A MADNESS TO THE METHOD: FIXING THE JOINT INFRINGEMENT SYSTEM FOR METHOD PATENTS AFTER AKAMAI TECHNOLOGIES, INC. V. LIMELIGHT NETWORKS, INC.

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Abstract

The Federal Circuit’s 2012 joint decision in Akamai Technologies, Inc. v. Limelight Networks, Inc. and McKesson Technologies, Inc. v. Epic Systems Corporation marked a pivotal moment in the federal courts’ development and application of joint patent infringement. In overruling the “single-entity” and “control or direction” rules and establishing a new “inducement-only” rule, the Federal Circuit case destroyed the backbone of joint infringement jurisprudence without a second thought. After being denied certiorari multiple times, the Supreme Court finally heard the appeal and ultimately overruled the Federal Circuit majority’s holding. Surprisingly, both the Federal Circuit’s en banc majority and the Supreme Court avoided several of the primary concerns that were the basis for the en banc rehearing in the first place, including whether or not direct infringement can occur through the joint actions of multiple entities. In contrast, Judge Newman’s dissenting opinion identified the shortcomings of both the previous law as well as the majority’s new rule and, taking the Supreme Court’s holding a step further, proposed an alternative approach which would bring a level of stability to the area of joint patent infringement that has not existed for decades.

This Article will first explain the historical development of joint patent infringement, the major judicial and legislative steps that lead to the present state of the law, including an examination of each of the Akamai Techs., Inc. v. Limelight Networks, Inc. opinions, the newly established “inducement-only” rule, and the Supreme Court’s holding and reasoning. This Article will then discuss the inadequacies that would have resulted from an adoption of either the majority’s opinion or Judge Linn’s dissenting opinion, as well as

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shortcomings of the Supreme Court’s limited holding. Finally, this Article will propose the implementation of Judge Newman’s recommendations and opinion and the benefits which it will entail in creating clarity and protection for method patent owners.

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I. INTRODUCTION

Patents are one of the only legal constructs that are specially reserved for the most innovative and advanced technological and scientific discoveries of the modern world.1 Yet, within the field of patent law, these revolutionary discoveries often do not provide the most complex issues, but in fact, it is the legal aspects related to protecting those discoveries that leads to the most

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The legal doctrines of patent infringement have endured remarkable amounts of change since the origins of the patent protection, and these changes continue to occur in the present day.

The United States patent system is based on rewarding innovation and discovery by granting the inventors an exclusionary right and thus a legal bar from having other unauthorized parties make, use, offer to sell, or sell their patented inventions within the United States. A patent can only be rewarded for specified patentable subject matter, and the duration of the patent lasts for twenty years from the date of the filing of the patent application to the United States Patent and Trademark Office (USPTO). If, during the time of the patent term, a party or parties makes, uses, offers to sell, sells, or imports into the United States the patented invention without the express authorization of the patent owner, then the patentee may bring an action claiming infringement of their patent.

The law of patent infringement has become a solidified pillar in the current legal landscape, but, just as there different patents for different products and methods, so are there different types of infringement for the

2. E.g., Blonder-Tongue Labs. v. Univ. Ill. Found., 402 U.S. 313, 331 (1971) (“We are also aware that some courts have frankly stated that patent litigation can present issues so complex that legal minds, without appropriate grounding in science and technology, may have difficulty in reaching decision.”); Valley Drug Co. v. Geneva Pharms., 344 F.3d 1294, 1308 n.20 (11th Cir. 2003) (“The cost and complexity of most patent litigation is a familiar problem to the court system.”).

3. E.g., infra Part II (summarizing part of the history and development of patent law). For a significantly more in-depth analysis of the history and evolution of patent law, extending over more than just indirect infringement, see R. CARL MOY, MOY’S WALKER ON PATENTS pt. I, ch. 1 (4d ed. 2012) (explaining the history and policy surrounding patent law).

4. See 35 U.S.C. § 154(a)(1) (2012) (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . . .”). This exclusionary right also includes the right to prevent a party from importing the invention into the United States. Id. It should be noted that a patent does not grant an inventor the right to make, sell, use, offer to sell, or import their patented invention; it only allows the party to exclude others from doing it. This is one of the fundamental rules of patent law. Id.

5. See 35 U.S.C. § 101 (2012). (Whoever invents or discovers any new and useful process, machine manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent . . . .”); e.g., MOY, supra note 3, pt. II, § 5:6 (explaining that these basic statutory forms of invention can be further broken down into two different groups: structures and processes). In addition to the statutorily defined subject matter that may be patented, the judicial system has denoted additional specific subject matter that cannot be patentable. E.g., Diamond v. Diehr, 450 U.S. 175, 185 (1981) (“This Court has undoubtedly recognized limits to § 101 and every discovery is not embraced within the statutory terms. Excluded from such patent protection are laws of nature, natural phenomena, and abstract ideas.”); MOY, supra note 3, pt. II, § 5:4 (“United States patent law therefore contains at least several judicially created exceptions to the categories of statutory subject matter set out in section 101.”) (emphasis added).

6. 35 U.S.C. § 154(a)(2) (2012) (“Subject to the payment of fees under this title, such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States . . . .”). Although twenty years is the base term duration for patents, both the legislation and regulatory entities have created methods of extending this term under certain circumstances. 35 U.S.C. § 154(b) (2012) (stating the codified extensions and adjustments on patent terms when particular qualifications are met).

7. 35 U.S.C. § 271(a) (2012) (“Whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”). The other subsections of § 271 define other forms of infringement, including active inducement, contributory, and patent misuse. See 35 U.S.C. § 271(b)-(d) (2012).
The primary forms of infringement include direct infringement and indirect infringement—which is made up of both active inducement and contributory infringement. The primary forms of infringement include direct infringement and indirect infringement—which is made up of both active inducement and contributory infringement.

Furthermore, the last eight years have significantly built upon the theory of indirect infringement by the development and use of the doctrine of joint infringement. The first major holdings on the concept of joint infringement were in the Federal Circuit’s Court of Appeals decisions in BMC Res., Inc. v. Paymentech, L.P. and Muniauction, Inc. v. Thomson Corp. Although the rules established by BMC and Muniauction were considered to be the main standard for joint infringement cases, the Federal Circuit took a surprising turn on their opinions in the previous two cases by reversing them both in their holdings in the consolidated rehearing of Akamai Techs., Inc. v. Limelight Networks, Inc. (“Akamai II”). The Federal Circuit’s holding in Akamai II was by a very disjointed court, with a minimum majority, a single judge dissenting, and then a joining of four other judges dissenting separately as

10. See infra Part II.C (discussing the recent evolution of the doctrines of indirect and joint infringement). The two most prominent rules that were established in joint infringement were the “control or direction” and “single-entity” rules. See also, Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1329–30 (Fed. Cir. 2008) (affirming and narrowing the BMC holding and rules), overruled en banc by Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012) (per curiam); BMC Res., Inc. v. Paymentech, L.P., 498 F.3d 1373, 1381 (Fed. Cir. 2007) (establishing the “single-entity” and “control or direction” rules for joint infringement), overruled en banc by Akamai Techs., Inc., 692 F.3d 130112 (per curiam).
11. Muniauction, 532 F.3d at 1329 (“[W]here the actions of multiple parties combine to perform every step of a claimed method, the claim is directly infringed only if one party exercises ‘control or direction’ over the entire process such that every step is attributable to the . . . ‘mastermind.’”); BMC Res., 498 F.3d at 1380; see also W. Keith Robinson, No “Direction” Home: An Alternative Approach to Joint Infringement, 62 AM. U. L. REV. 59, 77 (2012) (discussing the Federal Circuit holding in BMC in which they “establish[ed] the ‘control or direction test’”).
13. See Akamai 12Techs., Inc., 692 F.3d at 1306 (per curiam) (holding that while all the steps of a patented claim must be performed in order to be infringe, it is “not necessary to prove that all the steps were committed by a single entity”); id. at 1308 (“[I]nducement does not require that the induced part be an agent of the inducer or be acting under the inducer’s direction or control . . . .”). For a more detailed description of the majority’s opinion, see infra Part III.B (summarizing the majority opinion in Akamai II).
14. See id. at 1321, 1326 (Newman, J., dissenting) (holding that indirect infringement does, and always has required a prerequisite showing of direct infringement in order to show liability, and that it should not matter how many entities are performing the steps of a method, as long as all of the steps are jointly completed). For a more detailed description of Judge Newman’s dissenting opinion, see infra Part IIID (summarizing Judge Newman’s dissenting opinion in Akamai Techs.).
well.\textsuperscript{15} Two years after \textit{Akamai II}, the Supreme Court of the United States finally granted certiorari,\textsuperscript{16} eventually reversing the Federal Circuit’s holding, and thus reaffirming the \textit{BMC} and \textit{Muniauction}.

The consequences of the \textit{Akamai II} holding will certainly alter the jurisprudence involving both direct and indirect patent infringement in the future, not only in the Federal Circuit, but throughout the country.\textsuperscript{17} This Article intends to show why the majority’s decision in \textit{Akamai II} was both inadequate and harmful for the present principles of patent law, and instead claim, while the Supreme Court’s holding was correct, it remained severely limited and would still falter in advancing the law of joint patent infringement. Instead, this Article will argue that Judge Newman’s dissenting opinion and its proposals should be adapted in order to provide a much needed stability to the field. In Part II, this Article will first provide a brief outline of the historical development and evolution of the doctrines of joint and indirect patent infringement to their modern state before \textit{Akamai II}.\textsuperscript{18} Next, Part III will summarize the three opinions of the Court of Appeals for the Federal Circuit in \textit{Akamai II}, as well as the Supreme Court’s holding.\textsuperscript{19} Then, the shortcomings of both the majority’s opinion, Judge Linn’s dissent, and the Supreme Court’s reversal holding will be provided, while also analyzing the reasoning and support for Judge Newman’s opinion, in Part IV.\textsuperscript{20} Finally, Part V will provide evidence in support of a proposal of abandoning the majority’s ruling in \textit{Akamai II}, and building upon the Supreme Court’s holding by adapting Judge Newman’s recommendations and rules, as stated in her dissenting opinion, in its place.\textsuperscript{21}

\textsuperscript{15.} See \textit{id.} at 1338, 1347 (Linn, J., dissenting) (claiming that the “single-entity” rule established in \textit{BMC} is still valid law and should be affirmed); \textit{id.} at 1350 (discussing the contrasting views of Judge Newman’s dissenting opinion involving multiple entity infringement). For a more detailed description of Judge Linn’s dissenting opinion, see infra Part III.C (summarizing Judge Linn’s dissenting opinion in \textit{Akamai Techs.}).

\textsuperscript{16.} \textit{Akamai Techs., Inc. v. Limelight Networks, Inc.}, 692 F.3d 1301 (Fed. Cir. 2012), \textit{cert. granted}, 134 S. Ct. 895 (Jan. 10, 2014) (No. 12-786). \textit{Akamai II} was officially denied certiorari three times before finally being granted its day before the Supreme Court.

\textsuperscript{17.} Although joint infringement claims were not remarkably common in the earlier decades of patent law, they are becoming more and more prevalent. \textit{E.g., Wu, supra note 12, at 557 n.220 (“In 2012, there were six [Court of Appeals for the Federal Circuit] cases involving or mentioning joint infringement. . . . In the same year, there were about thirty-four district court cases.”) While these numbers may appear low as compared to the overall scope of infringement cases, the specific requirements of bringing a joint infringement claim could be to blame. \textit{See id.} (“[J]oint infringement claims are difficult to assert because a plaintiff must separately state a claim for such rather than rely on an allegation of ‘direct infringement’ or violation of 35 U.S.C. 271(a) to include it.”).

\textsuperscript{18.} \textit{See infra} Part II (describing the history of joint and indirect patent infringement to the ruling of \textit{Akamai Techs., Inc.}.

