1 IN THE SUPREME COURT OF THE UNITED STATES
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3 LIMELIGHT NETWORKS, INC., :
4 Petitioner : No. 12-786
5 v. :
6 AKAMAI TECHNOLOGIES, INC., :
7 ET AL. :
8 - - - - - - - - - - - - - - - - - - x
9 Washington, D.C.
10 Wednesday, April 30, 2014
11
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:05 a.m.
15 APPEARANCES:
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17 Petitioner.
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20 United States, as amicus curiae, supporting
21 Petitioner.
22 SETH P WAXMAN, ESQ., Washington, D.C.; on behalf of
23 Respondent.
24
25

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: Our last case this

4 term is Case 12-786, Limelight Networks v. Akamai

5 Technologies.

6 Mr. Panner?

7 ORAL ARGUMENT OF AARON M. PANNER

8 ON BEHALF OF THE PETITIONER

9 MR. PANNER: Mr. Chief Justice, and may it

10 please the Court:

11 The text of the Patent Act and this Court's

12 precedence answer the question that is properly before

13 this Court. There is no liability for indirect

14 infringement under Section 271(b) unless the defendant

15 -- defendant has deliberately brought about actionable

16 direct infringement under Section 271(a). And that

17 conclusion is strongly reinforced by the principle that

18 the patent laws best promote the legitimate interests of

19 inventors, of the innovative community, and the public

20 when rules and boundaries are clear.

21 The Patent Act draws a clear distinction

22 between conduct that invades a patentee's exclusive

23 rights and conduct that gives rise to secondary or

24 indirect liability. And this Court has consistently

25 refused to blur those statutory lines simply because a

1 patent owner complains of supposed unfairness in a
2 particular case. Instead, it is for Congress to make
3 adjustments as it did, for example, in response to this
4 Court's decision in Deepsouth. It is likewise
5 critically important for the scope of patent claims to
6 be clear so that the public has clear notice of the
7 patentee's exclusive rights and as between a patentee
8 who can choose the language to embody the invention and
9 the public, legal rules should place the obligation on
10 the patentee to define clearly the scope of what is
11 invented.
12 JUSTICE GINSBURG: Mr. Panner, is this -- is
13 this a problem that's special to business method patents
14 as opposed to, say, product?
15 MR. PANNER: I think it is a problem that
16 arises with method patents, Your Honor. It wouldn't
17 necessarily be exclusively within business method
18 patents. But I do think that it has arisen more often
19 in circumstances where there are interactions among
20 various individuals carrying out steps of what would be
21 called a business method and --
22 JUSTICE KENNEDY: Well, should the rule be
23 different for a method patent than a device patent?
24 MR. PANNER: Well, I don't think the rule is
25 different, Your Honor. The part --

1 JUSTICE KENNEDY: That's because the statute
2 isn't different, I assume.
3 MR. PANNER: That's exactly right, Your
4 Honor. And -- and, of course, it's -- it's true that
5 method patents have, in some ways, more restricted
6 rights associated with them. It's hard to -- you don't
7 make a method or sell a method, but you -- you use a
8 method by carrying out each and every step of that
9 method. And it's very well-established and it's one
10 reflection of the all elements rule, which is, again,
11 very old, that one doesn't have infringement unless all
12 the -- all the steps of the patent are carried out.
13 Now, that's the rule that the Federal
14 Circuit applied in finding that there was no
15 infringement -- direct infringement under Section
16 271(a). That issue is not properly before the Court at
17 this point because it was the subject of a
18 cross-petition that has not been granted.
19 CHIEF JUSTICE ROBERTS: Your -- your
20 position makes it pretty easy to -- to get around patent
21 protection, doesn't it? All you've got to do is find
22 one step in the process and essentially outsource it or
23 -- or make it attractive for someone else to perform
24 that particular step and you've essentially invalidated
25 the patent.

1 MR. PANNER: I don't think so, Your Honor.
2 In -- in the following -- in -- in two following senses.
3 First of all, empirically speaking, there have not been
4 very many cases in which this has proven to be a
5 problem. It has been a long -- long understood
6 principle of patent claim drafting that method claims
7 should be drafted from the point of view of a potential
8 infringer so that all of the steps can be carried out by
9 that potential infringer. And prospectively,
10 certainly -- and given that this rule has been clearly
11 articulated by the Federal Circuit now for many years,
12 or at least several years, prospectively, the patent
13 applicant has every incentive to draft claims from the
14 point of view of a single potential infringer.
15 This -- the claim that's at issue here,
16 there's no dispute. It could have been written in such
17 a way that the steps would have been carried out by a
18 single infringer and, indeed, that may have been the
19 intent. What the inventor had in mind may well have
20 been --
21 CHIEF JUSTICE ROBERTS: Well, but it would
22 be -- when you say it would be written that way, it
23 would be by not claiming one step in the method, I
24 assume, which changes the whole patent.
25 MR. PANNER: Well, it would be -- it would

1 be to claim what is carried out from the point of view
2 of the potential infringer. So, for example, in this
3 case what the method claim could have been written to
4 say, rather than to tag an embedded object, to deliver
5 an embedded object in response to a request for that
6 object where -- wherein the request --
7 CHIEF JUSTICE ROBERTS: But you don't know
8 really in every patent whether the tagging is an
9 important part of the process or not.
10 MR. PANNER: Well, by -- by definition, Your
11 Honor, the -- every step is material and important to
12 the invention. That is really very deeply -- deeply
13 engrained in the patent law, that --
14 JUSTICE SCALIA: I don't understand what
15 you're saying. You're saying that you can avoid the
16 problem if the patent is drawn in such a way as what, to
17 -- to require a single person to do all the steps?
18 MR. PANNER: Well, it is -- it's --
19 JUSTICE SCALIA: How does that give you any
20 more protection? I mean, you can still violate the
21 patent by not having one person do all the steps; have
22 another person do some of the steps. And -- and -- it's
23 -- it's just as effective in -- in -- in stealing the
24 idea and yet there would not be a violation of the
25 patent.

