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A METHODICAL LOOK AT DIVIDED INFRINGEMENT

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ABSTRACT

In *Akamai Technologies v. Limelight*, The Federal Circuit created a new type of multiple actor infringement called divided infringement. The divided infringement standard created by *Akamai* clashes with The Patent Act. It allows courts to increase the scope of method patents after an infringing act occurs, and it renders the concept of inducement of infringement unnecessary. This comment examines the evolution of the divided infringement standard up to *Akamai* and *Eli Lilly Company v. Teva Parental Medicines, Inc*, a case that applies the Akamai standard to a therapeutic method patent. It ultimately concludes that the solution to multiple actor infringement of therapeutic method patents lies in careful claim drafting or statutory revision, rather than the divided infringement standard.

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I. INTRODUCTION

A well-known principle in patent law is "that which anticipates, if before, infringes if after."[1] *Akamai Technologies, Inc. v. Limelight Networks, Inc.* creates a new form of infringement that ignores this important tenet. The actions of multiple entities cannot be combined to anticipate a method patent, but, according to *Akamai*, infringement of a method patent can be divided between multiple entities.[2] In fact, under the *Akamai* standard, infringement can be divided between multiple entities even when there is no contract or traditional agency relationship between them.[3] *Akamai*'s conflict with this well-known principle is one sign that the *Akamai* standard for divided infringement clashes with the Patent Act and the patent system.

This comment will examine the concepts of divided infringement and inducement. Part II of this comment will discuss the tort law foundations of divided infringement and inducement. Then it will examine the evolution of divided infringement up to *Akamai* and *Eli Lilly Company v. Teva Parental Medicines*, *Inc,* a case that applies the *Akamai* standard to a therapeutic method patent. Part III of this comment will analyze the effects of applying *Akamai*'s ends-driven solution to divided infringement. Part IV of this comment will ultimately conclude that the solution to multiple actor infringement should not be judicially increasing the scope of the method patent after the infringing act occurs.

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[1] Peters v. Active Mfg., 129 U.S. 530, 537 (1889) ("That which infringes, if later, would anticipate if earlier."); Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc., 246 F.3d 1368, 1378 (Fed. Cir. 2001) ("the patent law principle 'that which would literally infringe if later in time anticipates if earlier'"); *see generally* 1 DONALD S. CHISUM, CHISUM ON PATENTS § 3.02 (2013).

[2] Akamai Techs., Inc. v. Limelight Networks, Inc., 797 F.3d 1020, 1025 (Fed. Cir. 2015). *Akamai* held that an entity can be responsible for the remaining steps of a method patent performed by a separate entity if a certain relationship is present. *Id.* This finding allows the steps performed by separate sources to be pieced together for a finding of infringement. *Id.* However, for a finding of anticipation of method patent, each and every element of the method must be present in a single reference. ATD Corp. v. Lydall, Inc., 159 F.3d 534, 545 (Fed. Cir. 1998) ("A patent is invalid for anticipation when the same device or method, having all of the elements and limitations contained in the claims, is described in a single prior art reference.")

[3] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376. A doctor can be liable for directing or controlling the actions of the patient. *Id.* A company that provides storage servers can be liable for the actions of its customers that use the servers. *Akamai Techs., Inc.*, 797 F.3d at 1025. Compare this to the traditional tort law relationship for agency liability. *See infra* notes 23-28.

II. BACKGROUND

A. Inducement and Divided Infringement

The Patent Act recognizes two types of infringement—direct and indirect.[4] Direct infringement occurs when an unauthorized person "makes, uses, sells, offers to sell, or imports into the United States a patented invention."[5] Direct infringement is strict liability.[6] Prior to the establishment of divided infringement, the Federal Circuit required that one entity or its agent perform each and every step of the patented method for a finding of direct infringement.[7] *Akamai* set forth a new standard for divided infringement, which allows a finding of direct infringement without the traditional requirement that one entity perform each and every step of the method.[8]

Indirect infringement refers to situations where a party does not make, use, or sell a patented invention, but meets a degree of required culpability.[9] Inducement falls under the category of indirect infringement.[10] 35 U.S.C. § 271(b) states that whoever "actively induces" the infringement of a patent is liable for infringement.[11] Courts have interpreted this section to require that the inducer have specific intent to encourage infringement and knowledge that the patent is being infringed.[12] A

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[4] 35 U.S.C. § 271(a) (2014) (covering direct infringement); 35 U.S.C. § 271(b) (covering indirect infringement); 35 U.S.C. § 271(c) (covering indirect infringement). The Patent Act does not specifically use the words "direct infringement" and "indirect infringement," but these are the terms commonly used by practitioners. 5◦CHISUM, *supra* note 1, §◦17.01.

[5] 35 U.S.C. § 271(a); Roche Prods. v. Bolar Pharm. Co., 733 F.2d 858, 861 (Fed. Cir. 1984). *Roche Products* also noted that direct infringement can include (1) making without selling or using, (2) using without making or selling, or (3) selling without making or using. *Roche Prods.*, 733 F.2d at 861.

[6] Jurgens v. CBK, Ltd., 80 F.3d 1566, 1573 (Fed. Cir. 1996); Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2065 (2011)("[A] direct infringer's knowledge or intent is irrelevant."); *In re* Seagate Tech., LLC, 497 F.3d 1360, 1368 (Fed. Cir. 2007).

[7] Warner-Jenkinson Corp. v. Hilton Davis Corp., 520 U.S. 17, 117 (1997). Before the *Akamai* case, the Federal Circuit held that to directly infringe a method patent a party must perform each and every step or element of the claimed method. BMC Res., Inc. v. Paymentech, L.P., 498 F.3d 1373, 1381 (Fed. Cir. 2007) ("Direct infringement requires a party to perform or use each and every step or element of a claimed method or product."); Joy Techs., Inc. v. Flakt, Inc., 6 F.3d 770, 773 (Fed. Cir. 1993) ("For process patent or method patent claims, infringement occurs when a party performs all of the steps of the process.").

[8] *Akamai Techs., Inc.*, 797 F.3d at 1022. The recent *Akamai* case allows direct infringement when one party performs some steps of a method and is liable for another entity performing the remaining steps. *Id.* (holding that an entity is responsible for others' performing of method steps if it directs or controls others' performance or if the actors form a joint enterprise).

[9] DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1306 (Fed. Cir. 2006); *see generally* 5◦CHISUM, *supra* note 1, §◦17.01 ("Indirect infringement refers to . . . inducing or contributing to direct infringement by other persons.").

[10] 35 U.S.C. § 271(b)(2014) covers inducement of infringement, a form of indirect infringement. The Patent Act does not directly refer to it as indirect infringement, but this is the term commonly used by practitioners. 5◦CHISUM, *supra* note 1, §◦17.01.