\textsuperscript{19.} \textit{See infra} Part III (summarizing the majority opinion, and Judge Newman and Linn’s dissenting opinions from \textit{Akamai II}, and the Supreme Court’s holding in its reversal).

\textsuperscript{20.} \textit{See infra} Part IV (claiming that both the majority’s and Judge Linn’s solutions to the problems presented in \textit{Akamai II} would be unsuccessful, while Judge Newman’s opinion provides a legitimate answer to the issues).

\textsuperscript{21.} \textit{See infra} Part V (providing reasoning and support, both from statutory interpretation as well as case precedent, for the adaptation of Judge Newman’s opinion as common law).
II. BACKGROUND

The extensive history of uncertainty in the doctrines of indirect patent infringement came to a perfectly representative climax in the United States Court of Appeals for the Federal Circuit’s joint rehearing decision of Akamai Techs., Inc. v. Limelight Networks, Inc. and McKesson Techs., Inc. v. Epic Sys. Corp. The history of the judicial and statutory influences connected to the establishment of the present day joint infringement doctrine is complex and rich with overruling and contradicting interpretations. To fully grasp the consequences that the Akamai II holding will have on this field of law, it is vital to discuss the reasoning and record that led to the current state of the doctrine. This Part will briefly discuss and analyze the development of joint infringement from its roots in common law, the codification of that common law into the Patent Act of 1952, and finally the distinguishing of the varying types of direct and indirect infringement and their application to the ever-increasing fields of technology.

A. The Early Development of Indirect Infringement Common Law

Prior to the doctrine of indirect infringement’s codification into the Patent Act of 1952, the basis of the law relied not on a statute, but solely on the common law of the country’s courts. Arising from a manipulation of tort law, infringement was split into direct infringement—defined as "the..."
an unauthorized making, using or selling of the patented invention”—and contributory infringement—which was “any other activity where, although not technically making, using or selling, the defendant displayed sufficient culpability to be held liable as an infringer.”

A combination of prevalent Supreme Court and lower court decisions eventually began to pave the way for the further establishment of a separate form of infringement within contributory infringement: inducement infringement. In 1944, the Supreme Court finally considered the coexistence of the doctrines of indirect infringement in the case of Mercoid Corp. v. Mid-Continent Inv. Co., and, in a surprisingly broad holding, concluded to significantly restrict the applicability of the doctrine of contributory infringement. As many lower courts struggled with interpreting the actual


In the Patent Act of 1952, Congress attempted to clear some of the confusion surrounding patent infringement claims by defining the kinds of infringement and how they interact with each other. Additionally, Congress used this opportunity to distinguish between what had become two separate theories within the doctrine of contributory infringement by establishing Section 271(b) as defining “induce[ment] infringement,” and 271(c) as defining “contributory infringe[ment].” The two sections have since been considered to make up the combined doctrine of indirect infringement in patent law.

32. See generally, Gray Tool Co. v. Humble Oil & Ref. Co., 186 F.2d 365, 368 (5th Cir. 1951) (interpreting the Mercoid holding as “declaring that the effort by suit to stop contributory infringement is evidence of misuse,” but the court still eventually held “[i]t is not the case as to direct infringers . . . [p]laintiff never sued a competing manufacturer [and] . . . has never objected to anyone’s buying in competing manufacturers’); Stokes & Smith Co. v. Transparent-Wrap Mach. Corp., 156 F.2d 198, 201 (2d Cir. 1946) (quoting Judge Learned Hand, “it appears from the discussion in the [Mercoid] opinions that the doctrine of contributory infringement is itself not wholly free from doubt” [citations omitted]), rev’d on other grounds, 329 U.S. 637 (1947); Jacquard Knitting Mach. Co. v. Ordnance Gauge Co., 108 F. Supp. 59, 66 (E.D. Pa. 1952) (stating that Mercoid cut “away a great deal of the doctrine of contributory infringement and probably [weakened] the value to the owner of many method patents”), aff’d, 213 F.2d 503 (3d Cir. 1952). But cf. Florence-Mayo Nuway Co. v. Hardy, 168 F.2d 778, 785 (4th Cir. 1948) (finding that the holding in Mercoid “merely applies the salutary rule that a combination patent may not be used to protect an unpatented part from competition,” so a defendant would still be liable for selling “machinery with the knowledge, purpose and intent that it shall be used in a combination which will infringe”); Chicago Pneumatic Tool Co. v. Hughes Tool Co., 61 F. Supp. 767, 770 (D. Del. 1945) (“[T]he Supreme Court has not, so far, rejected the doctrine as applying to a ‘straight’ contributory infringement suit where there are no licenses or other tie-ins and no evidence of . . . violation of the Anti-Trust Laws.”), aff’d, 156 F.2d 981 (3d Cir. 1946).


36. 35 U.S.C. § 271(b)–(c) (2012); see Moy, supra note 3, at part III, §15.10 (“[T]he sections introduce a potential change in nomenclature. The language of paragraph (c) defines contributory infringement. Paragraph (b), in contrast, speaks of infringement via inducement . . . . The distinction between contributory infringement and infringement by inducement is thus a fairly recent innovation . . . .”). The doctrine of patent misuse was also included in the codification of 35 U.S.C. § 271 under paragraph (d). The future development and progression of this doctrine past this point in history is beyond the scope of this Article and will not be discussed further. For more information and a more complete overview of the doctrine of patent misuse and § 271(d), see generally Chisum, supra note 34, § 17.05.

37. E.g., Moy, supra note 3, at part III, §15.10 (“The 1952 Act addressed the law of indirect infringement in . . . paragraphs, (b) [and] (c) . . . of section 271.”). The main paragraphs of concern for this Article in The Patent Act of 1952 stand as follows: “(a) Except as otherwise provided in this title, whoever
The Legislature took special care in establishing the different subsections, and thus the different forms of infringement, to ensure that the judicial system would not be capable of carrying-over the confusing jurisprudence from the Mercoid holding. Although the doctrines of inducement infringement and contributory infringement were statutorily separated by the Patent Act of 1952, their inclusion under the same heading of “indirect infringement” does not prevent them from being distinguishable through interpretation of the statutory language. Foundationally, the essential difference between the two forms of infringement is the simple requirement that, under 271(c), the defendant must sell the element of the patented combination for use in that without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent. (b) Whoever actively induces infringement of a patent shall be liable as an infringer. (c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.” 35 U.S.C. § 271(a)-(c) (2012).

38. See Mox, supra note 3, at part III, §15.10 (“At the broadest level, the [1952 Act] provisions clearly reflect Congress’ intention to impose its own view of the substantive law, and displace much of the control previously wielded by the Judiciary . . . . In fact, the best view is that the provisions represent an attempt merely to roll back the Supreme Court’s most recent decision, Mercoid Corp. v. Mid-Continent Inc. Co.”); Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 492 (1964) (“Congress enacted § 271 for the express purpose of reinstating the doctrine of contributory infringement as it had been developed by decisions prior to Mercoid, and overruling any blanket invalidation of the doctrine that could be found in the Mercoid opinions.”). In fact, it could be seen that paragraph (c), which is laid out in noticeably specific and detailed terms, was drafted in a manner to explicitly limit the influence of future case law on the terminology presented in the statute. See Mox, supra note 3, at part III, §15.10 (interpreting the specificity of § 271 to reflect that Congress intended to “leave comparatively little room for additional case law development”); see also id. n.13 (“Considerable doubt and confusion as to the scope of the contributory infringement has resulted from a number of decisions of the courts in recent years. The purpose of [section 271] is to codify . . . principles of contributory infringement and at the same time eliminate this doubt and confusion.”) (quoting S. REP. NO. 82–1979, at 8 (1952), reprinted at 1952 U.S.C.C.A.N. 2402) (modification added); Chishum, supra note 34, § 17.02 [6] n.2 (quoting the same). But see Mox, supra note 3, at part III, §15.10 (“[T]he statutory provision present only a revision, rather than an abandonment, of the arrangement that had previously been defined in the cases . . . . Instead, the legislative history makes clear that the provision adopt an intermediate position . . . .”).

39. See Mox, supra note 3, at part III, §15.10 (“The best view . . . is probably that the two paragraphs are related, not unrelated . . . .”) (quoting Chishum, supra note 34, § 17.01 (“Section 271(b) concerns active inducement of infringement. It covers the range of actions by which one may cause, urge, encourage, or aid another to infringe a patent. The inducer must specifically intend to induce direct infringement.”)); Mox, supra note 3, at part III, §15.15 (describing § 271(b) and the requirements that are necessary under it to find liability against a party). On the other hand, the application of Section 271(c) is isolated to events when there was an actual sale of an element of a “patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process,” as long as that element was a “material part of the invention,” not just a “staple article or commodity of commerce.” 35 U.S.C. § 271(c); Chishum, supra note 34, § 17.01.
particular invention.\textsuperscript{41}

With the enactment of such a major piece of legislature, especially one that sought to completely rewrite the law involving patent infringement, it was natural that the judicial system would be wary of how exactly to apply the new statutory rules.\textsuperscript{42} The Supreme Court formally addressed the applicability of Section 271 in the cases \textit{Aro I} (1961) and \textit{Aro II} (1964).\textsuperscript{43}

In \textit{Aro I}, the Court found that the defendant did not directly infringe because the products in which they were selling were replacing a non-patented product, and that this replacement was considered to be a permissible repair.\textsuperscript{44} By refusing to find liability for contributory infringement in the absence of direct infringement, the Court upheld a long-standing rule that the Court reasoned was not altered by the enactment of Section 271.\textsuperscript{45} The Court dealt with a different issue of direct infringement and repair in \textit{Aro II}, where it held that because the defendant’s components were being used to repair an infringing product, this would cause those repair components to also be infringing because it was a continuation of the infringement.\textsuperscript{46} \textit{Aro II} also gave

\begin{itemize}
\item[\textsuperscript{41}] See Robinson, supra note 11, at 74 (“If the alleged defendant did not sell the component then § 271(c) does not apply.”). See also Jones v. Radio Corp. of Am., 131 F. Supp. 82, 83–84 (S.D.N.Y. 1955) (interpreting the newly enacted Section 271 as requiring the sale of the product in order to find liability for contributory infringement); John G. Mills et al., supra note 1, at pt. VI, ch. 20, § 20:7 (“By its terms, [Section 271(c)] only applies to sales, offers to sell, and importation into the United States.”) (citing Novapharm Ltd. v. Torpharm, Inc., 181 F.R.D 308 (E.D. N.C. 1998)).

\item[\textsuperscript{42}] See generally Dr. Salsbury’s Labs. v. I. D. Russell Co. Labs., 212 F.2d 414, 417 (8th Cir. 1954) (“The parties have devoted considerable discussion in their briefs to whether [§ 271] is merely a statutory codification of pre-existing stare decisis, or whether it has brought a change in the law.”); Welding Eng’rs, Inc. v. Aetna-Standard Eng’g Co., 169 F. Supp. 146, 150 (W.D. Pa. 1958) (applying paragraphs (a), (b), and (c), and struggling to determine how to apply (b), eventually concluding that inducement is more of an element of contributory infringement than a separate type of infringement); Calhoun v. State Chem. Mfg. Co., 153 F. Supp. 293, 301 (N.D. Ohio 1957) (attempting to distinguish between when § 271 (b) would be applied as compared to (c)).

\item[\textsuperscript{43}] Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 346 (1961); Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 483–85 (1964). See, e.g., Chisum, supra note 34, § 17.02 [7] (discussing the holdings in \textit{Aro I} & \textit{Aro II} and their effect on the judicial doctrine concerning Section 271); Moy, supra note 3, at part III, §15.11 (outlining the decisions of the Supreme Court in both \textit{Aro I} and \textit{Aro II}, and the methodology that the Court used in applying Section 271’s paragraphs (b), (c), and (d)).