1 MR. PANNER: Your Honor, I -- I would take
2 issue with that because I don't think that that's --
3 first of all, to the extent that one is being -- one is
4 using an agent where there would be a vicarious
5 liability for that conduct --
6 JUSTICE SCALIA: Yes. Then, of course. But
7 we're not talking about agents. We're talking about
8 somebody who simply cooperates with you. He's not your
9 agent.
10 MR. PANNER: Well, Your Honor, that reflects
11 -- that reflects the -- a very well-settled principles
12 of patent law, including the principle that the alleged
13 -- the defendant must carry out every step of the
14 patent. It reflects the fact that where there is
15 attribution of conduct -- if you have a circumstance --
16 JUSTICE SCALIA: Yes. I agree with you. I
17 mean, I'm not -- I'm not arguing about that. I'm just
18 -- I'm just arguing about whether the -- the safe haven
19 you have given us for -- for patentees really exists.
20 It doesn't seem to me you can avoid the problem by
21 simply requiring all the steps to be conducted by -- by
22 one person.
23 MR. PANNER: Well, Your Honor, in -- in my
24 experience in -- in terms of dealing with patents that
25 are written to technologies that do involve interaction,

1 for example, between cellular phones and networks and
2 content providers who are sending content to a phone,
3 for example, it is very common to draft claims from the
4 point of view of someone who's participating in that
5 process so that all of the steps will be carried out in
6 that -- by that person.
7 JUSTICE SOTOMAYOR: Is that what the briefs
8 are talking about as a single actor?
9 MR. PANNER: Yeah. It would -- it's
10 referred to sometimes as a single entity rule. I think
11 that's a little bit of a misnomer because, of course,
12 there could be multiple people involved with the alleged
13 infringement in a circumstance where the acts of one
14 actor are attributable to the principal, under
15 principles of vicarious liability.
16 And, you know, if there were a concern,
17 Justice Scalia, about the -- the potential for evasion,
18 that's something that Congress can address.
19 Essentially, the rule that is being --
20 JUSTICE SCALIA: You say this isn't here
21 anyway, right?
22 MR. PANNER: That's correct, Your Honor.
23 JUSTICE SCALIA: Okay. And 11 of the 12
24 judges on the Federal Circuit agreed with your position
25 on the thing, I gather, or something like that.

1 MR. PANNER: Well, 10 of 11. Just to be
2 clear, I don't want to overstate. The majority below
3 did not purport to address this question. It said that
4 it was leaving in place prior law which establishes this
5 position. The dissent expressly adopted it and then
6 there was one -- one judge below who indicated her
7 disagreement.
8 JUSTICE SCALIA: Okay. So how many out
9 of -- out of how many? Maybe -- maybe that's why we
10 didn't grant the cross-petition.
11 MR. PANNER: It may well be, Your Honor. It
12 may well be.
13 JUSTICE GINSBURG: But the parties
14 briefed -- this case tends to be rather confusing
15 because didn't the parties brief, what is it, 271(1)
16 or -- and then the Federal Circuit decided it on sub
17 (2).
18 MR. PANNER: So, Your Honor, that is --
19 that's accurate. What happened in the case, just to go
20 over quickly the -- the procedural history, Akamai moved
21 for rehearing from the panel decision. Akamai had
22 pursued their case as a direct infringement case under
23 271(a). The Federal Circuit granted that en banc
24 petition. They subsequently granted an en banc petition
25 in a case involving McKesson and Epic, and that case did

1 present a question of indirect infringement under
2 Section 271(b). And when the Federal Circuit heard the
3 case, therefore, they had the -- the -- you know, 271
4 more broadly before them and they decided the case on
5 the grounds of 271(b), which was -- and then they
6 offered Akamai the benefit of -- of that decision and
7 that's why we petitioned for -- for certiorari. And the
8 cross-petition was prompted by their dissatisfaction
9 with the 271(a) rule that was applied by the panel. But
10 I do --
11 JUSTICE SOTOMAYOR: I understand. And --
12 and perhaps I'm just confused. I thought the issue we
13 granted cert on was whether you could have an inducement
14 of infringement if no one is directly infringing.
15 MR. PANNER: That's exactly right, Your
16 Honor.
17 JUSTICE SOTOMAYOR: All right. So -- so the
18 question the Federal Circuit below didn't deal with did
19 someone directly infringe at all?
20 MR. PANNER: The -- the en banc court did
21 not, Your Honor. The panel decided it and the en banc
22 court chose not to disturb that. And so I do agree with
23 Your Honor that there's a straight -- that there's a
24 very straightforward path to this Court reversing this
25 case on the question that's properly presented by our

1 petition, which is to say simply that under the plain
2 language of Section 271(b), that if there is no direct
3 infringement -- actionable direct infringement under
4 271(a), that there is no liability. And that's a very
5 straightforward --
6 JUSTICE SOTOMAYOR: And that direct
7 infringement question would still be open before the
8 court below?
9 MR. PANNER: Potentially, Your Honor, yes.
10 We would certainly -- we don't think it's a cert-worthy
11 question, and we would urge -- we have urged the Court
12 to deny the petition -- the cross-petition, but --
13 CHIEF JUSTICE ROBERTS: And how would it --
14 just to follow up, how would it still be open for the
15 court below? It was decided; en banc review was not
16 granted? Isn't that done?
17 MR. PANNER: Well, en banc review actually
18 was granted, Your Honor, because the --
19 CHIEF JUSTICE ROBERTS: On -- on the direct
20 infringement question?
21 MR. PANNER: Yes, Your Honor.
22 CHIEF JUSTICE ROBERTS: And they just didn't
23 reach it?
24 MR. PANNER: Correct, Your Honor.
25 JUSTICE KAGAN: And, Mr. Panner, if they did

1 reach it a second time around and they decided well, now
2 that this inducement theory is not available to us, we
3 think that there is a real problem here, that there is a
4 kind of end run around the patent law and so we're going
5 to change what we think on the 271(a) question, if they
6 did that, it would be right to say it would render our
7 opinion on the 271(b) question a nullity?
8 MR. PANNER: Well, Your Honor, it is --
9 that -- that may be right in the -- in the following
10 sense. That it's often true that this Court will take a
11 question where there's an underlying prior legal ruling
12 that the Court doesn't choose to review or doesn't
13 disturb. And it's -- in any circumstance like that,
14 it's true that there's a potential that the prior rule
15 might later be disturbed and then that would alter
16 the --
17 JUSTICE KAGAN: Yes. I guess the question
18 I'm asking -- I mean, I can't think of a way in which
19 our decision on the 271(b) question would be relevant
20 for any case if the Federal Circuit on remand goes the
21 opposite way in a -- on the 271(a) question. But maybe
22 I'm not thinking more broadly enough.
23 MR. PANNER: I don't think so, Your Honor,
24 because if -- if the Court were to keep -- if the Court
25 were to maintain that rule -- if the Court were to

1 affirm the rule that the Federal Circuit articulated,
2 that might reach circumstances -- that would continue to
3 potentially provide an avenue for claims of induced
4 infringement and circumstances where on some
5 hypothetical new joint infringement doctrine under
6 Section 271(a), there might not be a claim.
7 So in other words --
8 JUSTICE KAGAN: Yes. I suppose I just
9 couldn't think of a place where somebody would make the
10 271(b) claim if the 271(a) claim were available to it.
11 MR. PANNER: Your Honor, that's probably
12 right, and that's a very good reason that the -- for the
13 Court to recognize that the Section 271(b) ruling is
14 incorrect. It essentially swallows -- or I should
15 say -- let me back up. It's a good reason to recognize
16 that Akamai's theory about Section 271(a), that 271(a)
17 ought to be expanded. Now, I realize that's not -- not
18 before the Court and we're not asking the Court to reach
19 that, of course.
20 JUSTICE ALITO: It's -- it's a good reason
21 to think that the question before us really has no
22 significance that I can think of unless the -- the Court
23 of Appeals -- unless the Federal Circuit is right about
24 (a).
25 MR. PANNER: Well, again, Your Honor,

1 certainly --

2 JUSTICE ALITO: So you're asking us to

3 decide a question -- to assume the answer to the

4 question on (a) and then decide a question on (b) that

5 is of no value -- no significant -- maybe I don't

6 understand some other -- I don't see some other

7 situations where it would apply, and no significance

8 unless the ruling on (a) stands, unless Muniauction is

9 correct?