[11] 35 U.S.C. § 271(b)(2014).

[12] *Global-Tech Appliances, Inc.,* 563 U.S. at 754; Manville Sales Corp. v. Paramount Sys., 917 F.2d 544, 553 (Fed. Cir. 1990) ("The alleged infringer must be shown, however, to have knowingly induced infringement. It must be established that the defendant possessed specific intent to

court will not find indirect infringement without an initial finding of direct infringement.[13]

In *Akamai*, the Federal Circuit established the standard for divided infringement.[14] Divided infringement of a method patent occurs when one party performs part of the method and influences another party to perform the remaining steps.[15] The test for divided infringement requires the court to evaluate whether the latter party is generally under "direction or control" of the first.[16] Divided infringement is different from the traditional notion of direct infringement because, in the case of divided infringement, neither party directly infringes the patent on its own.[17] Additionally, the "direction or control" standard for divided infringement suggests some sort of culpability, whereas traditional direct infringement is strict liability.[18] Divided infringement also differs from induced infringement because divided infringement does not require the heightened *mens rea* of specific intent or any initial finding of direct infringement.[19]

B. Tort Law Foundations

The concept of divided infringement is rooted in common law notions of tort liability.[20] As the concept of inducement of infringement evolved, courts connected it

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encourage another's infringement and not merely that the defendant had knowledge of the acts alleged to constitute inducement."); *DSU Med. Corp.* 471 F.3d at 1304 (explaining that an inducer must have knowledge of the patent to be liable for active inducement); Hewlett-Packard Co. v. Bausch & Lomb, Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990) (stating that "proof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement.").

[13] Moba B.V. v. Diamond Automation, Inc., 325 F.3d 1306, 1318 (Fed. Cir. 2003) ("[A] finding of inducement requires a threshold finding of direct infringement."); Dynacore Holdings Corp. v. U.S. Phillips Corp., 363 F.3d 1263, 1277 (Fed. Cir. 2004) (a party's "failure to prove direct infringement . . . necessarily dooms its allegations of indirect infringement"); *Joy Techs.*, 6 F.3d at 774 ("Liability for either active inducement of infringement or for contributory infringement is dependent upon the existence of direct infringement."); *BMC Res., Inc*., 498 F.3d at 1379; Lucent Techs v. Gateway, Inc., 580 F.3d 1301, 1322 (Fed. Cir. 2009).

[14] *Akamai Techs., Inc.*, 797 F.3d at 1022 ("We will hold an entity [directly] responsible for others' performance of method steps in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise.")

[15] *Id.* at 1023.

[16] *Id.*

[17] *See* note 6. Direct infringement traditionally required one entity to perform each and every element of the method. *Jurgens*, 80 F.3d at 38. Divided infringement allows steps of the method to be combined if one party is directing or controlling the other. *Akamai Techs., Inc*., 797 F.3d at 1022.

[18] 22 CHISUM, *supra* note 1, § SCG-5113.31. The divided infringement standard requires that two entities jointly infringe the patent or that one directs or controls the other. *Id.* "Directing and controlling" or a joint-agreement requires more culpability than strict liability, which can attach when someone "did not themselves commit all the acts necessary to constitute infringement and . . . had no way of knowing that others were acting." *In re Seagate Tech., LLC*, 497 F.3d at 1368.

[19] *Akamai Techs., Inc*., 797 F.3d at 1025. Induced infringement requires specific intent and knowledge that infringement is being induced. *See supra* note 12 and accompanying text. Divided infringement can be found as long as there is "direction or control." *Akamai Techs., Inc*., 797 F.3d at 1025.

[20] MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("these doctrines of secondary liability emerged from common law principles and are well established in the law"); Carbice Corp. of

with different types of tort liability.[21] The two forms of liability most relevant to divided infringement are joint tortfeasorship and vicarious liability.[22]

Joint tortfeasorship is a form of direct liability.[23] Joint tortfeasors are liable for the concerted action of a group of actors.[24] Joint tortfeasorship holds all persons equally liable who actively take part in a tort or who "further it by cooperation or request" in pursuance of "a common plan or design to commit a tortious act."[25] Vicarious liability, on the other hand, is a form of secondary liability.[26] Vicarious liability refers to a case where one actor is liable for another actor's tort due to "some relation existing" between them.[27] An actor can be vicariously liable regardless of the actor's mental state.[28]

C. The Development of Divided Infringement

Divided infringement is a creature of common law.[29] Prior to *Akamai*, the Federal Circuit held that infringement could be divided between two parties if one party controlled or directed the other through a contractual or agency relationship. *BMC v. Paymentech* applied this "control or direction" standard.[30] The patent in that case claimed a method for processing debit transactions without a personal identification number.[31] The method required multiple parties: the payee's agent, a remote payment network, and a financial institution that issued debit cards.[32] The Federal Circuit reiterated that a defendant must perform each and every step of a

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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 patent.").

[21] Lynda J. Oswald, *Simplifying Multiactor Patent Infringement Cases Through Proper Application of Common Law Doctrine*, 51 AM. BUS. L.J. 1, 19 (2014). The federal circuit has applied a variety of formulations for divided infringement and it has evolved over time. *Id.*

[22] *Akamai Techs., Inc.*, 797 F.3d at 1022 ("We will hold an entity [directly] responsible . . . (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise.")

[23] PROSSER AND KEETON ON THE LAW OF TORTS § 46 (W. Page Keeton et al. eds., 1984) [hereinafter "PROSSER AND KEETON"]. PROSSER AND KEETON discusses how tort law can impose either direct liability or secondary liability on a group of tortfeasors. *Id.*

[24] *Id.*

[25] *Id.* at 323. PROSSER AND KEETON discusses a party that "innocently and carefully" acts to further a tortious purpose is not acting in concert with a group of tortfeasors. *Id.*

[26] PROSSER AND KEETON, *supra* note 23. PROSSER AND KEATON discusses this type of liability in the case of negligent acts. *Id.* This situation is commonly called "imputed contributory negligence" or "respondeat superior." *Id.*

[27] *Id.*

[28] *Id.* PROSSER AND KEATON notes that vicarious liability attaches if the actor has done "nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it". *Id.* This liability was created to allocate the risk in losses caused by torts of employees. *Id.*

[29] *See* Oswald, *supra* note 21, at 26 ("The courts have answered these questions by creating a common law graft onto the statutory patent infringement liability scheme: a theory they initially termed joint infringement but now seem to have expanded to a new category of divided infringement.").

[30] *BMC Res., Inc.*, 498 F.3d at 1380.

[31] *Id.* at 1375.