\item[\textsuperscript{44}] Aro Mfg. Co., 365 U.S. at 346; see Chisum, supra note 34, § 17.02 [7] (summarizing the holding of \textit{Aro I} and its reliance on the fact that the replacement of the patented item was a permissible repair).

\item[\textsuperscript{45}] See Aro Mfg. Co., 365 U.S. at 341 (“It is plain that § 271(c) . . . made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement.”); id. at 348–50 (Black, J., concurring) (claiming that the Patent Act of 1952 showed that “Congress wanted to continue in force, but not expand, the judge-made doctrine of contributory infringement [that] person knowingly aids, encourages or abets the direct infringement of a patent is to be held liable as a contributory infringer . . . .”).

\item[\textsuperscript{46}] The second \textit{Aro} case instead dealt with the issue that the defendant had sold their repair components to be used in an unlicensed product that was similar to the plaintiff’s patented invention. The Supreme Court eventually held that, as compared to \textit{Aro I}, the defendant this time was “perpetuating the infringing use.” Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 483–85 (1964); see Moy, supra note 3, at part III, §15.11 (describing the holding in \textit{Aro II}). Therefore, unlike \textit{Aro I}, there was direct infringement, thus allowing liability for contributory infringement to be possible, and the Court found the defendant to be liable as such. Aro Mfg. Co., 377 U.S. at 485; see id. at 485–86 (holding that “most of the law” that was codified within Section 271 “was established in cases where, as here, suit was brought to hold liable for a contributory infringement a supplier of replacement parts specially designed for use in the repair of infringing articles.”). But see id. at 487–88 (recognizing that this case was “unique” because the defendant’s component was “hardly suitable for any noninfringing use” and that it would likely have worked on not only these specific unlicensed vehicles, but any vehicles with a convertible top) (emphasis in original).
the Court an opportunity to consider the knowledge requirement for contributory infringement under the newly enacted statutory requirements, on which the majority concluded that, under § 271(c), the contributory infringer must be shown to have known that his actions were infringement of a patented combination. Although the analysis by the Supreme Court in the *Aro* cases was influential in its interpretation and application of the new law, there remained many unclear aspects of indirect infringement.

Over the next several decades, the judicial system continued to progress the law of joint patent infringement. In addition to further affirming the doctrine of equivalents, the judicial system has also produced the “all elements” or “all limitations” rule. These two concepts have been combined

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47. *Aro Mfg. Co.*, 377 U.S. at 488; see id. at 488 (“[A] majority of the Court is of the view that § 271(c) does require a showing that the alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing.”) (emphasis added); e.g., *Chisum, supra* note 34, § 17.02 [7] (discussing the majority, concurrence, and dissenting opinions of the Supreme Court involving the knowledge requirement of § 271 in *Aro II*). *Contra Aro Mfg. Co.*, 377 U.S. at 527 (Black, J., dissenting) (“[Congress] attempted to make clear that innocent persons, who acted without any knowledge that the goods they sold were adapted for use in the infringement of a patent which they knew about, count not be held liable as contributory infringers.”) (emphasis added).

48. See *Mov, supra* note 3, at part III, §15.11 (“The majority’s holding [in *Aro II*] as to the required intent, odd as it is, has proved durable over time.”). Courts would apply the rules from *Aro II* to both § 271(b) and (c). See generally Anton/Bauer, Inc. v. PAG, Ltd., 329 F.3d 1343, 1348 (Fed. Cir. 2003) (applied to § 271(b)); Moba, B.V. v. Diamond Automation, Inc., 325 F.3d 1306, 1318 (Fed. Cir. 2003) (applied to § 271(b)); Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1364 (Fed. Cir. 2003) (applied to § 271(b)); Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990) (applied to § 271(c)); Manville Sales Corp. v. Paramount Systems, Inc., 917 F.2d 544, 553 (Fed. Cir. 1990) (applied to § 271(b)).

49. See *Chisum, supra* note 34, § 17.02 [7] (describing the split among the Supreme Court concerning both of the main issues from *Aro II*, specifically recognizing the peculiar voting patterns of those Justices that were in the majority on one of the issues, but dissenting on the other); *Mov, supra* note 3, at part III, §15.11 n.31 (explaining that because of the odd split amongst the Court in the two issues, it put “the author of the main opinion, Justice Brennan, in the position of disclaiming a part of his own writing.”).

50. Although this Article will not focus on the Doctrine of Patent Misuse, codified in § 271(d), the Supreme Court has made major decisions involving the application of § 271(d) and its connection with the other forms of patent infringement. For a discussion on the advancement of the law of patent misuse, see generally 1988 Patent Misuse Reform Act, Pub. L. No. 100–703, 102 Stat. 4276 (1988); Dawson Chem. Co. v. Rohm and Haas Co., 448 U.S. 176, 187–220 (1980) (history of § 271(c),(d)); *Chisum, supra* note 34, § 17.02 [8] (describing several of the key holdings involving § 271(d) and the consequences of those decisions); *Mov, supra* note 3, at part III, §15.12 (same).

51. *Robinson, supra* note 11, at 75. Although it was developed long before the Patent Act of 1952, the Doctrine of Equivalents found new life in its applicability in indirect infringement cases. See Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 339 U.S. 605, 608 (1950) (“[The doctrine of equivalents], [o]riginating almost a century ago in the case of *Winanas v. Demme*, 15 How. 330, . . . has been consistently applied by this Court and the lower federal courts, and continues today ready and available for utilization when the proper circumstances for its application arise.”); *id.* at 608 (“[A] patentee may invoke this doctrine to proceed against the producer of a device ‘if it performs substantially the same function in substantially the same way to obtain the same result.”’ (quoting Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 42 (1929))).

52. *Robinson, supra* note 11, at 75. Under this “rule,” it is maintained that a patented invention or method is defined by every single element and step that is included in the claim. However, the “all elements” rule is only applicable when it is combined with the doctrine of equivalents, then a party may still be found liable even if they do not infringe the exact steps or components, as long as they include an equivalent to those steps or components instead. See Canton Bio-Med., Inc. v. Integrated Liner Techs., Inc., 216 F.3d 1367, 1370 (Fed. Cir. 2000) (“Infringement of process inventions is subject to the ‘all-elements rule’ whereby each of the claimed steps of a patented process must be performed in an infringing process, literally or by an equivalent of that step . . . .”); *Robinson, supra* note 11, at 75 (discussing the “all elements” rule); cf. Philip M. Nelson, *Definition for “Limitation” in the Context of Prosecution History Estoppel and the All Elements Rule:*
in their application for decades, and have actually become some of the stable, non-contested aspects of indirect patent infringement.\footnote{\textit{C}
} The rest of this Part will focus on the evolution and relevance of the doctrine of inducement infringement codified in Section 271(b) and the theory of joint infringement in a patent case.

\textbf{C. The Advancement of Inducement and Joint Infringement}

The Patent Act of 1952 finally stabilized the field of patent infringement jurisprudence by distinguishing between the theories of inducement infringement and contributory infringement in their codification of § 271(b) and § 271(c), respectively.\footnote{\textit{D}} This split of the previous common law allowed an opportunity for the two separate concepts to establish themselves, as well as clarify the requirements that each demanded to find liability.\footnote{\textit{E}} Under Section 271(b), a party must satisfy the scienter requirement, which is possessing both the intention and the knowledge to aid and abet another party ‘s direct infringement of a patent, in order for there to be liability for induced infringement.\footnote{\textit{F}} The concept behind induced liability spawns from both tort and criminal law involving acts of the same nature consisting of aiding and abetting.\footnote{\textit{G}}

\textit{Proposed Solution to the Troubling Dictum in Kustom Signals v. Applied Concepts, 2003 B.Y.U. L. Rev. 353, 360 (2003) (“The All-Elements Rule refines the application of the doctrine of equivalents . . . . [T]he All-Elements Rule dictates that the way to determine if a product infringes through the doctrine of equivalents is not to examine the product as a whole . . . . Rather, the analysis must be . . . where each element is compared; the function/way/result analysis must be made ‘element by element.’”).}

\textit{E.g., Mox, supra note 3, at part III, §13.113 (stating that even thirty years after its original creation, the all-elements rule and doctrine of equivalents was once again affirmed in \textit{Warner-Jenkinson Co. v. Hilton Davis Chem. Co.} (citing \textit{Warner-Jenkinson Co. v. Hilton Davis Chem. Co.}, 520 U.S. 17 (1997)); Darcy August Paul, \textit{The Judicial Doctrine of Equivalents}, 17 Harv. J.L. & Tech. 247, 262 (2003) (“The all-elements rule, much like the doctrine of equivalents, was a judicially-announced standard that had evolved from a long history of cases. . . . With respect to the doctrine of equivalents in general and the all-elements rule in particular, this mix of gradualism and necessity appears to have guided judicial development of the patent law.”).}

\textit{E.g., Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2066 (2011) (“Before 1952, both the conduct now covered by \$271(b) (induced infringement) and the conduct now addressed by \$271(c) (sale of a component of a patented invention) were viewed as falling within the overarching concept of ‘contributory infringement.’”); supra notes 37–38 and accompanying text (discussing the enactment and language of 35 U.S.C. \$ 271).}

\textit{See 35 U.S.C. 271(b)–(c) (2012) (stating the statutory language of the \$ 271, referencing both inducement and contributory infringement, respectively); supra notes 38–40 and accompanying text (discussing the reasoning and intentions of Congress in enacting the Patent Act of 1952).}

\textit{See Winn Inc. v. Eaton Corp., 272 F. Supp. 2d 968, 974 (C.D. Cal. 2003) (“To prove inducement under 35 U.S.C. \$ 271(b), [a patentee] must provide evidence that [the infringer] knowingly aided and abetted direct infringement of the patent.”); TI Group Auto. Sys., (N. Am.), Inc. v. VDO N. Am. L.L.C., 62 U.S.P.Q.2d 1599, 1601 (D. Del. 2002) (“In order to establish active inducement, the following elements must be proven by a preponderance of the evidence: (1) an inducer’s knowledge of the asserted patent; (2) the presence of infringement by the third party allegedly induced; (3) an inducer’s actual intent to cause the acts which he knew or should have known would induce actual infringements; and (4) the commission of an act that constitutes inducement, not merely the power to act or the failure to act.”); HISUM, supra note 34, \$ 17.04 (discussing the development of the law surrounding inducement infringement).}

\textit{See Nat’l Presto Indus., Inc. v. W. Bend Co., 76 F.3d 1185, 1194 (Fed. Cir. 1996) (“The statutory liability for inducement of infringement derives from the common law, wherein acts that the actor knows will lead to the commission of a wrong by another, place shared liability for the wrong on the actor.”); Alcon Labs.,
Although the main focus of most liability is centered on whether or not there is active inducement, the other essential element of induced infringement is the fact that there must be an act that constitutes direct infringement in order for there to be any type of indirect infringement. Additionally, another key element of inducement infringement under § 271(b) is that there must also be actual intention and knowledge that the infringement of a patent is occurring; an element of indirect patent infringement since the 19th century. However, unlike the requirement of intention and knowledge, the requirement that the inducer be aware of the existence of the claimed patent, and thus have specific intent to infringe that particular patent, is much more novel and has yet to truly

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58. See, e.g., Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1321 (Fed. Cir. 2009) (“Inducement requires a threshold finding of direct infringement.”); BMC Resources, Inc. v. Paymentech, L.P., 498 F.3d 1373, 1380 (Fed. Cir. 2007) (“This court has held that inducement of infringement requires a predicate finding of direct infringement.”); Epcon Gas Sys., Inc. v. Bauer Compressors, Inc., 279 F.3d 1022, 1033 (Fed. Cir. 2002) (“It is well settled that there can be no inducement of infringement without direct infringement by some party.”); Arthur A. Collins, Inc. v. N. Telecom Ltd., 216 F.3d 1042, 1046 (Fed. Cir. 2000) (“To establish [a defendant’s] liability for inducing infringement, [a patent owner] must show a direct infringement . . . . [E]vidence of direct infringement is an essential element of inducement infringement . . . .”); CHISHUM, supra note 34, § 17.04, [1] (elaborating on the requirement of a showing of direct infringement in order to constitute liability for induced infringement). While it must be present, the direct infringement does not have to be committed by a named party in an inducement infringement case. MOY, supra note 3, at part III, §15.15, see, e.g., Glenayre Elecs., Inc. v. Jackson, 443 F.3d 851, 871 (Fed. Cir. 2006) (noting direct infringement was committed by unnamed customers); Moleculon Res. Corp. v. CBS, Inc., 793 F.2d 1261, 1272 (Fed. Cir. 1986), on remand, 666 F. Supp. 661 (D. Del. 1987), rev’d, 872 F.2d 407 (Fed. Cir. 1989) (noting direct infringement was perpetrated by unnamed members of the public).