10 MR. PANNER: Well, Your Honor, again, I

11 think that there's -- there are -- there might be

12 circumstances where Section 271(a) would still -- still

13 not apply and there might be an argument that, depending

14 on what the more -- we're talking about a hypothetical

15 271(a) rule that's broader, and we don't know what it

16 would look like and so whether that would leave room for

17 271(b).

18 It is certainly correct that if this Court

19 were to say there is no indirect liability under Section

20 271(b), as we would urge the Court to do, without direct

21 infringement under 271(a), that resolves this question.

22 Whether there would be further development under 271(a),

23 we would certainly urge the Federal Circuit not to

24 change the rules.

25 CHIEF JUSTICE ROBERTS: I just want to make

1 clear, you're saying that under existing law, the
2 question presented makes a huge difference; if existing
3 law is changed, it may not make a difference?
4 MR. PANNER: That's exactly right.
5 CHIEF JUSTICE ROBERTS: I suppose that's
6 true in every case we hear.
7 MR. PANNER: That's -- that's well said,
8 Your Honor. Thank you.
9 JUSTICE KAGAN: But I suppose, Mr. Panner,
10 what might make this a little bit different is that
11 notwithstanding what you said about 10 of 11 judges, it
12 was clear that the judges thought that there was a real
13 problem here in terms of an end run, and that they
14 looked at this and said, well we could do it under
15 271(a) or we could do it under 271(b), and 271(b) seems
16 a lot more natural and better for various reasons. But
17 your sense in reading the opinion that all those judges
18 who did it under 271(b) are just going to go back and do
19 the exact same thing under 271(a).
20 MR. PANNER: I -- I certainly wouldn't agree
21 with that, Your Honor. I think that the fact that
22 liability under 271(a) would actually be somewhat of a
23 disaster for the innovative community because of the
24 breadth of a strict liability claim under Section
25 271(a). That's precisely why -- absolutely on a policy,

1 you know, based on a policy judgment. But that's the
2 reason that the -- the decision should be reversed. The
3 Federal Circuit did make a policy judgment, tried to
4 amend the statute to reach a result that they thought
5 was fair in the particular case. That's a job for
6 Congress.
7 Could I reserve the remainder of my time?
8 CHIEF JUSTICE ROBERTS: You could.
9 MR. PANNER: Thank you, Your Honor.
10 CHIEF JUSTICE ROBERTS: Ms. Anders.
11 ORAL ARGUMENT OF GINGER D. ANDERS
12 FOR UNITED STATES AS AMICUS CURIAE,
13 SUPPORTING PETITIONER
14 MS. ANDERS: Mr. Chief Justice, and may it
15 please the Court:
16 The Federal Circuit's holding that a party
17 may be liable for inducing infringement under Section
18 271(b), even though no one has committed direct
19 infringement, is wrong for two primary reasons. First,
20 Section 271(b)'s text makes clear that to be liable for
21 inducement, a party must induce conduct that constitutes
22 direct infringement under 271(a). And second, I think
23 in expanding 271(b), the Federal Circuit departed from
24 the approach that this Court has -- has repeatedly
25 employed in interpreting Section 271.

1 I think the Federal Circuit was
2 understandably concerned about allowing inducers to
3 perform some stops of a process themselves to escape
4 liability, but this Court has twice held in both
5 Microsoft v. AT&T and before that Deep South v. Laitram
6 that judicial concerns about gaps in 271's coverage
7 should not drive the Court's interpretation of that
8 provision. That is because any time that you close a
9 gap in 271, expanding patent rights, you are invariably
10 implicating competing concerns and it's for Congress to
11 resolve those concerns.
12 So to go to the -- the concern about
13 circumvention, I think if Congress were just considering
14 the -- the traditional active inducer who simply induces
15 a party to perform all the steps of a process, that
16 person compared to someone who performs some steps
17 himself and induces someone else to perform the rest of
18 the steps, there's no obvious policy reason to
19 distinguish between those two actors.
20 JUSTICE ALITO: Is there any policy reason
21 for -- that could support a holding, if you were -- if
22 you were in Congress, support the conclusion that there
23 would -- there was not infringement on the facts here?
24 MS. ANDERS: Under 271(b), I think the --
25 JUSTICE ALITO: No. I mean, if you were

1 writing a statute. If you were amending -- you said
2 there are competing policy concerns. What are the --
3 what policy concerns would support holding a conclusion
4 that there was no infringement on the facts here?
5 MS. ANDERS: Well, I think the -- the
6 concern that comes from expanding 271(b), I think, is --
7 is ably represented by the Internet service providers,
8 the wireless providers, the software --
9 JUSTICE SCALIA: Is she talking about (b) or
10 (a)? I thought the question went to (a). And you're
11 answering (b).
12 MS. ANDERS: Yeah. I'm sorry. I was --
13 JUSTICE ALITO: Well, I don't care. (A) or
14 (b), whatever, or (c) or (d) or (z).
15 (Laughter.)
16 JUSTICE ALITO: What policy concern -- what
17 policy concern would support the -- the conclusion that
18 there is an infringement on the facts of this case?
19 MS. ANDERS: Well, I think one of the
20 concerns is that if you expand inducement so that --
21 someone only has to induce one step of a process --
22 JUSTICE BREYER: I think what he's saying,
23 is there any good reason that they aren't liable for
24 infringement? Is that --
25 JUSTICE ALITO: Yes. Exactly.

1 JUSTICE BREYER: All right. And I thought
2 the reason -- you have to answer it -- is because when
3 you have many steps in a process, and this is a very
4 similar process of the book I'm reading now about the
5 Seabees building constructions in World War II, you
6 know, they put some forward warehouses and they put some
7 other stuff in some other warehouses and they make the
8 eventual thing by shipping this from over there and the
9 other place. So it's tough.
10 Now, you probably want to insist upon a
11 pretty strict relationship between the different parties
12 in a joint venture or more before you hold them liable.
13 In other words, there's an issue I don't know about.
14 How close was this relationship? And I ask you that
15 because you're going to answer his question and I want
16 to just see if my stab in the dark here is somewhere
17 close to the -- to what you were about to say.
18 MS. ANDERS: Well, I think that's right,
19 Justice Breyer. I think if you look at this as a
20 problem under 271(a), which, again, is not the question
21 before the Court, but if you do, what everyone agrees, I
22 think, is that you can use traditional, well-established
23 tort principles of attribution in order to conclude that
24 someone who has not personally performed all the steps
25 of a process, nonetheless, should be liable for using