[32] *Id.*

method patent to infringe it.[33] However, it also held that the defendant could not escape liability by contracting to have another party carry out some of the method's steps.[34] The court determined that none of the relationships supported divided infringement because there was no evidence of a contract or of the payee's agent directing or controlling other parties.[35] Further, the Federal Circuit warned against expanding the concept of divided infringement so much that other types of infringement were rendered unnecessary.[36] The Federal Circuit also advised that the problem of divided infringement could be prevented by careful claim drafting.[37]

The Federal Circuit applied the control or direction standard again in *Muniauction v. Thompson Corp*.[38] *Muniauction* centered on a patent claiming a method for "original issuer auctions of financial instruments."[39] The method requires a bidder to complete an inputting step, and the remaining steps are completed by the auctioneer's system.[40] The question before the court was whether the auctioneer's actions combined with its customer's actions constituted direct infringement of the method patent.[41] The court applied the same control or direction standard as *BMC*.[42] It held that, even though the defendant controlled access to the system and instructed its bidders to use the system, the defendant did not directly infringe the method patent.[43] The opinion stated that the plaintiff "identified no legal theory under which the [defendant] might be vicariously liable" for its customers.[44]

D. The Akamai Standard

Akamai broadened the standard for divided infringement.[45] Akamai Technologies' (Akamai) patent claims a method for delivering content to consumers from a provider's storage server.[46] In accordance with this method, Akamai allows end users of other content providers to tag their content to be redirected to Akamai's storage servers.[47] The method covered by the patent can be performed by three

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[33] *Id.* at 1381.

[34] *Id.*

[35] *Id.* at 1382.

[36] *BMC Res., Inc.*, 498 F.3d at 1381. ("Under BMC's proposed approach, a patentee would rarely, if ever, need to bring a claim for indirect infringement.")

[37] *Id.*

[38] *Muniauction, Inc.*, 532 F.3d at 1323.

[39] *Id.* at 1321.

[40] *Id.*

[41] *Id.* at 1329.

[42] *Id.* The court held that a "claim is directly infringed only if one party exercises 'control or direction' over the entire process such that every step is attributable to the controlling party." *Id.* However, it cautioned that "arms-length cooperation" is not sufficient for direct infringement. *Muniauction, Inc.*, 532 F.3d at 1329.

[43] *Id.*

[44] *Id.*

[45] *Akamai Techs., Inc.*, 797 F.3d at 1022.

[46] Akamai Techs., Inc. v. Limelight Networks, Inc., 614 F. Supp. 2d 90, 96-97 (D. Mass. 2009). Akamai's customers are Internet content providers with servers incapable of storing all the provider's content, especially during disasters or when traffic increases. *Id.*

[47] *Id.*

entities: the end user, the content provider, and the content service provider.[48] Limelight, the defendant, implemented a similar service, but argued that it was not infringing Akamai's patent because the method was divided among multiple actors.[49]

In an *en banc* rehearing, the Federal Circuit broadened the doctrine of divided infringement and held that the Akamai patent was infringed.[50] *Akamai* held that an entity can be responsible for other parties' performance of steps of a method patent, providing that it directed or controlled that performance, or if both parties formed a joint enterprise.[51] The opinion noted that direction or control can be found when the 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."[52] The end users' use of Limelight's services met this standard because the evidence supported that Limelight "condition[ed] use of the content delivery network" and "establish[ed] the manner or timing of performance."[53] The opinion cited the welcome letters and instructions that Limelight sent to its customers as establishing direction or control.[54] The instructions were step-by-step, and written so that the customers would only receive the services if they performed the method detailed by the method patent.[55]

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[48] *Id.* To utilize the service, the content provider alters its web page links to direct to the service providers server. *Id.* The end user's browser fetches the content provider's site. *Id.* Then it uses the returned links to request the other objects on the page from the content service provider's servers. *Id.* The content delivery service provider replicates these page objects and directs the end user's request for an object to an appropriate server. *Id.*

[49] *Akamai Techs., Inc.*, 614 F. Supp. 2d at 96-97.

[50] *Akamai Techs., Inc.*, 797 F.3d at 1025.

[51] *Id.* at 1022.

[52] *Id.*

[53] *Id.* at 1024.

[54] *Id.* Limelight's form contract provides: "Customer shall be responsible for identifying via the then current [Limelight] process all [URLs] of the Customer Content to enable such Customer Content to be delivered by the [Limelight network]." *Id.*

[55] *Akamai Techs., Inc.*, 797 F.3d at 1024. The court describes how Limelight directed and controlled its customers in detail:

> Upon completing a deal with Limelight, Limelight sends its customer a welcome letter instructing the customer how to use Limelight's service. In particular, the welcome letter tells the customer that a Technical Account Manager employed by Limelight will lead the implementation of Limelight's services. . . . Moreover, Limelight provides step-by-step instructions to its customers telling them how to integrate Limelight's hostname into its webpages. . . . If Limelight's customers do not follow these precise steps, Limelight's service will not be available. Limelight's Installation Guidelines give Limelight customers further information on tagging content. . . . Lastly, the jury heard evidence that Limelight's engineers continuously engage with customers' activities. Initially, Limelight's engineers assist with installation and perform quality assurance testing. The engineers remain available if the customer experiences any problems.

E. Divided Infringement for Therapeutic Methods

Divided infringement is particularly relevant when a generic company produces a drug that is the subject of a method patent.[56] Generic drugs are copies of brand-named drugs, produced after the original brand name drug expires.[57] Generic companies do not foster the same client and doctor relationships that brand-name companies do.[58] They have drastically lower advertising expenditures than pharmaceutical companies. Typically, they have lower expenditures because they reach their customers through the substitution method.[59] The use of the substitution method can result in the generic company not being aware of how its product is labeled, let alone how a doctor will use it.[60]

Eli Lilly applied the *Akamai* standard in the pharmaceutical context.[61] In *Eli Lilly*, the court found that a generic drug manufacturer was liable for induced infringement of a method performed by both doctors and patients.[62] That method was for administering combination therapies for patients in need of chemotherapeutic treatment.[63] The court had to evaluate whether the doctor was sufficiently directing or controlling the acts of the patients in a way that "conditioned participation in an activity or receipt of a benefit."[64] The court determined this standard was satisfied because the doctor would perform all but one of the method

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[56] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376; Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348 (Fed. Cir. 2003).