59. See, e.g., Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011) (“[T]he same knowledge is needed for induced infringement under § 271(b). According to § 271(b)–(c) have a common origin in the pre-1952 understanding of contributory infringement, and the language of the two provisions creates the same difficult interpretive choice.”); Alloc, Inc. v. U.S. Int’l Trade Comm’n, 342 F.3d 1361, 1374 (Fed. Cir. 2003) (“[A patentee must show that an alleged infringer knowingly induced another to commit an infringing act to establish induced infringement under S]ection 271(b).”) (citing Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 553 (Fed. Cir. 1990)); Moba, B.V. v. Diamond Automation, Inc., 325 F.3d 1306, 1318 (Fed. Cir. 2003) (“Although § 271(b) does not use the word ‘knowingly,’ this court has uniformly imposed a knowledge requirement.”).

60. See, e.g., Snyder v. Bunnell, 29 F. 47, 47–48 (C.D.N.Y. 1886) (“If the defendants were . . . ‘making and putting on the market an article which, of necessity, to their knowledge, is to be used for the purpose of infringing the complainants’ patent,’ there would be little difficulty in holding that [there is infringement].”) (emphasis added); Wallace v. Holmes, 29 F. Cas. 74, 80, (C.C.D. Conn. 1871) (No. 17100) (holding that if the defendants contributed to the action or product “with the certain knowledge” that their contributions were “to be used, as they can only be used” to infringe a patent, then they are liable for infringement); Charles W. Adams, A Brief History of Indirect Liability for Patent Infringement, 22 SANTA CLARA COMPUTER & HIGH TECH L.J. 519, 523–36 (2006) (discussing a nineteenth-century case and several early twentieth-century cases that recognize the knowledge requirement for indirect infringement); supra notes 59 and accompanying text (discussing the requirements of knowledge and intent in infringement liability cases).

61. In order to find a defendant liable for inducement infringement, a party must be found to have “known that another would engage in the acts that are later determined to have infringed directly, and to have purposefully intended that those acts take place.” MOY, supra note 3, at part III, §15.15; see Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990) (“[W]here there is actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement.”); cf. Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 553 (Fed. Cir. 1990) (“The plaintiff has the burden of showing that the alleged infringer’s action induced infringing acts and that he knew or should have known his actions would induce actual infringements.”) (emphasis in original).
take a solid foothold in the courts. The Supreme Court’s decision in Global-Tech in 2011 finally brought all of the intention and knowledge requirements together and reaffirmed their application in inducement infringement prosecution.

In addition to the refinement of the knowledge and intent requirements, indirect infringement underwent further major changes to its foundation, particularly involving joint infringement, from the Federal Circuit’s holdings in BMC Resources, Inc. v. Paymentech, L.P. and Muniauction, Inc. v. Thomson Corp. BMC was the first case with a primary assertion of joint infringement—or infringement that was performed by multiple entities—to be heard by the Federal Circuit. The main focus of the court was the establishment of two new rules in regards to liability for joint infringement.

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62. See, e.g., Minn. Mining & Mfg. Co. v. Chemque, Inc., 303 F.3d 1294, 1305 (Fed. Cir. 2002) (reinforcing that liability for inducement requires “that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement.”); Mansville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 553 (Fed. Cir. 1990) (“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.”) (emphasis added); Michael N. Rader, Toward a Coherent Law of Inducement to Infringe: Why the Federal Circuit Should Adopt the Hewlett-Packard Standard for Intent Under § 271(b), 10 Fed. Cir. B.J. 299, 314–15 (2000) (describing the holdings and reasoning of both the Hewlett-Packard and Mansville holdings and also advocating for the specific intent requirement for inducement infringement). But cf. Golden Blount, Inc. v. Robert H. Peterson Co., 438 F.3d 1354, 1364 n.4 (Fed. Cir. 2006) (“It should be noted that ‘there is a lack of clarity concerning whether the required intent must be merely to induce the specific acts [of infringement] or additionally to cause an infringement.’”) (quoting MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1332 (Fed. Cir. 2005)).

63. See Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011) (“[W]e proceed on the premise that § 271(c) requires knowledge of the existence of the patent that is infringed . . . it follows that the same knowledge is needed for induced infringement . . . . Accordingly, we now hold that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.”); cf. MavOY, supra note 3, at part III, §15.20 (“Thus, the joint tort feasor must be aware of the activity that is directly tortious, and must intend for that activity to occur.”) For more information on the evolution of the knowledge and intent requirements of indirect infringement, as well as the requirements’ reaffirmation in Global-Tech, see MavOY, supra note 3, at part III, §15.20 (discussing the knowledge and intent requirements of § 271(b)).


65. See BMC Res., Inc., 498 F.3d at 1378 (“The case presents the issue of the proper standard for joint infringement by multiple parties of a single claim.”); Robinson, supra note 11, at 77 (summarizing the holding and impact from BMC). While joint infringement was never considered a separate form of infringement like active inducement or contributory, it instead became an overarching term that included any infringing acts that were jointly completed by multiple entities. Therefore, the actual method of infringement was irrelevant to the label, which means that it can include both inducement and contributory infringement, just as long as there are multiple entities infringing. E.g., Crystal Semiconductor Corp. v. TriTech Microelectronics Int’l, Inc., 246 F.3d 1336, 1361 (Fed. Cir. 2001) (holding that the two defendants jointly infringed the patents because, although the manufacturer actively induced the seller’s infringements, both parties knew that their actions were infringing the patents); Shields v. Halliburton Co., 493 F. Supp. 1376, 1389 (W.D. La. 1980) (“When infringement results from the participation and combined action of several parties, they are all joint infringers and jointly liable for patent infringement.”).

66. See Robinson, supra note 11, at 77 (stating that the Federal Circuit in BMC “used the occasion to establish the ‘control or direction’ test.”). To create these rules, the court first affirmed the district court’s interpretation of the Federal Circuit’s opinion in On Demand Machine Corp. v. Ingram Indus., Inc., 442 F.3d 1331 (Fed. Cir. 2006). By agreeing that there was never evidence of direction or control by Paymentech, and therefore no liability for indirect infringement, the court indirectly affirmed and further established the “control or direction” rule. See BMC Res., Inc., 498 F.3d at 1378 (affirming that there was no evidence of direction or control by Paymentech); see also id. at 1381 (“This court acknowledges . . . the standard requiring control or direction for a finding of joint infringement . . . .”) Robinson, supra note 11, at 79 (“The Federal Circuit concluded that Paymentech did not infringe under its newly minted control or direction standard.”). Secondly,
Together, the “control or direction” and “single-entity” rules stated that in order for a party to be found liable for joint infringement, the direct infringer must either complete each step themselves or be found to have control or direction over the completion of each step of the patented method. The Federal Circuit quickly followed the next year by both affirming and refining the rules from BMC in its decision in Muniauction. With the new the court took a firm stand by refusing to extend the applicability of the doctrine of joint infringement to include situations where multiple parties act independently. See BMC Res., Inc., 498 F.3d at 1381 (“[E]xpanding the rules governing direct infringement to reach independent conduct of multiple actors would subvert the statutory scheme for indirect infringement.”); Robinson, supra note 11, at 79 (“In its opinion, the Federal Circuit refused to expand the doctrine of joint infringement to cover the independent conduct of multiple actors . . . .”). Instead, the court elaborated on the requirements of direct infringement when proving liability for indirect infringement. This reasoning would later become known as the “single-entity” rule. See BMC Res., Inc., 498 F.3d at 1379 (“Indirect infringement requires, as a predicate, a finding that some party amongst the accused has committed the entire act of direct infringement.”) (citing Dynacore Holdings Corp. v. U.S. Philips Corp., 363 F.3d 1263, 1272 (Fed. Cir. 2004)); Robinson, supra note 11, at 79 (“The court [in BMC] went on to explain that a finding of indirect infringement requires that a party amongst the accused has committed the entire act of direct infringement.”).

67. E.g., Fromson v. Advance Offset Plate, Inc., 720 F.2d 1565, 1568 (Fed. Cir. 1983) (holding that there was no liability for direct infringement when the first step of the patented process was performed by the manufacturer and the second step was performed by the customer); Damon Gupta, Virtually Uninfringeable: Valid Patents Lacking Protection Under the Single Entity Rule, 94 J. PAT. & TRADEMARK OFF. SOC’y 61, 65 (2012) (describing the reasoning which the Federal Circuit applied in the BMC holding, eventually concluding that “the single entity rule existed and the direct or control test satisfied it.”). The Federal Circuit was quick to recognize the possible consequences and issues that could arise out of its rather strict holding in BMC. See BMC Res., Inc., 498 F.3d at 1381 (“This court acknowledges that the standard requiring control or direction for a finding of joint infringement may in some circumstances allow parties to enter into arms-length agreements to avoid infringement.”); id. at 1379 (“These rules for vicarious liability might seem to provide a loophole for a party to escape infringement by having a third party carry out one or more of the claimed steps on its behalf.”); M.O.Y., supra note 3, at part III, §14:36 (“The panel [in BMC] went on to address several potential criticisms of its ruling.”). But see BMC, 498 F.3d at 1381 (“The concerns over a party avoiding infringement by arms-length cooperation can usually be offset by proper claim drafting . . . .”) For example, BMC could have drafted its claims to focus on one entity . . . . [T]his court will not unilaterally restructure the claim or the standards for joint infringement to remedy these ill-conceived claims.”) (citing Mark A. Lemley et. al., Divided Infringement Claims, 33 AIPLA Q.J. 255, 272–75 (2005)); see also Sage Prods. Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1425 (Fed. Cir. 1997) (“[A]s between the patentee who had a clear opportunity to negotiate broader claims but did not do so . . . . it is the patentee who must bear the cost of its failure to seek protection for this foreseeable alteration of its claimed structure.”). The applicability of the “single-entity” rule for both direct and indirect infringement is further discussed in the remaining sections of this Article. See infra Part III–V (discussing and debating the “single-entity” rule as presented in Akamai II).

68. Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1329–30 (Fed. Cir. 2008); cf. Robinson, supra note 11, at 81 (“[I]n Muniauction, the Federal Circuit narrowed the joint infringement doctrine articulated in BMC.”). In Muniauction, the court references and relies heavily on their holding in BMC. See Muniauction, 532 F.3d at 1328–30 (“In BMC Resources, this court clarified the proper standard for whether a method claim is directly infringed by the combined actions of multiple parties . . . . Accordingly, where the actions of multiple parties combine to perform every step of a claimed method, the 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, i.e., the ‘mastermind.’”) (citing BMC Res., Inc., v. Paymentech, L.P., 498 F.3d 1373, 1380–81 (Fed. Cir. 2007)); see, e.g., Robinson, supra note 11, at 80–81 (describing the “multi-party spectrum” of finding liability under joint infringement according to BMC; with one end being liability for a party having “control or direction” over all of the parties and steps involved in the infringing of a patented method, and the other end of the spectrum consisting of no infringement when there is only a “mere ‘arms-length cooperation’ between the multiple parties that participate in the steps to infringing the patent”) (citing BMC Res., Inc., v. Paymentech, L.P., 498 F.3d 1373, 1329 (Fed. Cir. 2007)). Yet, the court ultimately decides to alter the language of the “control or direction” rule to instead only require that the third parties act “on behalf of” the principle infringer. See Robinson, supra note 11, at 80 (“[I]n Muniauction, the Federal Circuit modified the direction or control standard to an ‘on behalf of’ standard.”) (citing Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1330 (Fed. Cir. 2008)); id. at 80 n.151 (describing the Muniauction court as “building on the
standards for joint infringement liability in place, many lower courts began to apply the rules from BMC and Muniauction with the utmost confidence in their applicability and accuracy. However, it soon became clear that although these lower courts were applying the “control or direction” and “single-entity” rules to appropriate fact scenarios, a very slim amount of those cases were actually being found to satisfy the narrow requirements of liability.

As the amount of joint infringement cases continued to escalate, the Federal Circuit attempted to once again refine the standards required for liability in the two cases Akamai I and McKesson I. In Akamai I, the court decided to apply a different theory to the use of the “control or direction” rule by instead basing its application in agency law. The Federal Circuit took this interpretation a step further in McKesson by requiring either an agency relationship or a contractual commitment be present in order to attribute the actions of the third parties to the principal infringer. Although the Circuit’s

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69. See generally Am. Pat. Dev. Corp. v. Movielink, L.L.C., 637 F. Supp. 2d 224, 237 (D. Del. 2009) (finding a question of material fact regarding whether or not Movielink’s control resulted in liability); Global Pat. Holdings, L.L.C. v. Panthers BRHC L.L.C., 586 F. Supp. 2d 1331, 1332–33 (S.D. Fla. 2008) (holding that there was no infringement when remote users downloaded files because there was no showing that there was any control or direction over those users even if the downloaded material was being used for the defendant’s website), aff’d per curiam, 318 F. App’x 908 (Fed. Cir. 2009); Robert A. Matthews, Annotated Patent Digest § 10:30 (2013) (discussing cases which involve joint infringement and whether control was present and sufficient to attribute liability); Keith Robinson, Ramifications of Joint Infringement Theory on Emerging Technology Patents, 18 TEX. INTELL. PROP. L.J. 335 (2010) (explaining the application of BMC and Muniauction in the courts).

70. See, e.g., Global Pat. Holdings, L.L.C., 586 F. Supp. 2d at 1335 (holding that mere guidance or instruction is not enough to constitute “direction or control” under the BMC standard); Gammino v. Ccelco P’ship, 527 F. Supp. 2d 395, 398 (E.D. Pa. 2007) (stating that parties cannot avoid liability by entering into contracts); Robinson, supra note 11, at 81–82 (“In evaluating the relationships between the parties involved, most courts found that the factual situations with which they were presented did not satisfy the control or direction standard.”).


72. Akamai Techs., Inc., 629 F.3d at 1320 (“The words in the BMC Resources test must be read in the context of traditional agency law.”). This context would eventually shift the focus of the rule away from simply identifying direction or control of involved parties, and instead focus on whether or not there is an agency relationship present between the principal infringer and said parties. See id. at 1320 (“[T]here can only be joint infringement when there is an agency relationship between the parties who perform the method steps or when one party is contractually obligated to the other to perform the steps.”); id. at 1321 (providing support for the BMC test by showing that the Supreme Court as well as the Restatement also favors requiring an agency relationship); cf. Meyer v. Holley, 537 U.S. 280, 286 (2003) (“The Restatement . . . specifies that the relevant principal/ agency relationship demands not only control (or the right to direct or control) but also ‘the manifestation of consent by one person to another that the other shall act on his behalf . . . and consent by the other so to act.’” (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1957)) (emphasis in original)); Akamai Techs., Inc., 629 F. 3d, at 1321 (“Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms.”) (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)).

73. See McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA), at 1285 (“[T]he ‘control or direction’ standard is satisfied in situations where the law would traditionally hold the accused direct infringer vicariously liable for the acts committed by another party that are required to complete performance of a claimed method.”) (quoting Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1330 (Fed. Cir. 2008)); id. at 1285 (“This court has time and again rejected liability where one party performed most of the patented method and left it to another party to complete the method in the absence of any contractual obligation or agency relationship that would
intended were to provide clarity in the area of joint infringement prosecution. Judge Newman pointed out two key problems with the majority’s holding in her dissent in McKesson.

Due to the continued confusion surrounding the rules for liability under the doctrine of joint infringement in regards to establishing direct and indirect infringement when involving multiple entities, as well as the questions raised both by Judge Newman’s dissent and the involved parties, the Federal Circuit decided to rehear both Akamai I and McKesson I in a joint en banc hearing.

III. DISCUSSION

At the time when the Court of Appeals for the Federal Circuit held its rehearing for Akamai I and McKesson I, the general standards for liability under the doctrines of direct and indirect infringement, although not entirely consistent, were being widely applied and accepted. According to these doctrines, direct infringement liability only existed when a single entity performed every step of a patented method or performed some of the steps and then used their control or direction to induce another party to perform the remaining steps of the method. On the other hand, indirect infringement vicariously attribute the acts of the one party to the other.

74. Robinson, supra note 11, at 87–88 (discussing the Akamai I and McKesson I decisions in detail and elaborating on the confusion that resulted). The confusion, both from these two cases as well as from the years before them, finally became too much for the Federal Circuit to avoid. The court would finally take the stand and try to establish a concrete application of indirect infringement in its en banc consolidated rehearing of these two cases a year later. See Akamai Techs. Inc. v. Limelight Networks Inc., 692 F.3d 1301 (Fed. Cir. 2012) (en banc) (per curiam) (rehearing both McKesson I and Akamai I before an en banc bench of the Court of Appeals for the Federal Circuit).

75. McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA) at 1285 (Newman, J., dissenting). Judge Newman argued both that the majority’s holding does not follow the earlier precedent set forth by the Federal Circuit, and also that previous panels of the Federal Circuit have found liability for infringement when multiple entities perform the steps of the patented method. Id. at 1288–90 (Newman, J., dissenting) (“[The] absolute requirement that there must be direct infringement by a single entity who performs or directs every step of the claimed method before there can be indirect infringement . . . [is] contravened by precedent.”). Judge Newman’s reasoning in the Akamai I dissent directly mirrors that of her later dissent in the en banc rehearing Akamai II, which will be discussed in the next Part. See infra Part III.D (discussing Judge Newman’s dissenting opinion, including many of the same arguments which she raised in Akamai I).

76. See Akamai Techs. Inc., 692 F.3d at 1305 (“In the two cases before us, we address the question whether a defendant may be held liable for induced infringement if the defendant has performed some of the steps of a claimed method and has induced other parties to commit the remaining steps (as in the Akamai case), or if the defendant has induced other parties to collectively perform all the steps of the claimed method, but no single party has performed all of the steps itself (as in the McKesson case).”); McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA) at 1288–90 (Newman, J., dissenting) (recognizing many of the issues with the “single-entity” rule issues that would eventually be analyzed in Akamai II).

77. See supra Part II.C (summarizing the developments and applications of the doctrines of direct and indirect infringement). But cf. Adams, supra note 60, at 398 (“Even after being codified, the precise extent of . . . inducement of infringement remains unclear, as it has produced an intra-circuit conflict within the Federal Circuit . . . . Nevertheless, the doctrines of contributory infringement and inducement of infringement are stronger than ever . . . .”).

78. See Akamai Techs., Inc., 692 F.3d at 1305 (“When a single actor commits all the elements of infringement, that actor is liable for direct infringement under 35 U.S.C. § 271(a).”).
existed only when a party shares the intent to infringe a known patented method by knowingly collaborating with, urging on, encouraging, or aiding a direct infringer in the performance of actual infringement. 79 This Part will first describe the general aspects of the two cases on appeal, 80 and then will explain the Akamai II majority’s holding and the reasoning which they employed in overruling BMC and Muniauction. 81 Afterward, Judge Linn’s dissenting opinion will be summarized. 82 Finally, this Part will discuss the dissenting opinion of Judge Newman and the recommendations that she puts forward. 83 Finally, the Supreme Court’s reversal of the Akamai II holding will be reviewed, including a description of where the law of indirect patent infringement stands now. 84

A. Akamai I and McKesson I

In Akamai, Akamai Technologies, Inc. owned a patented method for delivery of web content by a process of placing specific content in a set of replicated servers and then modifying the provider’s web page to direct Internet browsers to retrieve the stored content on said servers. 85 Limelight Networks, Inc., on the other hand, possessed a network of servers which, similar to the patented method used by Akamai, delivered stored content by placing the content on Limelight’s servers first, and then redelivering it. 86 Limelight’s process did not modify the provider’s web page by itself, but instead instructed its customers of the steps required to complete the modification themselves. 87 Akamai filed a complaint against Limelight, alleging both liability for direct and indirect infringement of their patented method. 88

(discussing the creation of the “single-entity” and “control or direction” rules from BMC, as well as examples of their use in recent precedent). But see Akamai Techs., Inc., 692 F.3d at 1305 (“[W]hen the acts necessary to give rise to liability for direct infringement are shared between two or more actors, doctrinal problems arise.”).
79. See id. at 1305 (“When a single actor induces another actor to commit all the elements of infringement, the first actor is liable for induced infringement under 35 U.S.C. § 271(b).”); Arris Grp., Inc. v. British Telecommms. PLC, 639 F.3d 1368, 1379 n.13 (Fed. Cir. 2011) (“[A]ctive inducement of infringement . . . includes acts that intentionally cause, urge, encourage, or aid another to directly infringe a patent.”); supra notes 56–59 and accompanying text (describing the requirements for inducement infringement liability).
80. See infra Part III.A (summarizing the facts and holdings of both Akamai I and McKesson).
81. See infra Part III.B (describing the majority opinion from Akamai II and the reasoning on which it relied).
82. See infra Part III.C (summarizing Judge Linn’s dissenting opinion in Akamai II).
83. See infra Part III.D (summarizing Judge Newman’s dissenting opinion in Akamai II).
84. Akamai Techs., Inc., 692 F.3d at 1303摧毁
86. Akamai Techs., Inc., 692 F.3d at 1306; Akamai Techs., Inc., 629 F.3d at 1316. The claims asserted by Akamai were based on a process of “tagging” the specified objects in the servers and then delivering them accordingly. See Robinson, supra note 11, at 89–90 (discussing the facts of Akamai I as well as providing the actual patent language of the asserted claims).
87. Akamai Techs., Inc., 692 F.3d at 1306. Limelight’s content delivery server required the content provider to perform certain steps, but then ultimately required the user to complete the process by requesting one of the stored objects. Akamai Techs., Inc., 629 F.3d at 1316.
88. Akamai Techs., Inc., 692 F.3d at 1306. Akamai recognized that Limelight was not, in fact,
In McKesson, McKesson Information Solutions LLC was the patent owner of a method allowing electronic communication between medical providers and their patients. Conversely, Epic, a software corporation, licensed software to healthcare organizations that consisted of an application called “MyChart,” a program that allowed medical providers to communicate electronically with their patients. Epic did not perform any of the steps of the patented method themselves; it left the entirety of the steps to be divided between the patients, whom actually commenced the communication, and the providers, whom performed the remaining steps. Similar to Akamai, McKesson filed a complaint directed at Epic alleging inducement infringement of their patented method.

The courts in both cases found no liability for infringement of the claimed method patents, reasoning that because multiple parties performed the steps of the method patents in each case, that there could not be liability for direct infringement and without proof of direct infringement, there could be no finding of indirect infringement.