1 the process because they have worked in concert with
2 someone else. I think everyone agrees on that.
3 JUSTICE SCALIA: Yes, but that is not the
4 tort rule for what this is, which is an absolute
5 liability. I mean, you asked for the policy reason.
6 The policy reason is someone who does not even know
7 about the existence of the -- of the patent, who happens
8 to be one of the people who -- who performs one or more
9 of the -- of the steps is suddenly automatically liable.
10 That's -- that's the policy reason. It's a strict
11 liability tort.
12 MS. ANDERS: I think that's absolutely the
13 reason that we -- I think we would all agree that --
14 that if you had two unrelated parties who each happen to
15 use some steps of a process, happened to perform some
16 steps, unbeknownst to each other, we wouldn't say that
17 those people had used the process in any reasonable
18 construction of the term.
19 JUSTICE SCALIA: Well, even knownst -- even
20 knownst to each other, but -- but one of them who is
21 knownst doesn't know about the patent. He would still
22 be liable, wouldn't he?
23 MS. ANDERS: It depends on what tort
24 principles you would use under 271(a). But I think that
25 is a significant concern and it is one that this Court

1 would have to take into account in deciding what tort
2 principles to incorporate in 271(a).
3 JUSTICE SOTOMAYOR: But I think under
4 Justice Scalia's example, they're not liable today,
5 because if they're -- if they're on the method patent,
6 someone has to practice the four steps, and they have to
7 be vicariously liable, correct?
8 MS. ANDERS: Well, I think the rule is that
9 you either have to practice all of the steps yourself --
10 JUSTICE SOTOMAYOR: Right.
11 MS. ANDERS: -- or you have to have them
12 attributed to you under traditional tort principles of
13 attribution.
14 JUSTICE SOTOMAYOR: Right. Exactly.
15 MS. ANDERS: The Federal Circuit has said
16 principal agent right now. That rule makes sense. I
17 think everyone agrees that that rule, at least, is
18 correct. If the Court wanted to broaden that out, it
19 would have to consider, I think, the significant concern
20 about expanding liability too far so that you have
21 parties who don't know about the patent, who don't know
22 exactly what steps they need to perform or avoid
23 performing in order to avoid liability.
24 JUSTICE KAGAN: But in some ways that's why
25 the Federal Circuit did what it did, right? I mean, you

1 can look at the Federal Circuit's ruling and say it
2 makes no sense. How can you induce infringement if
3 there's no infringement in the first place. And that's
4 a very strong argument. But the reason they put this
5 under 271(b) rather than under 271(a) is because of what
6 Justice Scalia said, that 271(b) is not a strict
7 liability offense, and so that you can say, you have to
8 know and you have to have instructed the -- the person.
9 So, you know, they thought that they were being very
10 clever by putting it into a 271(b) box and avoiding the
11 strict liability consequences of what they were doing,
12 but also avoiding the possibility of an end run of the
13 patent law.
14 MS. ANDERS: I think that's right. I think
15 another reason the Federal Circuit might not want --
16 JUSTICE SCALIA: And also avoiding the text
17 of the statute.
18 (Laughter.)
19 JUSTICE KAGAN: There is that problem.
20 There is -- There is that problem.
21 (Laughter.)
22 MS. ANDERS: Right. I think the problem
23 under 271(a) for the Federal Circuit was that
24 well-established tort doctrines don't support
25 attribution liability when you have a vendor customer.

1 So it turned to 271(b). The problem with 271(b), as
2 Justice Scalia said, is that it's very clear from the
3 text of the statute that the conduct induced has to be
4 direct infringement.
5 And I think the Court has twice before
6 confronted situations where there was conduct that
7 clearly was intended to circumvent the Patent Act. In
8 both Microsoft v. AT&T and Deepsouth, it was very clear
9 that what -- what the defendant was trying to do was
10 ship operations overseas so that it could avoid the
11 Patent Act. And in both of those cases, the Court
12 reversed lower court decisions that had used that desire
13 to stop circumvention as the primary driver of its
14 interpretation of the Act. So in both cases, the Court
15 said, to be liable under 271, you have to satisfy the
16 requirements of 271. We are not going to interpret the
17 text simply to avoid circumvention concerns, even when,
18 you know, you would say, if you were looking from the
19 perspective of the patentee, that essentially their --
20 their patent had been performed.
21 In both cases, the Court said it is for
22 Congress to make that judgment because there will always
23 be countervailing policy concerns. And I think --
24 JUSTICE GINSBURG: Ms. Anders, will you
25 clarify if the government, which has now told us what

1 its position is on sub (b) also has a position on sub
2 (a), which is what the Federal Circuit originally
3 decided this case under?
4 MS. ANDERS: Well, I think -- we haven't
5 briefed that question. I think we -- if the Court were
6 to decide that issue, we think it probably should order
7 further briefing. But I would say three things about
8 it, which I think are relevant both to why we think the
9 Court shouldn't decide the issue in this case and
10 relevant to our view of the merits.
11 The first is that, as we've been discussing,
12 the 271(a) issue, I think, raises a very different legal
13 question than the 271(b) issue. 271(a) turns on what
14 the -- the content and application of well-established
15 tort doctrines. I think there's substantial
16 disagreement about what the content of those doctrines
17 are and how they would apply here, which would, I think,
18 need to be decided by looking at treaties, state law,
19 how these doctrines have been applied.
20 That relates to the second point, which I
21 think is that these tort doctrines, properly applied, we
22 don't think apply easily to the vendor-customer
23 situation. There is no agreement to circumvent the
24 patent. There's no common pecuniary interest of the
25 sort that courts have looked for when they've looked at

1 joint enterprise cases or conspiracy cases. So I
2 think -- you know, although one of the most -- the
3 pressing policy concern, I think, it addressed or raised
4 by the other side's amici is this idea of two people
5 agreeing to circumvent a patent.
6 I don't think that situation can easily be
7 resolved here because we have a vendor-customer
8 situation here, and so I think the Court could, I think,
9 resolve that question in a future case.
10 And the final thing I --
11 JUSTICE SOTOMAYOR: Could I -- I have one
12 last question. In your brief, and I think your
13 adversary -- your -- Mr. Panner mentioned it, too.
14 You said that there's some kind of method
15 patents that simply cannot be drafted from the
16 perspective of a single entity. Could you give me an
17 example? And -- and how that would be circumvented or
18 how you can't get it circumvented.
19 MS. ANDERS: It's hard to give a very
20 concrete example, but I think patents that involve the
21 use of -- of different machines that have to be operated
22 by two people might be an example. And I think even --
23 even if you draft patents from the perspective of a
24 single actor, it's always theoretically possible for --
25 for different actors to split up the claims or split up