[57] *See* Food and Drug Administration, *Understanding Generic Drugs* http://www.fda.gov/Drugs/ResourcesForYou/Consumers/BuyingUsingMedicineSafely/UnderstandingGenericDrugs/default.htm. The FDA defines generic drugs as "a drug product that is comparable to brand/reference listed drug product in dosage form, strength, route of administration, quality and performance characteristics, and intended use" or "copies of brand-name drugs and are the same as those brand name drugs in dosage form, safety, strength, route of administration, quality, performance characteristics and intended use." *Id.*

[58] Shashank Upadhye, *There's A Hole In My Bucket Dear Liza, Dear Liza: The 30-Year Anniversary Of The Hatch-Waxman Act: Resolved And Unresolved Gaps And Court-Driven Policy Gap Filling*, 40 WM. MITCHELL L. REV. 1308, 1360 (2014). Mr. Upadhye provides insight into how generic companies function: "While the patient and doctor may know that the intent of the drug prescription is to treat a patented indication, the generic drug company does not and cannot know. In fact, it might be callous (but true) to say that the generic drug company does not care how the patient uses its drug." *Id.*

[59] William H. Shrank, et al., *State Generic Substitution Laws Can Lower Drug Outlays under Medicaid*, 29 HEALTH AFF. 1383 (2010), *available at* http://content.healthaffairs.org/content/29/7/1383.long. All the states have implemented generic substitution laws which can vary depending on the state. *Id.* Some require pharmacists to substitute a generic for a branded medication and more permissive generic substitution laws enacted in other states allow, but do not require, pharmacists to substitute generics. *Id.*

[60] *See* Upadhye, *supra* note 58, at 1365. Mr. Upadhye describes how this results in a prescribing change where not every actor is aware of what happens to the drug. "A further problem is the practical reality that a generic company's drug labels are rarely seen by anyone in the prescribing chain. In the distribution of a generic product, multiple bottles are packed into boxes with the labels (usually on a printed pad of paper) thrown in." *Id.* at 1365.

[61] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376.

[62] *Id.*

[63] *Id.*

[64] *Id.*

steps and then would instruct the patient to complete the remaining method step, self-administering folic acid.[65]

III. ANALYSIS

This section applies the *Akamai* divided infringement standard to the facts of *Eli Lilly*, and evaluates whether the standard is consistent with the Patent Act and the patent law system. It then examines *Eli Lilly* under a divided infringement standard that requires a traditional agency relationship.

A. The Eli Lilly Case

Suppose a pharmaceutical company has received approval to market a generic form of a chemotherapy drug. The patent for the brand name version of the drug expired, but the patentee holds a method patent for a combination therapy involving the drug. This method patent requires that a doctor administers the chemotherapy drug along with several other drugs, and that the patient supplements the therapy by self-administering folic acid. The pharmaceutical company provides a label on the drug detailing the regimen.

The patent owner sues the pharmaceutical company for inducement. The doctor alone does not perform all of the steps of the therapeutic method. However, the patentee argues that the doctor's and patient's activities can be grafted together for a finding of direct infringement. The required *mens rea* can be attributed to the pharmaceutical company by virtue of the instructions on the drug. This is the situation in which Teva Parental Medicines found itself.[66]

B. Application of the Akamai Standard

Under the *Akamai* standard, Teva Parental Medicines is liable for inducement.[67] According to *Akamai,* a party directly infringes a method patent when it performs steps of the method, and directs another party to perform the remaining steps.[68] *Akamai* held that a company directed and controlled its customers to complete the remaining steps of a method patent by instructing them, in writing, to perform the

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[65] *Id.*

[66] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376. In *Eli Lilly*, plaintiff Eli Lilly and Company alleged that defendant Teva Parenteral Medicine, Inc. was liable for inducement of infringement of Eli Lilly therapeutic method because Teva Parenteral had put instructions on its chemotherapy instructing on a method that would be performed by both doctors and patients under the control of their doctors. Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376 (INSD). This case in the Southern District of Indiana was decided after the *Akamai* case which allowed for a finding of direct infringement when an entity directs or controls another's' performance, which can include providing a set of instructions for customers. *Akamai Techs., Inc.*, 797 F.3d at 1022.

[67] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376.

[68] *Akamai Techs., Inc*. 797 F.3d at 1025.

steps.[69] Under this logic, a doctor directs or controls if the doctor tells the patient to perform the remaining steps of a patented therapeutic method.[70]

To establish inducement, Eli Lilly must also demonstrate that Teva Parental Medicines specifically intended the patent to be infringed, and knowingly induced the doctor to infringe it.[71] The labels on the drug are sufficient to demonstrate Teva Parental Medicine's *mens rea*.[72] Infringement requires specific intent, but courts have applied a standard resembling strict liability to generic drugs with labels that list the steps of a method patent.[73] The court can find that Teva Parental Medicines induced the doctor to infringe the patent, even though the doctor did not perform all of the steps of the method. Further, it does not even have to scrutinize the doctor's subjective intent.[74] This standard may protect Eli Lilly and Company, but it conflicts with patent law principles.

C. Problems with the "Direction or Control" Standard

According to *Akamai*, it is consistent with The Patent Act to consider generally whether all method steps can be attributed to a single entity rather than requiring a traditional tort basis for liability.[75] Even though no contract or agency relationship existed between Limelight and its customers, the court determined Limelight directed or controlled them.[76] *Akamai*'s standard for inducement clashes with the concept of direct infringement set out in The Patent Act.[77] 35 U.S.C. § 271 (a) does not describe any form of direct infringement that can be divided between two actors.[78] It follows that one entity should be liable for direct infringement of a method only if it performs all of the steps itself or through another entity's acts under

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[69] *Id.* ("We conclude that the facts Akamai presented at trial constitute substantial evidence from which a jury could find that Limelight directed or controlled its customers' performance of each remaining method step.").

[70] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376.

[71] *Global-Tech Appliances, Inc.*, 563 U.S. at 754; *Manville Sales Corp*., 917 F.2d at 553; *DSU Med. Corp*., 471 F.3d at 1304; *Hewlett-Packard Co*., 909 F.2d at 1469.

[72] AstraZeneca LP v. Apotex Corp., 623 F. Supp. 2d 1042, 1047 (Fed. Cir. 2010) (The court held that that the patentees would be able to establish inducement because consumers following the indications on the generic label would infringe the patented once-daily dosage method.); Aventis Pharma Deutschland GmbH v. Cobalt Pharm., Inc*.,* 355 F. Supp. 2d 586,599 (D. Mass. 2005) ("Plaintiffs' active inducement claim rests entirely on language in Cobalt's proposed labeling instructions and package insert."). *Wyeth* stated that even when there is a non-infringing label, the mere fact the drug is sold could be the basis for inducement. Wyeth v. Sandoz, Inc., 703 F. Supp. 2d 508, 521 (E.D.N.C. 2010) ("[E]ven if [Sandoz] successfully persuaded the finder of fact that the labels [do] not instruct, direct, or encourage infringement . . . this would not be legally sufficient to establish that the labels do not induce infringement.")

[73] *See supra* note 72 and accompanying text.

[74] *See supra* note 72 and accompanying text.

[75] *Akamai Techs., Inc*. 797 F.3d at 1025.

[76] *Id.*

[77] *See infra* notes 84-85.