B. The Majority Opinion

The majority, represented by the minimum six judges, held that although all of the steps of a patented method must be performed in order to establish liability for inducement infringement, it is not required that the all of the steps be proved to have either been performed by a single entity or performed by parties that were under the control or direction of a single entity. In addition to performing all of the steps of the claims by themselves, so instead based its reasoning on joint infringement at 1317.

90. Akamai Techs., Inc., 692 F.3d at 1306. The patented technology used a series of personalized web pages for both the doctors and the patients. The physician can then choose to allow the patient to access specific content following visits or procedures. McKesson Tech., Inc. v. Epic Sys. Corp., 98 U.S.P.Q.2d (BNA) 1281, 1282. (Fed. Cir. 2011).

91. Akamai Techs., Inc., 692 F.3d at 1306; McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA) at 1282.

92. Akamai Techs., Inc., 692 F.3d at 1306. Epic never actually used the MyChart software, and instead simply licensed it out to providers who then decide whether or not to offer it as a resource to their patients. McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA) at 1282.

93. Akamai Techs., Inc., 692 F.3d at 1306–07; McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA) at 1284 (“Without an agency relationship or contractual obligation, the MyChart users’ actions cannot be attributed to the MyChart providers, Epic’s customers. Thus, McKesson has failed to demonstrate that any single party directly infringed . . . . Absent direct infringement, Epic cannot be liable for indirect infringement.”); Akamai Techs., Inc., 629 F.3d at 1322 (“Akamai did not meet [its] burden because it did not show that Limelight’s customers were acting as agents of or were contractually obligated to Limelight when performing the [infringing] steps. Thus, the district court properly granted [judgment as a matter of law] of noninfringement to Limelight.”).

94. Akamai Techs., Inc., 692 F.3d at 1306. It is important to emphasize that the Akamai II holding only applied to inducement infringement, not direct infringement. See Joanna Liebes, Akamai: A Cure for Medical Process Patent’s Prometheus Ailment?, 5 HASTINGS SCI. & TECH. L.J. 309, 339 (2013) (“[T]he [Akamai II] decision focused on whether an actor may be held liable for induced infringement if she has partially performed the method herself and induced another to commit the remaining steps or has simply induced other actors to collectively perform the steps without a single direct infringer.” (citing Akamai, 92 F.3d at 1306) (emphasis added)).
to this holding, the court also chose not to rule on the present state of direct infringement liability when the infringement is performed by multiple parties. The majority based their holding on extensive statutory analysis, legislative testimonies, and comparisons to criminal and tort law.

The majority’s first major decision in their opinion was to avoid revisiting the looming question of whether or not multiple entities that jointly perform all of the steps of a patented method can be found liable for direct infringement. Although the court did not officially rule on the issue facing direct infringement, it did take the time to outline the current law that makes up the doctrine. After presenting the standard of law, the majority opinion came to the conclusion that neither of the cases at hand relied on the doctrine of direct infringement, so they would not revisit the doctrine.

With direct infringement out of the way, the majority focused its attention

95. *Akamai Techs., Inc.*, 692 F.3d at 1307. While the primary en banc issue involved multiple parties jointly directly infringing a patent, the majority denied the opportunity to rule on the issue. See Part III.B (explaining that the majority in *Akamai II* did not believe that the case called for a ruling on the issue of multi-party direct infringement). But see Part III.C–D (summarizing both dissenting opinions, each which did speak on the issue of multi-party direct infringement).

96. See *Akamai Techs., Inc.*, 692 F.3d at 1314–15 (countering Judge Linn’s dissenting opinion by analyzing the language and intent behind § 271); id. at 1309–11 (referencing House of Representative Reports and quoting testimony by Judge Giles S. Rich during the enactment of the Patent Act of 1952 and shortly thereafter); id. at 1311–14 (comparing the doctrine of indirect infringement with the elements of liability and policy reasoning in the Federal Criminal Code and the Restatements of Torts).

97. See *Akamai Techs., Inc.*, 692 F.3d at 1307 (“We have no occasion at this time to revisit any of those principles regarding the law of divided infringement as it applies to liability for direct infringement under 35 U.S.C. § 271(a).”); Liebes, *supra* note 94, at 339 (“While many believed the Court would address the continued use of the single-entity rule [for direct infringement], the Court declined to do so.”) (citation omitted).

98. See *Akamai Techs., Inc.*, 692 F.3d at 1307 (“[F]or a party to be liable for direct patent infringement under 35 U.S.C. § 271(a), that party must commit all the acts necessary to infringe the patent, either personally or vicariously. . . . [T]he accused infringer must perform all the steps of the claimed method, either personally or through another acting under his direct or control. Direct infringement has not been extended to cases in which multiple independent parties perform the steps of the method claim.”); id. (“[D]irect infringement applies when the acts of infringement are committed by an agent of the accused infringer or a party acting pursuant to the accused infringer’s direct or control.”). As part of this overview, the majority does recognize the rules that had been established by *BMC* and *Muniauction* in regards to finding liability for direct infringement. See id. at 1307 (citing BMC’s “single-entity” rule and “control or direction” rule, as well as citing the support *Muniauction* provided for the rules when applied to direct infringement). It is important to recognize the difference between the application of the “single-entity” rule and “control or direction” rule in direct infringement liability as compared to that of indirect liability. This use of the rules is supported by precedent ranging back to even before the enactment of the Patent Act of 1952, and has largely been considered to be uncontroversial. See generally id. at 1315 (recognizing that the rule supported by *Dynacore*, that infringement is a requirement to prove inducement of infringement, is judicially “sound and uncontroversial” (citing Dynacore Holdings Corp. v. U.S. Philips Corp., 363 F.3d 1263, 1272 (Fed. Cir. 2004))); Joy Tech., Inc. v. Flakt, Inc., 6 F.3d 770, 774 (Fed. Cir. 1993) (“Liability for either active inducement of infringement or for contributory infringement is dependent upon the existence of direct infringement.”); Met-Coal Sys. Corp. v. Korners Unlimited, Inc., 803 F.3d 684, 687 (Fed. Cir. 1986) (“Absent direct infringement of the patent claims, there can be neither contributory infringement nor inducement of infringement.”).

99. *Akamai Techs., Inc.*, 692 F.3d at 1319, 1337. The dissenting judges take a different stance on this decision. While the two cases at hand may not entirely turn on the doctrine of direct infringement, both Judge Newman and Judge Linn recognize that the issue of joint direct infringement is flush in modern law. Therefore, both of the dissenting opinions choose to rule on the issue, regardless of the fact that it may not have affected the overall ruling of the cases. See Part III.C–D (discussing both Judge Newman and Judge Linn’s solutions to joint direct infringement and the reasoning for each).
on the present state of indirect infringement liability.\footnote{See Akamai Techs., Inc., 692 F.3d at 1307-09 (describing the current rules and law that is used to establish liability for indirect patent infringement under § 271(b)). See generally Mox, supra note 3, at part III, §§ 15:10–15:12 (describing the historical development of the doctrine of inducement infringement); Part II.C (outlining the evolution of indirect patent infringement to the point of the Akamai I and McKesson I cases).} It first recognized many of the main principles of the current law,\footnote{See Akamai Techs., Inc., 692 F.3d at 1308 (“Unlike direct infringement, induced infringement is not a strict liability tort; it requires that the accused inducer act with knowledge that the induced acts constitute patent infringement.” (citing Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011))); id. (“[T]his court has described the required intent as follows: ‘[I]nducement requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement.’” (quoting DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc)) (alteration in original)). Compare Akamai Techs., Inc., 692 F.3d at 1308 (“[I]nducement does not require that the induced party be an agent of the inducer or be acting under the inducer’s direct or control to such an extent that the induced party can be attributed to the inducer as a direct infringer.”), with Akamai Techs., Inc., 629 F.3d at 1319 (“[T]he performance of a method step may be attributed to an accused infringer when the relationship between the accused infringer and another party performing a method step is that of principal and agent, applying generally accepted principles of the law of agency . . . .”).} but then indicated a flaw in the conclusion held by the BMC court regarding the strict requirements of the “single-entity” rule.\footnote{See Akamai Techs., Inc., 692 F.3d at 1308–09 (claiming that although the BMC court correctly recognized that “(1) liability for induced infringement requires proof of direct infringement and (2) liability for direct infringement requires that a single party commit all the acts necessary to constitute infringement,” the rule that it established from its interpretation of these rules was incorrect). The majority stated that there was a key difference between proving that direct infringement has occurred and that one of the parties was the direct infringer. The majority’s description of this difference was both confusing and unclear, which likely weakened its reasoning against the previously established rules of BMC. See Akamai Techs., Inc., 692 F.3d at 1308–09 (“Requiring proof that there has been direct infringement as a predicate for induced infringement is not the same as requiring proof that a single party would be liable as a direct infringer.”); Patrick E. King, Timothy T. Lau, & Gautam V. Kene, Navigating the Shoals of Joint Infringement, Indirect Infringement, and Territoriality Doctrines: A Comparative Analysis of Chinese and American Patent Laws, 25 COLUM. J. ASIAN L. 275, 281–82 (2012) (“Overturining [BMC and Muntanian], a majority of the Federal Circuit sitting en banc drew a distinction between (i) liability for direct infringement under § 271(a) . . . and (ii) the act of direct infringement supporting a claim of inducement under § 271(b) . . . .”)). Furthermore, the majority identified the questionable allowance that a party who induces other entities to perform the steps of a patented method would be found liable, but the induced parties, even if they are shown to have the shared intent to infringe a known patent, avoid all liability.\footnote{Akamai Techs., Inc., 692 F.3d at 1309. The court stressed the policy in preventing parties from avoiding liability for indirect infringement simply by organizing the infringing steps to ensure that a single defendant did not commit every act. This same concern was one of the recognized consequences that the BMC court pointed out but decided to not take action on, and instead relied on patentees to draft better claims. Compare Akamai Techs., Inc., 692 F.3d at 1309 (“[T]here is no reason to immunize the inducer from liability for indirect infringement simply because the parties have structured their conduct so that no single defendant has committed all the acts necessary to give rise to liability for direct infringement.”), with BMC Res., Inc. v. Paymentech, L.P., 498 F.3d 1373, 1381 (Fed. Cir. 2007), overruled by Akamai, 692 F.3d 1301 (Fed. Cir. 2012) (“This court acknowledges that the standard requiring control or direction for a finding of join infringement may in some circumstances allow parties to enter in arm’s-length agreements to avoid liability.”).} By its reasoning, the majority essentially overrules the application of the “single-entity” rule in finding liability for indirect infringement.

The majority cites a number of cases, both from before the enactment of
the Patent Act of 1952, as well as afterwards, that lend support to its ruling.\textsuperscript{105} The majority opinion first distinguishes the holdings from \textit{Aro} from the cases at hand by relying on the fact that \textit{Aro I & II} focused entirely on a product patent infringement and contributory infringement, neither of which are at issue in \textit{Akamai} or \textit{McKesson}.\textsuperscript{106} The main case, which the court relied on in direct support of the theory that there can be liability for indirect infringement without the presence of liability for direct infringement was \textit{Fromson v. Advance Offset Plate, Inc.}\textsuperscript{107}

In support of their holding, the majority opinion relied heavily on the testimony and opinions of, now Judge, Giles S. Rich.\textsuperscript{108} Relying on the words of Mr. Rich, the court reasoned that, even in the absence of a single direct infringer, there should still be an available remedy for obvious indirect infringement.\textsuperscript{109} The majority further focused on the legislative intent during the enactment of the Patent Act of 1952.\textsuperscript{110} In addition to the legislative

\footnotesize{
\textsuperscript{105} Id. at 1315–18 (citing both cases that support the majority’s holding as well as distinguishing the cases that are brought by the dissenting opinions as inapplicable to the current cases). The majority began by recognizing the possible origins of the application of the “single-entity” rule to indirect infringement cases from the Court of Appeals for the Federal Circuit’s holding in \textit{Dynacore}. Dynacore Holdings Corp. v. U.S. Phillips Corp., 363 F.3d 1263, 1272 (Fed. Cir. 2004); see Akamai Techs., Inc., 692 F.3d at 1315 (distinguishing the holding that “indirect infringement can only arise in the presence of direct infringement” from Dynacore from the future proposition stated in \textit{BMC} which added the requirement that a single entity perform all of the steps in said infringement) (quoting Dynacore, 363 F.3d at 1272).