1 the steps of the process to use it together. But we
2 think that's one thing that Congress should consider in
3 deciding what the rules should be here.
4 CHIEF JUSTICE ROBERTS: You had a third
5 point you were going to make on 271(a)?
6 MS. ANDERS: The third point was just
7 something that I think we already alluded to a little
8 bit, which is that, when the Court is deciding what --
9 what tort doctrines to import into 271(a), I think
10 there's a lot of reason for caution because if -- if you
11 expand the doctrines too much and you use doctrines that
12 don't require a whole lot of knowledge, then you are
13 going to increase uncertainty and litigation burdens and
14 ultimately chill innovation.
15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
16 Mr. Waxman?
17 ORAL ARGUMENT OF SETH P. WAXMAN
18 ON BEHALF OF THE RESPONDENTS
19 MR. WAXMAN: Mr. Chief Justice, and may it
20 please the Court:
21 Please make no mistake about what Limelight
22 is asking you to do. Under Limelight's theory, two or
23 more people can divide up and perform the steps of any
24 method claim, however drafted, without liability.
25 Imagine, for example, to go to the question -- Justice

1 Ginsburg's question about business method patents,
2 imagine a pretty common medical treatment claim. Let's
3 assume that there is disclosure and patenting of a cure
4 for cancer or a novel treatment for cancer that
5 involves, as they often do, the administration of
6 different drugs sequentially. And two parties get
7 together and say, I'll administer Drug 1, you administer
8 Drug 2, and we can take advantage of this marvelous
9 patented process without paying anything -- giving
10 anything whatsoever to the company that spent a billion
11 dollars and 25 years developing.
12 JUSTICE SOTOMAYOR: Isn't that a
13 partnership?
14 MR. WAXMAN: Excuse me?
15 JUSTICE SOTOMAYOR: Isn't that a
16 partnership?
17 MR. WAXMAN: It would not necessarily be a
18 partnership. I mean, the fact of the matter is,
19 that's -- there's no reason why it would have to be. We
20 don't have to have a formal partnership. We don't have
21 to have a formal --
22 JUSTICE SOTOMAYOR: There's nothing in the
23 law that requires a formal partnership.
24 MR. WAXMAN: This is exactly, exactly the
25 point here, which is that as this Court has taught, the

1 Patent Act, and in particular 271(a), imports common law
2 principles of liability unless the law, the Patent Act
3 clearly can be read to exclude them. And the whole
4 fight here, if you'll pardon me, on the 271(a) question,
5 which is a predicate question to the 271(b) question, as
6 it was in Arrow and Deepsouth and the Sony Betamax case,
7 the 271(a) question is just which common law rules of
8 attribution apply?
9 Now, the Court -- the panel below said,
10 well, we know -- there are only two rules that apply.
11 One is if there is a binding contractual obligation by
12 each party to perform all the joint steps. And two, if
13 there is a formal agency principal relationship. Those
14 two are correct.
15 At common law, there was attribution for
16 tort liability, whether it was strict negligence or
17 intentional, under those circumstances, but -- and you
18 can consult any of the treatises that we cite at pages
19 25 through 27 of our brief -- there were all -- there
20 also was a well -- there were well-recognized
21 attribution doctrine that applied where there was
22 direction and control. That is, one party directed or
23 controlled the other, which is the basis on which the
24 jury found liability here, and also where the parties
25 were engaged in a concerted action or a common plan.

1 And, Justice Scalia, to your point about,
2 you know, people could be inadvertently liable, even if
3 they didn't know about all the steps or they didn't know
4 each other, the common law didn't accommodate those
5 circumstances. The common law required, across tort
6 law, whether a strict liability tort law like trespass,
7 libel, conversion, patent infringement, required not
8 that you know about and intend to violate the patent,
9 but in order to be -- have another party's conduct
10 attributed to you, you had to know about the other
11 party's conduct.
12 JUSTICE SCALIA: I think there's -- there's
13 disagreement about whether only those two, mainly agency
14 or -- what's the other?
15 MR. WAXMAN: Contractual obligation.
16 JUSTICE SCALIA: Contractual obligation,
17 whether only those two at common law would apply to
18 strict liability torts. There's disagreement on that
19 point. If you're absolutely clear that that's what the
20 common law did, but I don't think that's what the common
21 law did.
22 MR. WAXMAN: You know, let me just say --
23 JUSTICE SCALIA: Not strict liability torts.
24 MR. WAXMAN: Let me just say, Justice
25 Scalia, that the proposition that they've asserted, and

1 I gather that you're giving -- you're crediting in their
2 reply brief, that where the underlying tort is strict
3 liability, the attribution rules have to be these formal
4 nonknowledge rules. They don't have -- they have not
5 cited a single case in support of that proposition.
6 There is no logical reason why it would necessarily be
7 true, and I can give you cases that suggest -- that
8 quite definitely suggest the other, including a patent
9 case that all the parties have been -- Liddy have been
10 writing about, which is Jackson vs. Nagle.
11 That was a case in which there was a
12 infringement of a method patent where some of the steps
13 were performed by a contractor and some of the steps
14 were performed by the subcontractor, and there is no
15 respondeat superior in the common law for
16 contractor/subcontractor relationship. The Court found
17 them both individually liable, even though neither
18 completed all the steps under what the Court called
19 principles of joint liability.
20 JUSTICE KENNEDY: Well, under your
21 submission in a process patent, if the consumer adds the
22 final step, vast numbers of consumers, and let's assume
23 they have noticed -- they've been notified that they
24 can't do this, then there's liability.
25 MR. WAXMAN: Well, I mean, look, before I

1 came here this morning, using my smartphone, I'm sure
2 that technically I performed the last step of probably
3 15 different method patents. Consumers aren't sued
4 under patent law for infringement, whether there's a
5 single user or multiple users.
6 JUSTICE KENNEDY: Yet, until we issue the
7 case in your favor.
8 MR. WAXMAN: No, no, not at all. Quite to
9 the contrary. The consumer -- first of all, consumers
10 aren't sued, because under the patent law, under like --
11 under -- unlike copyright law, there are no liquidated
12 damages. No one sues individual consumers.
13 The consumers, the customers in this case
14 are big companies like Microsoft and CNN and ESPN who
15 operate these websites using the patented method through
16 Limelight services.
17 But more to the point here, Justice Kennedy,
18 the point is that there -- at common law, there was no
19 liability absent knowledge about who was doing all of
20 the other steps. And that was the protection that
21 existed. You could always send a letter to people
22 saying, You may not have known about it in the past, but
23 now you know about it. That rendering plant that you
24 built turns out to be part of a -- together with many
25 other pollution-emitting sources constitutes a nuisance,

1 a strict liability, often a strict liability crime. And
2 now that you know about it, you're liable. And
3 that's -- that was the law. That was the rule.
4 But I think the consequences here to
5 consumers, if you're talking about consumers rather than
6 the -- the parties that knowingly, under Limelight's
7 direction, performed a critical step in the patented
8 method, were not traditionally sued. They were not
9 traditionally liable, and it was the -- A, the absence
10 of -- of knowledge of what everybody else was doing.
11 I mean, the consumer in your hypothetical,
12 Justice Kennedy, may get a letter saying, Well, we have
13 a patent on, you know, what Nokia's phone does, and
14 you're infringing it. At common law, there would be no
15 attribution to you of all the steps that -- of what
16 Nokia was otherwise doing, unless you knew specifically
17 the specific steps of the claim method that were being
18 patented.
19 And so in this whole discussion about, you
20 know, is the only question before the Court 271(b), or
21 is there 271(a) imported, I'm going to leave to side the
22 question of whether you should or shouldn't grant our
23 pending conditional cross-petition, and assuming you
24 don't want to do it.
25 You should address -- I mean, you could