[78] 35 U.S.C. § 271(a)(2014) states "whoever without authority makes, uses, offers to sell, or sells any patented invention . . . infringes the patent." It does not mention a method divided among multiple actors. 35 U.S.C. § 271(a).

an established theory of liability.[79] In fact, the Federal Circuit has required a traditional agency relationship for multi-actor infringement in previous cases.[80] A divided infringement standard without these relationships results in a new type of direct infringement, the creation of which should be left to the legislature.[81]

The *Akamai* standard further clashes with the Patent Act by rendering the concept of inducement unnecessary.[82] The Patent Act requires a finding of direct infringement for a finding of inducement.[83] The types of infringement that can be divided between two actors, contributory infringement and inducement, both require an initial finding of direct infringement.[84] Both types of infringement have additional requirements, such as the heightened *mens rea* necessary for inducement.[85] Inducement and contributory infringement cover the only situations where behavior that amounts to less than direct infringement incurs liability.[86]

The divided infringement standard creates another situation where behavior less than direct infringement incurs liability.[87] Divided infringement also doesn't require specific intent like inducement requires.[88] It resembles inducement of infringement, with looser requirements.[89] It allows acts to be divided between two entities like inducement.[90] However, it has less stringent requirements for the

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[79] *See* Hill v. Amazon.com, Inc., 2006 U.S. Dist. LEXIS 3389, *1, 2006 WL 151911 (E.D. Tex. Jan. 19, 2006) ("proof of an agency relationship or concerted activity would be sufficient to impose liability in circumstances where one party does not perform all of the steps of the claimed method."). *See also Meyer v. Holley*, 537 U.S. 280, 282 (2003) ("When Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.").

[80] *New Jersey Patent Co.*, 159 F. at 173; *Mobil Oil Corp.*, 367 F. Supp. at 252; *Crowell*, 143 F.2d at 1004; *Limelight Networks, Inc.*, 134 S.Ct. 2111, 189 (2014) ("A method's steps have not all been performed as claimed by the patent unless they are all attributable to the same defendant.").

[81] *BMC Res., Inc.*., 498 F.3d at 1381. ("Expanding the rules governing direct infringement to reach independent conduct of multiple actors would subvert the statutory scheme.")

[82] *See infra* notes 84-85 and accompanying text.

[83] *Moba B.V.*, 325 F.3d at 1318; *Dynacore Holdings Corp.*, 363 F.3d at 1277; *Joy Techs.* F.3d at 774; *BMC Res., Inc.*, 498 F.3d at 1379; *Lucent Techs*, 580 F.3d at 1322; *Muniauction*, 532 F.3d at 1328 ("The law of this circuit is axiomatic that a method claim is directly infringed only if each step of the claimed method is performed.").

[84] 35 U.S.C. § 271(b)(2014) (covering inducement of infringement and requiring that the one party induce the other to infringe); 35 U.S.C. § 271(c) (covering contributory infringement and requiring a party to produce parts that can only be used for an infringing purpose). An initial finding of direct infringement is necessary to find infringement under either of these sections. *Moba B.V.*, 325 F.3d at 1318; *Dynacore Holdings Corp.*, 363 F.3d at 1277; *Joy Techs.* F.3d at 774; *BMC Res., Inc.*, 498 F.3d at 1379; *Lucent Techs*, 580 F.3d at 1322.

[85] *Manville Sales Corp.*, 917 F.2d at 553 ("The alleged infringer must be shown, however, to have knowingly induced infringement. It must be established that the defendant possessed specific intent to encourage another's infringement and not merely that the defendant had knowledge of the acts alleged to constitute inducement.").

[86] *See infra* notes 87-88 and accompanying text.

[87] *Akamai Techs., Inc.*, 797 F.3d at 1023.

[88] *See generally Akamai Techs., Inc.*, 797 F.3d at 1020.

[89] *Muniauction, Inc.*, 532 F.3d at 1381.

[90] *Id.*

relationship between the entities and the mental state.[91] Thus, it renders the statutory causes of action for inducement unnecessary.[92]

An additional problem with the *Akamai* standard is how it clashes with an important tenet of patent law. A well-known maxim in patent law is "that which anticipates if before infringes if after."[93] If two separate entities perform steps of a method sought to be patented, these entities' actions can't be grafted together to anticipate a method patent.[94] Yet under the *Akamai* standard, two entities' actions can be added together for a finding of infringement.[95] The lack of symmetry demonstrates how divided infringement is at odds with the patent system.[96]

Finally, *Akamai*'s general standard for direction or control allows courts to define infringement after the fact.[97] The court can find liability anywhere between a traditional agency relationship, and "some connection" between the parties, in order to protect a patent.[98] The doctor-patient relationship in *Eli Lilly* is not defined by the *respondeat superior* theory.[99] The patient isn't obligated to follow the doctor's instructions, the patient hasn't assumed liability for the doctor, and the patient hasn't agreed to carry out the doctor's will. However, the court still found direction or control after evaluating this relationship.[100] Without strict boundaries, companies in Teva Parental Medicine's position do not have clear notice of what conduct constitutes infringement.

D. Divided Infringement and Mens Rea

35 U.S.C. § 271(b) states that whoever "actively induces" the infringement of a patent is liable for inducement.[101] Courts have interpreted 271(b) as requiring that the inducer have knowledge that the patent is being infringed and that the inducer

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[91] *Id.* at 1381 ("[A] patentee would rarely, if ever, need to bring a claim for indirect infringement.").

[92] *Id.*

[93] *Lewmar Marine, Inc..*, 827 F.2d at 747. *Peters*, 129 U.S. at 537; Door-Master Corp. v. Yorktowne, Inc., 256 F.3d 1308, 1312 (Fed. Cir. 2001).

[94] *ATD Corp.*, 159 F.3d at 545 ("A patent is invalid for anticipation when the same device or method, having all of the elements and limitations contained in the claims, is described in a single prior art reference").

[95] *Akamai Techs., Inc.*, 797 F.3d at 1025; *ATD Corp*, 159 F.3d at 545.

[96] *See* Oswald, *supra* note 21, at 61-63; *Meyer*, 537 U.S. at 282.

[97] *See* Oswald, *supra* note 21, at 61-63. Professor Oswald discusses how divided infringement was first defined as "something less than agency and more than a mere connection to determine whether or not the accused party directs or controls a third-party supplier" and has never been carefully defined. *Id.*

[98] *See supra* note 88 and accompanying text.

[99] PROSSER AND KEETON, *supra* note 23. *Respondeat Superior* refers to a case where one actor is liable for another actor's tort and it attaches whether the actor has intent or not. *Id.* 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 to so act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

[100] *Akamai Techs., Inc.*, 797 F.3d at 1025.