\textsuperscript{106} Akamai Techs., Inc., 692 F.3d at 1316 (claiming that the Aro court only found that when there was no direct infringement, there could be no contributory infringement; nothing is discussed about whether or not there can be inducement infringement when there is or is no actual infringing conduct by multiple parties) (citing Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 500 (1964)); see id. (distinguishing between the complications involving a product patent claim and those involved in a method patent claim specifically that in product claims, the party that “adds the final element of the combination” is considered to be the party that officially “makes” the product, and thus is always seen to be directly infringing).

\textsuperscript{107} Fromson v. Advance Offset Olate, Inc., 720 F.2d 1565, 1568 (Fed. Cir. 1983) (holding that the defendant did not perform all of the steps of the patented method, so there could not be direct infringement). Although it supported a form of the “single-entity” rule in its holding, it also held that even when there is no direct infringement, the defendant could still be liable for indirect infringement. See Akamai Techs., Inc., 692 F.3d at 1317 (claiming that although the Fromson court held that there could not be direct infringement liability, the defendant “could be liable for contributory infringement.”) (quoting Fromson, 720 F.2d at 1567–68).

\textsuperscript{108} Akamai Techs., Inc., 692 F.3d at 1309–11. Giles Rich, whom at the time was only an attorney, was considered to be one of the main drafters of the Patent Act of 1952 and also a key influence to the legislature in issues involving patents in general. See id. at 1310. See generally James F. Davis, Judge Giles S. Rich: His Life and Legacy Revisited, 2 LANDSLIDE: A.B.A. INTELL. PROP. L. 8 (Sept./Oct., 8–16 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideSept09_Davis.authcheck dam.pdf (describing Judge Giles S. Rich’s legal career and his influence on the field of patent law).

\textsuperscript{109} Akamai Techs., Inc., 692 F.3d at 1310. The majority specifically relied on an extensive statement by Judge Rich during the proposal of what would become the Patent Act of 1952. Id. (“Improvements in such arts as radio communication, television, etc., sometimes involve the new combinations of elements which in use are normally owned by different persons . . . . To describe such an invention in patent claims, it is necessary either to specify a new method which involves both transmitting and receiving, or a new combination of an element in the receiver and an element in the transmitter. The recent decisions of the Supreme Court [the cases targeted by the statutory changes] appear to make it impossible to enforce such patents in the usual case where a radio transmitter and a radio receiver are owned and operated by different persons, for, while there is obvious infringement of the patent, there is no direct infringer of the patent but only two contributory infringers,” (quoting Contributory Infringement of Patents: Hearings Before the Subcomm. on Patents, Trade-marks, and Copyrights of the H. Comm. on the Judiciary, 80th Cong. 5 (1948) (statement of G. Rich on behalf of the New York Patent Law Association)) (emphasis added).

\textsuperscript{110} The majority claimed that the Legislature aimed for liability under 271(b) to include parties that aid
reasoning behind the Patent Act of 1952, the majority also cites both
criminal—primarily Federal Criminal Code 18 U.S.C. § 2—and
tort principles—mainly associate liability and inducement—as support for its
holding.\(^{113}\)

Finally, the majority also bases its holding on its analysis and
interpretation of 35 U.S.C. § 271(a)–(b).\(^{114}\) The first conclusion that the court
comes to is that § 271(a) does not actually define the term “infringement,” but
instead establishes the type of conduct that would qualify as infringement.\(^{115}\)
Similarly, § 271(b) also does not define inducement infringement per se; it simply sets forth a different kind of conduct that would also constitute as infringement. Under this interpretation, the majority decides that neither subsection contains language that requires infringement under § 271(a) in order to find liability under § 271(b). The court also denies the legitimacy of the argument that 35 U.S.C. § 281 provides for this requirement as well.

Relying on this support and reasoning, the majority held that both cases, Akamai I and McKesson I, were incorrect in their findings and should be reversed and remanded under the newly established theory of induced infringement. Furthermore, by denouncing the application of the “single-entity” rule for indirect infringement, the majority technically overruled the

116. Akamai Techs., Inc., 692 F.3d at 1314. The majority’s extended interpretation of § 271 opens it up to further consequences which the majority may have not contemplated before coming to such a conclusion. E.g., King et al., supra note 102, at 290 (explaining the majority’s interpretation that § 271(b) only sets forth actions which constitute infringement and recognizing that this could mean that if an “actor in the United States induces others abroad to infringe a U.S. patent” then the inducer could argue that the “situs of the induced infringement is America” although all of the infringing acts occurred outside of the U.S.).

117. Akamai Techs., Inc., 692 F.3d at 1314. In order to further support their theory, the majority analyzes the other subsections of § 271 as also free of any specific wording that would require liability under § 271(a) before finding liability under that subsection. See, e.g., id. at 1314 (“[S]ection 271(e)(2) makes it an ‘act of infringement’ to submit an application to the FDA for a drug, or the use of a drug, claimed in a patent; that use of the term ‘infringement’ is not in any way tied to the use of the term ‘infringes’ in section 271(a).” (citing 35 U.S.C. § 271(e)(2))); id. (“[S]ection 271(f) provides that a party shall be ‘liable as an infringer’ if it supplies in the United States a substantial portion of the components of a patented invention in such manner as to induce a combination of those components outside the United States. Again, the statutory term ‘infringer’ does not advert to the requirements of section 271(a) . . . .” (citing 35 U.S.C. § 271(f))); id. (“[S]ection 271(g) provides that a person who imports into the United States a product made by a process patented in the United States ‘shall be liable as an infringer.’ That provision likewise does not require that the process used to make the imported product be ‘infringing’ in a way that would satisfy section 271(a), such as being performed by a single entity.” (citing 35 U.S.C. § 271(g))).

118. 35 U.S.C. § 281 (2012). The majority states that while § 281 allows a patentee a remedy for infringement through civil action, it would not apply to the conduct that constitutes infringement under § 271. Instead, the majority says that § 281 only applies to the sections involved with remedies for infringement. See Akamai Techs., Inc., 692 F.3d at 1314 (claiming that § 281 cannot be read as to provide a remedy through civil action for “any act of infringement”); cf. id. at 1314–15 (analyzing the history of the codification of both §§ 271 and 281, and claiming that the original subsection that would eventually become 271 stated that a party that performs an action under the section “shall be liable to a civil action for infringement,” which points to the reasoning that it would not necessarily fall under § 281); id. at 1315 (“There is certainly no suggestion in the legislative history (or in subsequent case law) that section 281 was meant to restrict the scope of liability for induced infringement under section 271(b) to cases in which a single entity would be liable for direct infringement.”).

119. Akamai Techs., Inc., 692 F.3d at 1319. Although this case had the prime potential for a Supreme Court ruling, it was denied the opportunity at this point in the procedural history. Akamai Techs., Inc., 692 F.3d, cert. denied, 133 S. Ct. 1520 (2013). But see Wu, supra note 12, at 557 n.220 (“In June 2013, the U.S. Supreme Court asked the U.S. Solicitor General to provide views on the Akamai II joint infringement case.”). This could raise the possibility that the Supreme Court denied hearing the cases as a way of deferring to Congress in making such a significant decision on the very statutes which it crafted it the first place. However, Congress had their opportunity to clarify the en banc issue with the round of amendments to patent law in the American Invents Act of 2011, but the legislature decided instead to not, once again, provide the correct interpretation of the statute that they created over fifty years ago. Leahy-Smith Am. Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011) (to be codified in scattered sections of 28 and 35 U.S.C.) (omitting any mention of indirect patent infringement or whether direct infringement is necessary to prove liability for it). See Robinson, supra note 11, at 102 (“Unfortunately, Congress missed an excellent opportunity to clarify the law. Specifically, the America Invents Act did nothing to resolve the issues raised in Akamai I and McKesson.”).
holdings in both BMC and Muniauction.\textsuperscript{120}

C. Judge Linn’s Dissenting Opinion

The dissenting opinion written by Judge Linn, and joined by Judges Dyk, Prost, and O’Malley, took an essentially opposite stance from the majority opinion towards the ruling in Akamai I and McKesson I and the rules that both involved.\textsuperscript{121} In support of his opinion, Judge Linn challenges the majority’s interpretations of § 271, the cases and precedent set forth by the Federal Circuit and other courts, the Legislative intent involved in the enactment of the Patent Act of 1952, and the comparisons with criminal and tort law.\textsuperscript{122}

Judge Linn begins his dissent by approaching the issue of whether or not direct infringement is necessarily a requirement for the finding of indirect infringement liability.\textsuperscript{123} In contrast to the majority’s opinion, Judge Linn claims that § 271(a) officially defines the act of infringement and is therefore applicable to the rest of § 271, including subsection (b).\textsuperscript{124} Furthermore, Judge Linn implies that Congress intended to limit the scope of infringement to those actions that directly fall under § 271(b)–(c), and if they found it necessary to add an additional path of liability, then they would amend the statute themselves, not rely on the judicial system to interfere.\textsuperscript{125} Judge Linn specifies

\textsuperscript{120} Akamai Techs., Inc., 692 F.3d at 1319. Many observers have taken the stance that the “inducement-only” rule is a significantly more flexible standard as compared to the previous “single-entity” rule. See, e.g., King et al., supra note 102, at 282 (“By removing the single direct infringer requirement from the inducement analysis, the Federal Circuit relaxed the test for infringement for inducement claims compared to direct infringement.”); Wu, supra note 12, at 542 (“The Akamai II holding provide a more relaxed theory of induced infringement that expands a patentee-plaintiff’s ability to prevail on such claims even if the accused infringer did not perform all the steps of a claimed method invention by itself.”).

\textsuperscript{121} Akamai Techs., Inc., 692 F.3d at 1337 (Linn, J., dissenting). As compared to the majority’s approach of overruling previous standards of law and creating new ones, Linn instead advocates for official recognition that direct infringement is a requirement for indirect infringement and that the “single-entity” rule from BMC should be upheld in its previous state. Id.

\textsuperscript{122} Akamai Techs., Inc., 692 F.3d at 1337–38 (Linn, J., dissenting). The reasoning cited and applied by Judge Linn was very similar to that in BMC and Muniauction. While there is more analysis involving the statutory history and precedent in his dissent in Akamai II, the opinion still falts for many of the same reasons as the BMC opinion. See infra Part IV.C (discussing the issues in the reasoning applied by Judge Linn in Akamai II).

\textsuperscript{123} Akamai Techs., Inc., 692 F.3d at 1338 (Linn, J., dissenting); see id. at 1337 (Linn, J., dissenting) (“Divorc ing liability under § 271(a) from liability under § 271(b) is unsupported by the statute, subverts the statutory scheme, and ignores binding Supreme Court precedent.”).

\textsuperscript{124} E.g., id. at 1338 (Linn, J., dissenting) (recognizing that the tort of patent infringement came from the enactment of § 271, and thus the language of the statute defines the act and the circumstances in which liability for it can be found); 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373, 1379 (Fed. Cir. 1998) (“The tort of infringement . . . exists solely by virtue of federal statute.”); H.R. Rep. No. 82–1923, at 9 (1952) (“Section 271, paragraph (a), is a declaration of what constitutes infringement.”) (emphasis added).