1 affirm the Federal Circuit on the theory that it
2 adopted, and I am prepared to defend it because I think
3 it was correct.
4 But at a minimum, we think in order to
5 provide a full analysis under 271(b) and to provide,
6 heaven knows, much needed guidance in this area -- and
7 let me just say that Mr. Panner is brilliant, but his
8 math on the court below is wrong. There were four
9 judges on the En Banc Court who disagreed with us on
10 direct liability. The five in the majority took no
11 position. They said that they had no occasion to
12 address it at this time.
13 JUSTICE KENNEDY: Well, if you don't prevail
14 on your indirect infringement claim, can you relitigate
15 the direct infringement case in the -- before the En
16 Banc Court, or --
17 MR. WAXMAN: I think, both the Government
18 and -- at the petition stage, both the Government and
19 Limelight took pains to point out that if you simply
20 reverse and don't grant the cross-petition, the Federal
21 Circuit will have in front of it the question on which
22 it granted en banc review and vacated the panel
23 decision.
24 But I would go farther. No matter if you --
25 if you affirm either on 271 grounds on its own right or

1 271 grounds using an analysis similar to what you did in
2 Aro and Deepsouth and the Sony Betamax case, which was
3 to say, okay, we have a question presented that poses a
4 question of indirect liability. But indirect liability
5 depends on direct liability, and we are not simply going
6 to assume, for argument's sake, this artificial
7 assertion that there is no direct liability. We're
8 going to look and see in Aro whether the car owner was
9 engaged in --
10 JUSTICE BREYER: My problem is I have no
11 idea. I mean --
12 MR. WAXMAN: No idea --
13 JUSTICE BREYER: I have no idea whether they
14 should be liable or not on a theory of patent
15 infringement themselves. It sounds simple when you take
16 the invention that you gave, but it doesn't sound simple
17 to me when I start thinking about this one, because this
18 one does seem to me a variation on a very old theme.
19 And that is a supplier who makes customized materials,
20 some of which involve standardized materials and some of
21 which have to be made fresh, and where the specialists
22 are in crowded cities. But -- and so it takes time to
23 put it on the truck and get out of the city.
24 But the standardized parts can be shipped
25 from anywhere in the country. Has a system of phoning

1 up standardized people and customized people and putting
2 them all together, and it involves the customer.
3 And there are not just two steps. There are
4 87 steps, and many of them involve very innocent things
5 like taking a truck and driving it from one place to
6 another.
7 Now, when we get into something as
8 complicated as that -- and this is one is even more
9 so -- and many of them are things that people do every
10 day, and there are all kinds of states of knowledge, I
11 become very nervous about writing a rule that suddenly
12 might lead millions of people to start suing each other.
13 And that's what I would not like to do unless I have
14 pretty thorough briefing on this subject.
15 MR. WAXMAN: Justice Breyer, let me answer
16 the question and then -- and get to my -- the point I
17 was trying to make in response to Justice Kennedy's
18 question.
19 This case is not complicated. This case
20 involves a four- or five-step method in which Limelight
21 performs all but one or two of the steps and tells its
22 customers, if you want to use our service, you have to
23 perform the other step. Here's exactly how you do it.
24 We have somebody 24 hours a day, seven days a week
25 assigned to you to help make sure you do it the right

1 way. And the question in this case is whether that
2 constitutes, under 271(a), as the jury found and the
3 judge denied JMOL under the law that existed at the
4 time, all of the steps were performed at -- the steps --
5 the step that Limelight's customers performed were at
6 the direction --
7 JUSTICE BREYER: And of course, my problem
8 is a rule. And if this is a simple case, it's hard to
9 me. Why do they have a patent? Well, they do have some
10 forward warehouses and they had -- phone up and say,
11 which one comes from which place? But, you see, I don't
12 understand the underlying stuff. So they probably have
13 a valid patent. I assume that.
14 But for some of them, could be 87 steps, and
15 I don't have one rule for four steps and another one for
16 87.
17 MR. WAXMAN: Justice Breyer, just so that
18 we're clear, in telling -- in urging the Court to
19 address the predicate question of (a) liability in this
20 case, we are not suggesting that it would be possible or
21 appropriate -- well, of course, it's possible --
22 appropriate for this Court to write a treatise on 271(a)
23 that deals with all method claims regardless of the
24 state of knowledge of various parties, many of whom
25 don't even know about each other.

1 What we're asking this Court to do is to say
2 either we affirm on 271(b), or we can't decide or
3 shouldn't decide the 271(b) question until there is
4 consideration of the question on which you -- you've --
5 the basis on which you vacated the panel decision and
6 granted review. Because in, as in Lebron -- and this is
7 a fortiori case from Lebron -- as in Lebron, it's not
8 satisfying to us as a --
9 JUSTICE KAGAN: And --
10 JUSTICE BREYER: And I'd have the same
11 question, by the way, as to 271(b), exactly the same
12 question. For X number of years, the patent bar and
13 everyone else has lived with the statute and the
14 interpretations which are different from this one. And
15 now suddenly we have a new one. And I get the -- and
16 now do you understand my question? Can you apply it to
17 this one, too, and explain why we should say the Federal
18 Circuit is right to depart from a pretty clear
19 understanding differently?
20 MR. WAXMAN: Yes, I can. May I just
21 answer -- finish answering Justice Kennedy's question
22 before I forget it, which I am greatly in -- in danger
23 of doing?
24 The point here, Justice Kennedy, is whether
25 you would affirm here on 271(b) grounds or (a) grounds,

1 the result will be exactly the same. We are not
2 expanding the relief that we are requesting this Court
3 to grant, because even if you just affirm on (b), just
4 say the Federal Circuit was right, either because it's
5 theory is right or because we think that the common law
6 attribution rules are broader than the Court -- the
7 panel previously had thought, the result is going to be
8 a remand to decide a quest -- the question of
9 infringement under 154(1) and 271(a) because there -- as
10 they -- as Limelight points out like on every third page
11 of its briefs, there is an unresolved pending appellate
12 challenge to the jury's finding that Limelight's
13 customers, in fact, practiced the tagging step.
14 So they are going to have to address on
15 remand a -- the question of whether or not there is
16 direct infringement, whether direct infringement
17 occurred.
18 JUSTICE KAGAN: And, Mr. Waxman, if -- if --
19 if we say something about the 271(a) question here, I
20 mean, it does seem as though it's sandbagging Limelight.
21 Limelight did not brief this until you briefed it, so we
22 have part of Limelight's reply brief. None of the
23 amicus knew -- the amici knew that it was in the case
24 until you briefed the 271 issue. So that would seem a
25 real problem in getting to the 271 issue here.

