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IP: A boon for patent trolls

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A **Federal Circuit** decision in late August has given patent trolls a new, potentially devastating weapon to extract license fees, This weapon that will likely be aimed squarely at companies with a heavy Internet and software-technology focus. In the cases ***Akamai Tech. v. Limelight Networks*** and ***Mckesson Tech. v. Epic Systems***, the court ruled *en banc* that a single party no longer needs to practice all steps of a patented method claim in order to be found liable for indirect infringement. The 6-5 decision narrowly overturned the previous rule, known as the "Joint Infringement Defense," in the context of indirect infringement based on inducement. As the *per curiam* opinion put it: "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."

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The Federal Circuit was careful to explain that its holding applies only to a "knowing" inducer and expressly declined to apply its decision to "strict liability" direct infringement. Nonetheless, the decision will likely have a sweeping impact. Patent holders that previously would have been forced to focus on perhaps less-than-perfect direct infringement claims will now likely repackage their cases to target inducement. In this manner, the holding provides patent plaintiffs with a potential path around the Joint Infringement Defense, which had been a thorn in their side since the Federal Circuit established it.

Despite the fact that liability for inducement still requires a plaintiff to show that the defendant knew that the induced acts constituted patent infringement, it still significantly reshapes the patent landscape, to the likely benefit of patent trolls and those who sell patents to them. First, the decision increases the value of obtaining broad method claims covering the operation of multi-actor systems, including software systems implemented over the Internet that have large numbers of putative defendants and licensing targets. Second, the decision will likely embolden potential plaintiffs with patent claims of this type, including patent trolls, who will then begin asserting these types of broad method claims even more frequently and aggressively than the all-time highs reached in recent years.

Given these potential ramifications and the close split in the Federal Circuit, this decision will undoubtedly be appealed to the Supreme Court, and this area of law will remain in a closely watched state of flux for the foreseeable future. Therefore, those who use Internet and software technology in their business models should prepare for a newly invigorated barrage of attacks from the patent troll universe.

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