded objects** of the page so that the requests for the page objects resolve to the domain instead of the content provider domain;
  - Responsive to a request for the given page received at the content provider domain, serving the given page from the content provider domain; and
  - Serving at least one embedded object of the given page from a given content server in the domain instead of from the content provider domain.

### Other example of divided infringement

- Managing and monitoring individual medical records electronically at a remote location
- Service provider contracts with individuals or doctors (customers) to host medical data on its servers
- Service provider offers customers remote access to data via the internet
- McKesson v. Epic (Fed Cir. 8/2012)

## McKesson patent claim

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- 1. A method of automatically and electronically communicating between at least one health-care provider and a plurality of users serviced by the health-care provider, said method comprising the steps of:
- **Initiating a communication by one of the plurality of users** to the provider for information, wherein the provider has established a preexisting medical record for each user;
- Enabling communication by transporting the communication through a provider/patient interface over an electronic communication network to a Web site which is unique to the provider...
- Electronically comparing content of the communication with mapped content...
- Returning the response to the communication automatically...

## District Courts

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- No single entity performs all method steps either directly or vicariously
  - Contract between service provider and customer does not force the customer to use the service
  - Explanations, guidance <> direction, control
- District Court holdings:
  - No direct infringement
  - As a result: no induced infringement

## Federal Circuit (en banc)

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- Held: induced infringement requires direct "infringement," but not necessarily by a single party
  - Inducer of several parties collectively is liable
  - Inducer of another party for some steps is liable
- Focus must be on how patentee is impacted
- Analogy with tort law
- Reversed – Remanded to consider induced infringement

## Conclusion: more to come?

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- 7 -5 decision
- Dissenter's proposals:
  - Establish direct infringement by collaboration (1)
  - Keep traditional vicarious liability test (4)

## Questions, comments?

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