1 MR. WAXMAN: Well, Justice Kagan, first of
2 all, I mean, if it were a real problem, the Court could
3 order supplemental briefing. It could order, as it did
4 in Kiobel order supplemental briefing and have a
5 reargument in the fall either on our cross-petition or
6 in the predicate question.
7 But it's not quite as unfair as you think.
8 The question on which the case was briefed and argued --
9 the only question briefed and argued by the parties and
10 22 amici in the Federal Circuit en banc proceedings was
11 the 271(a) question. And in response to -- in our
12 petition papers, we said look, whether you grant our
13 cross-petition or not, (a) is a predicate question that
14 the Court should address in order to render a meaningful
15 decision and do what it did in Aro and Sony Betamax.
16 JUSTICE KAGAN: That --
17 CHIEF JUSTICE ROBERTS: I'm sorry,
18 Mr. Waxman. You tried to dodge Justice Breyer's
19 question earlier, and I'd like to give you a chance to
20 respond.
21 MR. WAXMAN: Okay. So the question, as I
22 understand it, is, what's your defense of the Federal
23 Circuit's rationale for 271(b) liability; is that --
24 JUSTICE BREYER: And my question is one you
25 probably can't answer, which is a problem because you

1 have limited time, and the way -- you have such limited
2 time in these complicated cases.
3 And my problem is, the question is this is
4 so complicated. And the reasons I found it so
5 complicated is I can -- and I'll spare you the
6 details -- think of so many different kinds of
7 situations with so many different steps in method
8 patents where so many rights and wrongs of it are
9 differently at play that I become worried about setting
10 forth any rule.
11 And it's under those circumstances that I
12 say okay, let's go with what we've had for 30 years, and
13 if Congress feels they should change it, change it. And
14 that's the --
15 MR. WAXMAN: Okay.
16 JUSTICE BREYER: -- that -- that is
17 basically my idea. And it depends upon the complexity,
18 which I'm seeing in my -- as -- as I think about it.
19 MR. WAXMAN: Okay.
20 JUSTICE BREYER: And it doesn't depend just
21 upon that there were 4 steps in this case, because there
22 could have been 104.
23 MR. WAXMAN: Okay. I -- I --
24 JUSTICE BREYER: There could have been 104
25 different circumstances.

1 MR. WAXMAN: Okay. I understand the
2 question, and it's -- it's really a hesitation --
3 JUSTICE BREYER: Yes.
4 MR. WAXMAN: -- a concern about saying
5 anything about (a).
6 JUSTICE BREYER: Yes. Well, anything about
7 (a) and also about (b), because (b), if you're liable
8 under (b), my goodness, you could become more easily
9 liable perhaps or less easily in some circumstances, but
10 you didn't even -- I mean, it's the same question for
11 (a) and (b).
12 MR. WAXMAN: Well, just --
13 JUSTICE BREYER: Go with what you have
14 because I don't understand it well enough to know all
15 the facts and circumstances to which I would be applying
16 a new rule.
17 MR. WAXMAN: Justice Breyer, if you are
18 hesitant, and perhaps you should be, to say anything
19 about (a) or (b) in the utterly peculiar circumstances
20 of this case litigated judgment on (a), vacation of the
21 panel decision to have argument and decision on (a) and
22 then nothing said about (a) except we don't need -- then
23 the -- then the option for the Court -- it seems to me,
24 the best option for the Court would be simply to dismiss
25 the petition as improvidently granted or to vacate on

1 the grounds that the -- look, you don't ask, you don't
2 get. To -- to --
3 (Laughter.)
4 CHIEF JUSTICE ROBERTS: Well, sure you do.
5 MR. WAXMAN: I'm serious, though, because
6 the real question in this case that you're grappling
7 with is -- I mean it would be clearly presented and you
8 could hear -- you know, get full briefing and argument
9 about it in the fall on (a) as well as (b) and
10 ultimately have to decide, but --
11 JUSTICE SOTOMAYOR: Mr. Waxman, is -- is the
12 decision that the Federal Circuit made below a new
13 decision? Do you have any case that has ever found
14 inducement where there was not direct inducement --
15 MR. WAXMAN: Infringe --
16 JUSTICE SOTOMAYOR: -- direct infringement
17 by someone?
18 MR. WAXMAN: That's not our submission.
19 There's no question that there has --
20 JUSTICE SOTOMAYOR: This is a new rule by
21 the Federal Circuit?
22 MR. WAXMAN: I don't -- the principle that
23 the -- let me -- the answer is no. What is new is the
24 2008 -- beginning in 2008 jurisprudence in the Federal
25 Circuit on 271(a) that unnaturally limited the common

1 law attribution rules.

2 The (b) decision is not new because, and I

3 say this because the principle is certainly as the

4 majority said below, you cannot have liability for

5 inducement or contributory infringement unless there is

6 direct infringement. That is tautological. No one

7 disagrees with that.

8 Infringement in the Patent Act is defined in

9 section -- what is now Section 154(a)(1), but was, in

10 fact, the entire metes and bounds of the patent law

11 starting in the Patent Act of 1836, which is that -- and

12 this Court itself has called it the foundational

13 definition of infringement. 154(a)(1) says that, A, you

14 know, a patentholder has the exclusive right to make,

15 sell, use, or offer to sell his invention during the

16 term of the patent. That's what sets out the metes and

17 bounds of the property right. And any encroachment on

18 that property right is a infringement.

19 And therefore, because there -- the jury

20 found that all the -- I know there's an outstanding

21 question on appeal, but the jury found that every step

22 of -- there was an encroachment in this case, there was

23 an infringement. And the common -- the patent law, as

24 well as the common law, was very, very clear that

25 whether the underlying conduct was conducted by one

1 person or two people or three people, the party that
2 induced those people to do it was liable.
3 And I would -- if you're asking for
4 authority, I don't think that there's a better authority
5 than -- well, I'll give you three really good ones, not
6 necessarily in order of importance. The Robinson 1890
7 treatise on patents which this Court has repeatedly
8 referred to, says point blank and cites authorities for
9 that proposition; similarly, the Walker treatise; and
10 finally this Court's decision -- this Court's opinion
11 last month in United States versus Rosemond, which was a
12 criminal aiding and abetting case, but in the course of
13 the -- of the Court's discussion, the Court explains
14 that look, let's take a kidnapping example and let's say
15 that someone is abducted, but the abduction occurs as a
16 result of four people just basically getting at the
17 other and saying, you know, you provide the home or the
18 warehouse --
19 JUSTICE KAGAN: Mr. Waxman, I think it's a
20 very different situation. I mean, in that case it's
21 clear that there was a kidnapping. It happened to be a
22 kidnapping done by four people rather than a kidnapping
23 done by one person. But there was a kidnapping.
24 Now, in your case, I don't think you can say
25 the same thing because the question is: Is there an