[101] 35 U.S.C. § 271(b)(2014).

specifically intends for the third party to infringe it.[102] Analyzing how generic pharmaceutical manufacturers operate provides insight into whether intent to induce divided infringement should be assumed from a label. Generic companies do not have a patient-focused business model.[103] Generally, they focus their business on wholesalers at the top of a distribution chain.[104] The wholesalers then distribute down the chain to a retail pharmacy.[105] On top of this, generic pharmaceutical manufacturers do not focus on promoting individual drugs to patients, pharmacies, or doctors.[106] This adds another layer of separation between the generics manufacturer and the doctor. These companies generally do not advertise products on television, radio, or in print media.[107] They also do not have sales representatives that visit doctors or, sponsor medical symposia and other similar marketing activities.[108] In fact, a generic company may not even pay attention to how its drug prescription is used.[109] Many times, generic companies do not even put the labels on the products they sell.[110]

Another important factor is the doctor's knowledge of the generic drugs. Generic pharmaceutical manufacturers' labels are rarely seen by any members of the prescribing chain.[111] Doctors do not typically look at the labels on the drugs.[112] They simply assume the generic is a complete substitute for the original.[113] Given these considerations, the instruction cannot prove intent on behalf of the drug company to induce infringement divided between the doctor and the patient. The generic company may not intend for one entity to infringe the patent, let alone for

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[102] *Global-Tech Appliances, Inc.*, 563 U.S. at 754; *Manville Sales Corp*., 917 F.2d at 553; *DSU Med. Corp*., 471 F.3d at 1304; *Hewlett-Packard Co*., 909 F.2d at 1469.

[103] *See* Upadhye, *supra* note 58, at 1359-1360.

[104] *Id.*

[105] *Id.*

[106] *IMS Health Inc.,* 550 F.3d at 46 ("Detailing involves tailored one-on-one visits by pharmaceutical sales representatives with physicians and their staffs. This is time-consuming and expensive work, not suited to the marketing of lower-priced bioequivalent generic drugs. . . . Brand name drug manufacturers . . . in the year 2000 spent roughly $4,000,000,000 on detailing.").

[107] *Id.*

[108] *Id.*

[109] *See* Upadhye, *supra* note 58, at 1365. Mr. Upadhye provides insight into how generic companies function: "While the patient and doctor may know that the intent of the drug prescription is to treat a patented indication, the generic drug company does not and cannot know. In fact, it might be callous (but true) to say that the generic drug company does not care how the patient uses its drug." *Id.*

[110] *Id.* at 1365. ("A further problem is the practical reality that a generic company's drug labels are rarely seen by anyone in the prescribing chain. In the distribution of a generic product, multiple bottles are packed into boxes with the labels (usually on a printed pad of paper) thrown in.").

[111] Complaint for Declaratory, Injunctive, and Other Relief at 17-18, Wyeth Pharm., Inc. v. Food & Drug Admin., Civ. A. No. 1:09-cv-01810-FJS (D.D.C. 2009), 2009 WL 3226432 ("Because healthcare professionals assume that generic and branded drugs are completely interchangeable, they generally do not scrutinize the generic drug and the branded drug for labeling differences."); Plaintiff's Motion for Summary Judgment at 12-13, Wyeth Pharm., Inc. v. Food & Drug Admin., No. 1:09-cv-01810-FJS (D.D.C. Oct. 23, 2009), 2009 WL 3460818 ("Healthcare professionals justifiably rely on the fact that the Hatch-Waxman Act requires generic drugs to be the same as their branded counterparts in all material respects. . . . They have no reason to scrutinize the labeling for any differences and, as a matter of clinical practice, rarely do so.")

[112] *Id.*

[113] *Id.*

infringement to be divided among two entities. Additionally, the doctor would be held liable for controlling the patient even though the doctor is unaware of the patent. Direct infringement is strict liability, but divided infringement may have different requirements.[114] These issues demonstrate that divided infringement combined with inducement, can capture a broad spectrum of behaviors, some outside what is covered by the Patent Act.[115]

E. Applying a More Stringent Standard

A more stringent standard, closer to the one in *Muniauction*, requires a finding of direct infringement for a finding of inducement.[116] It also requires that the finding of direct infringement only extends to acts legally attributable to a single party.[117] Teva Parental Medicines is not liable under this standard. The patient is not the agent of the doctor under a traditional tort theory of agency.[118] The patient is not agreeing to represent the doctor or colluding with the doctor to infringe the patent.

This old standard comports with the statutory scheme and does not require ends-driven policy-making on behalf of the courts. However, it leaves the patent owner with no remedy. The Federal Circuit has articulated that an infringer should not be allowed to circumvent a method patent by delegating performance of method steps to another party.[119] Under this standard, Eli Lilly & Company will struggle to protect its patents. Even though it may struggle, the problem requires a different solution than the departure from traditional agency standards.

IV. PROPOSAL

This section summarizes the issues presented by the *Akamai* divided infringement standard; proposes possible solutions regarding claim drafting, statutory interpretation, and statutory revision; and analyzes the effects of these solutions on Eli Lilly.

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[114] *Akamai Techs, Inc.*, 797 F.3d at 1022. All that is required is that an entity is responsible for others' performing of method steps if it directs or controls others' performance or if the actors form a joint enterprise. *Id.*

[115] *Limelight Networks, Inc.*, 134 S. Ct. at 2120 (arguing that a desire to avoid the consequences of allowing multiple partners to carry out a method does not justify "fundamentally altering the rules of inducement liability that the text and structure of the Patent Act clearly require" and results in a "free-floating concept of "infringement" with no statutory basis that is difficult to apply consistently); McKesson Techs. Inc. v. Epic Sys. Corp, 2011 U.S. App. LEXIS 7531,* 13 (Fed.Cir. 2011) (explaining that patent law is a "creature of statute," and that greatly expanding indirect infringement outside the bounds of infringement is inappropriate).

[116] *Muniauction, Inc.*, 532 F.3d at 1330 ("Thomson neither performed every step of the claimed methods nor had another party perform steps on its behalf. . . . Therefore, Thomson does not infringe the asserted claims as a matter of law.").

[117] *Id.*

[118] *Id.*; PROSSER AND KEETON, *supra* note 23 (A party that "innocently and carefully does an act which furthers the tortious purpose of another" is not acting in concert with them.").

[119] *BMC Res., Inc.*, 498 F.3d at 1381.

A. Summary of the Issues

The *Akamai* standard for divided infringement contradicts a well-established rule in patent law: that a finding of direct infringement is required for a finding of indirect infringement.[120] This new standard is at odds with the statutory definition of inducement.[121] It provides an ends-driven fix to multi-actor infringement that protects method patents by bolstering their scope in court, but it clashes with the patent system and The Patent Act.