1 infringement? Under Federal Circuit law, there is no
2 infringement when different people do these different
3 steps of the process. That's just the fact of the
4 matter.
5 MR. WAXMAN: Well, I'm on thin ice indeed,
6 Justice Kagan, in -- in arguing with you or dialoguing
7 with you about what Rosemont -- the Rosemont opinion
8 involved. But let me take a valiant step in any event.
9 What this Court said was that from the
10 perspective -- and -- and the two treatises that this
11 Court cited also say this -- from the perspective of the
12 victim, which is the perspective that the Court used in
13 the example and is the perspective that the common law
14 of torts takes, there was an encroachment upon rights.
15 Now, what this Court said in its discussion is none of
16 those four people are liable for kidnapping as a
17 principal, but they are all liable under the common plan
18 analysis for indirect liability. And that is -- this --
19 what is really most notable about the common law is --
20 and the early patent cases -- is how assiduously, going
21 back at least through the 19th Century, the courts
22 worked to make sure that where there was an invasion of
23 the property or personal right, either in criminal law
24 or in civil tort law, that parties that cooperated with
25 each other or a party that was directing other parties

1 to do it were held liable whether one person did
2 elements A, B, C, or D or not.
3 JUSTICE KAGAN: But I think again,
4 Mr. Waxman, what -- what -- what your argument just
5 glides over is did you need the infringement. And the
6 question is whether, under substantive law, you have the
7 infringement when different people do different steps of
8 the process. And as I understand the Federal Circuit's
9 law in this area, it's that you don't have any
10 infringement when different people do different steps of
11 the process. So that takes you back to the 271(a)
12 question, which you think is wrong, but if it's right,
13 you just don't have an argument in the 271(b) question.
14 MR. WAXMAN: Justice Kagan, no. The Federal
15 Circuit's law as announced by the majority below is that
16 you have (b) liability when there is infringement as
17 defined by 154(1). And here the patent law and the
18 common law --
19 JUSTICE GINSBURG: An infringement without
20 an infringer.
21 MR. WAXMAN: You can certainly have
22 infringement without an actionable infringer,
23 absolutely. Under anybody's rule you can do that. The
24 whole debate we have with the other side on the (a)
25 question is how -- what attribution rules do or don't

1 apply. But if you have an example, to take Justice --
2 one of the things that's bother -- one of the -- one
3 small part of what's bothering Justice Breyer, you have
4 a situation where however many steps there are and
5 however many parties there are, there are some parties
6 that don't know about each other or what they're doing.
7 In those circumstances, the common law
8 doesn't apply liability, and therefore, you would have
9 an instance in which there could be an infringement
10 under 154(1) in the sense that all of the steps of the
11 patented method are performed, but there will be no
12 liability because the performers were not acting in
13 concert or at the direction or control of each other.
14 And that's -- that's why I think what the
15 Federal Circuit did on its own terms is not novel. It
16 accepted the proposition that you can't have inducement
17 liability unless there is an infringement, unless there
18 is a tort, and --
19 JUSTICE SOTOMAYOR: You're making 271(b) a
20 strict liability crime?
21 MR. WAXMAN: No, no, not at all. I'm sorry,
22 I -- no, no.
23 JUSTICE SOTOMAYOR: That everybody who
24 performs -- who performs the steps to get -- if they get
25 to the patented methods, they have --

1 MR. WAXMAN: No, absolutely. Under
2 Global-Tech, there's no liability under 271(b) unless
3 there is an intent by the inducer to, in fact,
4 violate -- infringe the patent. So to give you an -- a
5 prosaic example. Let's say --
6 JUSTICE SOTOMAYOR: So the customer intends
7 to -- in your example, is the customer intending to
8 violate the patent?
9 MR. WAXMAN: In our example, no. I mean,
10 there's no facts here to suggest that -- that
11 Limelight's customers even -- forget knowing about the
12 patent, they don't even know what steps Limelight is
13 taking. All they know is Limelight is saying, hey, if
14 you use our service and you provide our pointer or our
15 -- or our tag, we'll provide you all of this content
16 instantaneously. So there is no liability, although
17 there is liability because there is knowledge on the
18 part of Limelight which is asking its customers to --
19 telling its customers to do exactly what Akamai is
20 asking and telling its customers to do.
21 So, in short, we think that the Federal
22 Circuit -- the en banc Federal Circuit is correct even
23 on its own terms because there was an act of
24 infringement in this case. There was infringement in
25 the sense that all of the steps of the patented method

1 were performed, whether or not there is an attribution
2 rule that would apply liability to one or more of those
3 parties under 271(a).
4 JUSTICE SCALIA: What does -- what does (b)
5 require? Does it require inducing an infringement or
6 inducing an infringer?
7 MR. WAXMAN: Inducing an infringement. And
8 I'll give you a concrete example. Let's say that
9 there's a five-step patented method that I know about,
10 and I convince -- I induce Mr. Panner to do steps 1, 2,
11 and 3 and Ms. Anders to do steps 4 and 5. If I'm doing
12 that because I know about the patent and I want to take
13 advantage of their otherwise innocent performance
14 collectively of the steps, at common law and at patent
15 law, it was uncontroversial that I was liable. I was
16 responsible.
17 Just -- I don't want to belabor the Rosemont
18 point because I have a skeptical author looking at me,
19 but the common law made -- the cases going back made
20 clear that there was no escape from liability even
21 though neither Mr. Panner nor Ms. Anders may be directly
22 liable if they didn't know that each other was doing the
23 steps or otherwise cooperate with each other. And
24 that's what this case is. And that's why the Federal
25 Circuit's decision on its own terms is correct.

1 Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Panner, four minutes.

4 REBUTTAL ARGUMENT OF AARON M. PANNER

5 ON BEHALF OF THE PETITIONER

6 MR. PANNER: Thank you, Mr. Chief Justice.

7 In 1952, Congress adopted a statute that

8 took the development of infringement law largely out of

9 the hands of the courts. There are -- there's a statute

10 strict liability 271(a) provision that provides for

11 direct infringement. There are two basic indirect

12 infringement statutes, 271(b), which requires inducing

13 infringement, and 271(c). And 271(c) is sort of

14 interesting because it has a very specific limitation on

15 when providing a component of invention will lead to

16 liability. And what Congress said was if it's a

17 specially adapted component and it brings about

18 infringement, there -- there can be liability in that

19 circumstance.

20 But even if you know that what you're

21 selling is going to lead to infringement, if it's a

22 staple article of commerce, we don't impose liability in

23 that situation. That's the kind of line-drawing that

24 Congress does. Congress has done -- has made

25 adjustments when it felt appropriate and this -- this

1 Court has not hesitated to stick to the lines that --
2 that Congress drew and that's what it should do in this
3 case. Unless the Court has questions.
4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.
6 (Whereupon, at 11:03 a.m., the case in the
7 above-entitled matter was submitted.)
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