B. Careful Claim Drafting

Unitary claim drafting can resolve the divided infringement problem before litigation starts.[122] The Federal Circuit has recognized that a patentee can draft a claim so that only a single party can infringe it.[123] Unitary claim drafting prevents the enforcement of poorly drafted patents and does not widen a patent's scope after infringement.[124]

Mr. Lemley, in his article titled "Divided Infringement Claims," provides strategies for unitary claim drafting.[125] A drafter can focus a method claim on one entity by using "receiving" language when another entity supplies a claim element.[126] Mr. Lemley includes an example involving a method of communication between browsers and websites.[127] If drafted correctly, the claim can capture only the server's actions by using receiving language when referring to the third party.[128] The claim can be written from other perspectives as well.[129] For example, the drafter could

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[120] Novartis Pharms. Corp. v. Eons Labs. Mfg., Inc., 363 F.3d 1306, 1440 (Fed. Cir. 2004); Deepsouth Packing Co., Inc. v. Laitram Corp., 406 U.S. 518, 526 (1972); Aro Mfg. Co., Inc. v. Convertible Top Co., 365 U.S. 336, 341 (1961).

[121] *Joy Techs., Inc*. 6 F.3d at 774 ("To hold that the sale of equipment which performs a patented process is itself a direct infringement would make that portion of § 271(c) relating to the sale of an apparatus for use in practicing a patented process meaningless."); Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301, 1350 (Fed. Cir. 2012) ("Under such an approach, the need for contributory infringement and inducement, as Congress envisioned, is essentially eviscerated.").

[122] Akamai Techs., Inc. v. Limelight Networks, Inc., 786 F.3d 899, 909 (Fed. Cir. 2015) ("Many amici have pointed out that the claim drafter is the least cost avoider of the problem of unenforceable patents due to joint infringement.").

[123] *BMC Res., Inc.*, 498 F.3d at 1381 ("The concerns over a party avoiding infringement by arms-length cooperation can usually be offset by proper claim drafting. A patentee can usually structure a claim to capture infringement by a single party."); *see* Mark A. Lemley et al., *Divided Infringement Claims*, 33 AIPLA Q.J. 255, 272-75 (2005); *see* Oswald, *supra* note 21, at 65-66; *see generally* W. Keith Robinson, *Ramifications of Joint Infringement Theory on Emerging Technology Patents*, 18 TEX. INTELL. PROP. L.J. 335, 363-69 (2010).

[124] *BMC Res., Inc.*, 498 F.3d at 1381; *see* Lemley, *supra* note 123, at 272-75.

[125] *See* Lemley, *supra* note 123, at 272-75 ("Most inventions . . . can be covered using claims drafted in unitary form.").

[126] *Id.*

[127] *Id.*

[128] *Id.* For example instead of "Transmitting a request to a server," a step performed by the customer, Mr. Lemley suggests constructing the claim as "Receiving a request from a client". *Id.* This way the server is the only entity that performs the steps. *Id.*

[129] *See* Lemley, *supra* note 123, at 272-75.

draft the claim from the perspective of a third party inducing another to perform the method patent.[130]

This strategy is effective in both the *Eli Lilly* and the *Akamai* cases. Like Mr. Lemley's example, *Akamai* also involves server technology. Akamai Technologies could have used this receiver-focused language when referring to the actions of the third-party users that perform the tagging step.[131]

Original Claim	"tagging at least some of the embedded objects of the page so that requests for the objects resolve to the domain instead of the content provider domain"[132]
Receiver-Focused Claim	"Receiving a client request for objects that were tagged to resolve to the domain instead of the content provider domain"

Eli Lilly & Company could also have employed this strategy. Instead of method claims directing the patient to take the pemetrexed disodium, the claims could be written from the perspective of the doctor.[133]:

Original Claim	"administration of pemetrexed disodium."[134]
Doctor-Focused Claim	"Instructing the patient to administer pemetrexed disodium."

Opponents of this solution argue that unitary claim drafting results in confusing and indefinite claims.[135] Patent law requires that inventions must be claimed clearly

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[130] *Id.* ("In particular, a complementary version of the unitary claim should be drafted in an attempt to cover client-side acts performed in cooperation with such an offshore server.") *Id.* Employing this strategy, the drafter could frame the steps in terms of transmitting the request to the off-shore server, sending the appropriate data the server, and then receiving information back from the server. *Id.*

[131] *Akamai Techs, Inc.,* 614 F. Supp. 2d at 96-97. Akamai owns a number of storage servers around the country. *Id.* The content provider can modify its URLs so that the end users are redirected to Akamai's servers when they visit the original content provider's site. *Id.* Akamai's patent allowed customers to "tag" their web pages to be redirected to the nearest server. *Id.*

[132] *Akamai Techs, Inc.,* 692 F.3d at 1334.

[133] Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376 (INSD). As discussed in the analysis, Eli Lilly & Company's method steps were substantially performed by a doctor, but the doctor had to instruct the patient to obtain and administer the premetrexed disodium. *Id.*

[134] *Id.*

[135] Michelle Lee & Michael Shuster, *Threading the Needle Between Divided Infringement Issues and Patentable Subject Matter* (2012) *available at* https://www.fenwick.com/publications/pages/threading-the-needle-between-divided-infringement-issues-and-patentable-subject-matter.aspx ("Method claims drafted to avoid divided infringement, for example, by claiming only the data analysis and not the data collection steps, can give rise to patentability issues under the patent law's eligible subject matter statute.")

and concisely to provide public notice.[136] Another opposing viewpoint is that it may always be possible to divide the performance of method steps between multiple entities.[137] This solution may not capture all cases, but it has been recognized by academics and the Federal Circuit as feasible. It also captures the behavior in the *Akamai* and *Eli Lilly* cases.[138]

C. Proper Statutory Interpretation

The problems surrounding divided infringement and inducement can also be solved by proper interpretation of the Patent Act. One actor should only be liable for another's activity through a traditionally recognized agency standard.[139] An agency standard does not encompass mere arms-length cooperation, the vendor-customer relationship in *Akamai*, or the doctor-patient relationship in *Eli Lilly*.[140] There are several actors in *Eli Lilly*: the patient who has to take the drug; the doctor who has to prescribe it; the pharmacy that has to fill it; the wholesaler that provided the drug to the pharmacy; and the generic drug company that made it and sold it to the wholesaler.[141] In all of these relationships, there is no master-servant or principal-agent relationship. The Federal Circuit has indicated that it doesn't want parties to shirk liability though cooperation that does not amount to an agency relationship.[142] However, judicially creating a new form of infringement without a sufficient basis for liability is not the proper solution.

The Patent Act also requires a finding of intent as a predicate to inducement.[143] The infringer must knowingly induce infringement.[144] The case law strongly

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[136] 35 U.S.C. § 112 (2014); U.S. PAT. & TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE § 112 (8th ed. 2008); Muniauction Petition for en banc Rehearing of Plaintiff-Appellee, 2008 WL 3833922 (C. A. Fed.).

[137] NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1317-18 (Fed. Cir. 2005) (stating that a method claim is necessarily formed of individual steps, or elements, and implies that each step occurs in isolation).

[138] *See* Lemley, *supra* note 123, at 272-75; *BMC Res., Inc*., 498 F.3d at 1381.

[139] PROSSER AND KEETON, *supra* note 23, § 69. Agency, or vicarious liability, requires one actor assume liability for another's actor tortious conduct due to "some relation existing" between them, traditionally an employer-employee relationship. *Id.* This sort of liability originated from employer being imputed with liability for losses caused by torts of employees, a surety of doing business and owning employees. *Id.*

[140] HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 1-3 (2d ed. 1990); RESTATEMENT (SECOND) OF AGENCY 1 (1958) (explaining the agency relationship results when one individual consents to allow the other to act on her behalf); Carr v. Runyan, 89 F.3d 327, 331 (7th Cir. 1996) (noting that "actual authority exists where the principal has in fact authorized the agent to [act] . . . on behalf of the principal."). In general, the purpose behind agency principles "is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another's efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed." HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 1-3 (2d ed. 1990).

[141] *See* Upadhye, *supra* note 58, at 1365.

[142] *BMC Res., Inc*., 498 F.3d at 1381.

[143] 35 U.S.C. § 271(a) (2014).

[144] *Manville Sales Corp*., 917 F.2d at 553. ("The alleged infringer must be shown, however, to have knowingly induced infringement.")

suggests inducement requires specific intent.[145] The mere existence of a label does not necessarily indicate specific intent.[146] A generic company shouldn't be held liable because its product was labeled by another entity and then transported to the infringer through the stream of commerce.[147] If stream of commerce is not sufficient for jurisdiction, it should not prove specific intent.[148] If Teva Parental Medicines did not have specific intent, it has not committed the tort laid out by the drafters of the Patent Act.[149]

It may seem unfair to allow parties to escape liability merely because they have divvied up the steps of the claims without creating a certain relationship. However, judicially eliminating important concepts of patent law is not the proper solution.

D. Statutory Revision

Statutory revision provides a solution to multiple actor infringement scenarios and allows Congress, rather than the courts, to alter the patent law.[150]

One possible revision is removing direct infringement as a predicate to inducement.[151] The inducement section could be re-written to encompass situations where one party induces two others to jointly infringe a method patent.[152] Under this proposed standard, a party is liable for inducement as long as they have the specific intent to induce other parties to infringe.[153] The *Eli Lilly* defendants, if they demonstrated the specific intent, could incur liability under this standard. This alteration prevents the creation of a new, confusing notion of divided infringement, which is at odds with the concept of indirect infringement.[154] It would acknowledge that two parties can be induced by one actor to infringe, without themselves being directly liable. This revision would alter a fundamental tenet of patent law, and is a

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[145] *Hewlett-Packard Co.*, 909 F.2d at 1469 (stating that "proof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement."); *Manville Sales Corp*, 917 F.2d at 553 ("It must be established that the defendant possessed specific intent to encourage another's infringement and not merely that the defendant had knowledge of the acts alleged to constitute inducement.").

[146] *See* Upadhye, *supra* note 58, at 1359-1360.

[147] *Id.* at 1364; Eli Lilly and Company v. Teva Parenteral Medicines, Inc., et. al., 1-10-cv-01376 (INSD); *see generally* Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1351 (Fed. Cir. 2003).

[148] For a discussion on stream of commerce, *see* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2784 (2011). If "specific intent" by stream of commerce was enough for inducement, there would be negative implications for other areas of law that utilized specific intent—such as criminal law. Hammer manufacturers, rope makers, and drill makers would be liable for bank robberies, rapes, and safe cracking. Email interview with Shashank Uphadye, Partner at Amin Talati & Upadhye (Nov. 11 2015).

[149] *See supra* note 145 and accompanying text.

[150] *See* Oswald, *supra* note 21, at 5 ("multiactor patent infringement doctrine that is not grounded in either precedent or statutory language suggests that the court is infringing on the congressional realm of creating patent policy").

[151] *Id.* at 66. In her dissent, Judge Newman argued that "a broad, all-purpose single-entity requirement is flawed, and restores infringement to its status as occurring when all of the claimed steps are performed, whether by a single entity or more than one entity." *Akamai Techs, Inc.*, 692 F.3d at 1319.

[152] *Id.*

[153] *Id.*

[154] *Joy Techs., Inc.* 6 F.3d at 774*; Akamai Techs, Inc.,* 692 F.3d at 1350.

large revision for a narrow problem. However, it is better to put in the hands of the legislature, than the Federal Circuit.[155]

Congress could also create divided infringement as a subset of direct infringement.[156] The tort of divided infringement between two actors could be added, and the law could specifically address which types of relationships qualify as divided infringement.[157] It could address whether strict direction and control is required, or whether a mere arms-length relationship is sufficient. The statute could also include traditional common law notions of liability, including joint-tortfeasorship or an agency standard.[158] This is a substantial alteration implemented to solve a narrow problem.[159] However, the policy makers are best equipped to make this decision. Including it in the statute provides clear notice of what is protected: an important policy of patent law.[160]

V. CONCLUSION

A combination of proper statutory interpretation and unitary claim drafting is an effective response to the divided infringement problem. After implementing these new standards, some cases may still slip through the cracks, leaving certain plaintiffs without a remedy. If this becomes a problem, a statutory revision is the best solution to the problems presented by the divided infringement standard.

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[155] *Akamai Techs, Inc.*, 692 F.3d at 1314; *Cordis Corp.*, 194 F. Supp. 2d at 349.

[156] *Akamai Techs., Inc.*, 797 F.3d at 1023. This is the standard that the Federal Circuit implemented in *Akamai*. *Id.*

[157] *Id.* For example, Akamai held that "liability under § 271(a) can also be found 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." *Id.* The legislature could include this as a situation that incurs liability. *Id.*

[158] *Id.* The Federal Circuit has discussed agency, joint tortfeasorship, the direction or control standard, and an aiding and abetting standard. *Akamai Techs., Inc.*, 797 F.3d at 1023-25.

[159] *See* Oswald, *supra* note 21, at 66. For the precedent regarding these concepts *see Novartis Pharm. Corp., Inc.*, 363 F.3d at 1308; *Deepsouth Packing Co.*, 406 U.S. at 526; *Aro Mfg. Co.,* 365 U.S. at 341; *Joy Techs.*, 6 F.3d at 774; *Akamai Techs, Inc.*, 692 F.3d at 1333-36.

[160] Litton Systems, Inc. v. Honeywell, Inc. 145 F.3d 1472, 1474-77, (Fed. Cir. 1998) ("Public notice of the scope of the right to exclude, as provided by the patent claims, specification, and prosecution history, is a critical function of the entire scheme of patent law").