\textsuperscript{125} Akamai Techs., Inc., 692 F.3d at 1337 (Linn, J., dissenting) (“Congress carefully crafted subsections (b) and (c) to expressly define the only ways in which individuals not completing an infringing act under § 271(a) could nevertheless be liable . . . .”). In its enactment of the Patent Act of 1952, Congress specifically voiced their animosity towards the confusion that had been created by the judicial system in regards to prosecuting liability for patent infringement, and openly voiced their strong determination that the judicial system would never be able to muddle the doctrines of patent infringement again after the enactment of § 271. See id. at 1343 (Linn, J., dissenting) (“Congress enacted § 271 (e) and (f) in 1984 and § 271(g) in 1987 to satisfy specific policy goals . . . . When Congress intended to cover acts not encompassed within the traditional definition of infringement, it knew how to create an alternative definition thereof.”). Congress has
that the interpretation of § 271 should be a straightforward task of looking at the actual language instead of attempting to bend the words to match a new standard.

To further support his view on the meaning behind § 271, Judge Linn delves deeper into the intent of Congress during the crafting of § 271(a) and (b)’s language. Linn claims that the meaning of the word “infringement” is consistent throughout § 271, which would favor a reading that subsections (b) and (c) are premised on the underlying “infringement” established in § 271(a). Furthermore, Linn agrees with the reading by the courts in BMC and recognized the need for new additions to the statute several times over the past decades, and has taken the duty upon themselves to amend § 271 accordingly. See, e.g., id. (explaining that Congress’s passing of § 271(f) was a response to the Supreme Court’s decision in DeepSouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972) and was based on the intention to be a “legislative solution to close a loophole in patent law”) (quoting H.R. REP. NO. 1984, reprinted in 1984 U.S.C.C.A.N. 5627, 5828); H.R. REP. NO. 100–60, at 6 (1987) (“[T]here was no policy justification for encouraging such . . . violation of United States intellectual property rights. The courts cannot solve this defect. The Congress can. The compelling nature of this policy deficiency has been evident to leaders in both the legislative and executive branches.”).

126. E.g., Akamai Techs., Inc., 692 F.3d at 1339 (Linn, J., dissenting) (“Reading subsection (b) in light of subsection (a) is a straightforward exercise. Section 271(a) defines infringement, and, in turn, § 271(b) and (c) establish indirect infringement liability for one who ‘actively induces infringement’ or sells a component part ‘especially adapted for use in an infringement’,” (quoting 35 U.S.C. § 271(a)–(c) (2012)) (emphasis in original)). Judge Linn also introduces the theories of positive and negative articulation when interpreting § 271, and relies on these concepts to support both the “single-entity” rule and the requirement of direct infringement for indirect infringement liability. See id. (“A person who practices the entire invention is an infringer, liable under subsection (a); a person who actively induces such practice is an inducer, liable under subsection (b) (‘positive articulation’). The negative inference is equally straightforward: A person who does not practice the entire invention is not liable under subsection (a); a person who actively induces such partial practice is not liable under subsection (b) (‘negative articulation’”). Judge Linn claims that the majority did not properly interpret the statute and instead attempted to rewrite the statute in order to create some type of support for their new rules. See id. at 1339 (Linn, J., dissenting) (“The majority attempts to . . . essentially rewrite subsection (b) so it reads: ‘Whoever actively induces infringement of [or induces two or more separate parties to take actions that, had they been performed by one person, would infringe] a patent shall be liable as an infringer.’”) (emphasis in original).

127. Akamai Techs., Inc., 692 F.3d at 1339 (Linn, J., dissenting); see S. REP. NO. 82–1979, at 9 (1952) (“§ 271(a) is a declaration of what constitutes infringement in the present statute.”). Overall, Judge Linn’s main concern with the majority’s opinion is that he believes the judicial system is overstepping its bounds in attempting to change the well-established rules of indirect patent infringement, solely on the basis that it does not agree with the wording and policy that Congress possessed when enacting the statute. See Akamai Techs., Inc., 692 F.3d at 1342 (Linn, J., dissenting) (“Broadening the doctrine of inducement, such that no predicate act of direct infringement is required, is a sweeping change to the nation’s patent policy that is not for this court to make.”). Even the Supreme Court has thoroughly recognized the habit that the judicial system has to attempt to alter the statutory law by interpreting the language of the legislature in order to fit their doctrine; however, the Court has recognized that this issue exists and has taken steps in previous cases to ensure that the judiciary is no longer stepping into the role of policymaker. E.g., Mayo Collaborative Servs. v. Prometheus, 132 S. Ct. 1289, 1305 (2012) (“We must hesitate before departing from established general legal rules lest a new protective rule that seems to suit the needs of one field produce unforeseen results in another. And we must recognize the role of Congress in crafting more finely tailored rules when necessary.”).

128. See Akamai Techs., Inc., 692 F.3d at 1340 (Linn, J., dissenting) (warranting that the word “infringement” in § 271(b) and (c) has the same meaning, only in verb form, in § 271(a)). Linn further cites the Supreme Court’s own language in various holdings to support this interpretation. See, e.g., Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2004–05 (2012) (“[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”) (internal quotations omitted); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007) (“A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning . . . . That maxim is doubly appropriate [when the statutory provisions were] inserted . . . at the same time.”). Finally, Judge Linn even advocates a different analysis of the Aro holding than presented by the majority’s opinion. Akamai Techs., Inc., 692 F.3d at 1340 (Linn, J., dissenting)
Muniauction of the term “whoever” in § 271(a) to refer to a single entity, and not, as the majority claims, referring to any number of parties. Judge Linn’s dissenting opinion swiftly counters the majority’s confidence in Judge Giles S. Rich’s testimony, while it also attempts to discredit the majority’s finding of support in the language of § 281.

Finally, in contrast to the majority opinion, Judge Linn’s dissent finds the comparison of criminal and tort law unremarkable; both in the application of 18 U.S.C. § 2, and the interpretation of the tort of inducement. Instead of

(stating that the Aro court, when using the term direct infringement, was referring to “direct infringement under §271(a)”; therefore, the Aro court’s holding can be summarized as saying that when there is no direct infringement under §271(a), there cannot be liability for indirect infringement) (quoting Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 341 (1961)).

129. Akamai Techs., Inc., 692 F.3d at 1347–48 (Linn, J., dissenting). Judge Linn’s dissent lays out two primary reasons for the limited reading of the term. First, the statute’s language, when read simply and straightforwardly, does not support the plural usage. See id. at 1348 (showing that if the term “whoever” includes the plural meaning, then the statute would state the blatantly obvious rule that more than one party can be “independently liable for direct patent infringement if each entity practices every element,” which is simply saying that multiple entities can all be liable for direct infringement when each satisfies the “single-entity” rule by themselves). Second, the context of § 271(b) and (c) are so specifically defined that it can only be read that § 271(a), by not including joint infringement, would be just as specific. See id. at 1341 (Linn, J., dissenting) (discussing that it is unclear whether Judge Rich’s comments were in reference to the relevant inducement infringement or to contributory infringement, which would not be applicable in the present case); see also id. (“[T]he Supreme Court has repeatedly admonished that Congressional hearing testimony, not from a member of Congress, is not entitled to any weight or significance in statutory interpretation.”); Kelly v. Robinson, 479 U.S. 36, 51 (1986) (stating that, even when a certain testimony refers to a specific interpretation, if it is not “made by a Member of Congress” ... then the courts should “decline to accord any significance” to it); McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 494 (1931) (“For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute.”).

130. See Akamai Techs., Inc., 692 F.3d at 1341–42 (Linn, J., dissenting) (criticizing the majority’s reading of § 281 to only refer to the statutory language involving remedies for patent infringement instead of applying to the entire doctrine of patent infringement, including § 271). The actual language of § 281 is incredibly basic. See 35 U.S.C. § 281 (2012) (“A patentee shall have remedy by civil action for infringement of his patent.”). This simplicity opens the statute up for remarkably broad interpretations and applications. See, e.g., Jacob H. Rooksby, Innovation and Litigation: Tensions between Universities and Patents and How to Fix Them, 15 YALE J. L. & TECH. 312, 368–69 (2012) (proposing a solution to university-asserted patent issues by adding specific language to § 281).

132. Judge Linn claims that the majority’s parallel application of 18 U.S.C. § 2(b) with § 271(b) is incorrect, because the proper comparison should be between § 2(a) and § 271(b) instead. Akamai Techs., Inc., 692 F.3d at 1344 (Linn, J., dissenting); see 18 U.S.C. § 2(a) (2012) (provides that any party who “aids, abets, counsels, commands, induces or procures [the] commission of a crime, is punishable as a principal.”). If one applies the reasoning established in § 2(a), then the principal must be proven to be guilty in order for the defendant to be charged with aiding and abetting; thus, if this same reasoning is used through 271(b), then it would be that liability for direct infringement would have to be found before any party could be found liable for indirect infringement. See Akamai Techs., Inc., 692 F.3d at 1344–45 (Linn, J., dissenting) (“Like § 2(a), which requires an actual ‘offense,’ § 271(b) requires an actual ‘infringement.’”). Judge Linn also goes into detail in describing the reasoning for enacting § 2(b) as a primary way of handling situations that did not qualify as criminally aiding and abetting, specifically when there was no intent present. See United States v. Concepcion, 983 F.2d 369, 383–84 (2d Cir. 1992) (describing that Congress added § 2(b) as a way to reach primary actors that did not have “the ‘essential criminal intent’” in which to “secure a conviction on a theory of aiding and abetting in violation of subsection (a)” (citations omitted). Linn further identifies that the language of § 2(b) on which the majority relies would allow liability without all of the steps of the act being completed, the opposite of the requirement of patent infringement. Akamai Techs., Inc., 692 F.3d at 1345 (Linn, J., dissenting) (“When a person induces one or more entities to perform acts that do not constitute the statutorily defined act of patent infringement . . . that person does not induce any prohibited conduct under the statute and thus cannot be said to aid and abet any prohibited conduct.”); see U.S. v. Gleason, 616 F.2d 2, 20 (2d Cir. 1979) (“Under 18 U.S.C. § 2(b) a person who causes an innocent party to commit an act which, if
tort and criminal law, Judge Linn advocates for the continued use of the
principles of vicarious liability, both in its own application as well as
support for the “single-entity” rule. Citing the BMC rule of vicarious
liability, Linn explains that the limited scope of infringement under § 271
actually provides an answer to the loophole that was mentioned by the court in
BMC, and thus should remain the standard. For the reasons explained below, Judge Linn and the joining dissenting judges would therefore affirm both the district courts’ holdings in Akamai I and McKesson I as valid applications of the present standard under BMC and

done with the requisite intent, would constitute an offense may be found guilty as a principal . . . .”

133. Judge Linn cites the Restatement (First) of Torts as support for the requirement of actual
infringement for a party to found liable for inducing said infringement. See Akamai Techs., Inc., 692 F.3d at
1346–47 (Linn, J., dissenting) (claiming that there is no tort for “inducing an act that is something less than an
infringement,” so direct infringement under § 271(a), which is the statutorily definition of infringement, must
be proven before inducement can exist). Linn continues this reasoning by pairing together the concepts of
breach of direct duty and direct infringement. See, e.g., id. (“[T]he defendant’s breach of a direct duty to the
plaintiffs: . . . the cases are thus direct liability cases— analogous to direct or vicarious liability situations in
patent law context under § 271(a)— and are not dependent upon the commission of a separate statutorily
defined tortious act by some innocent, or otherwise immune party.” (citing Pelster v. Ray, 987 F.2d 514, 523–
24 (8th Cir. 1993)) (emphasis in original).

134. Akamai Techs., Inc., 692 F.3d at 1348 (Linn, J., dissenting) (stating that the applicability of vicarious
liability in patent infringement cases is far from unique. However, simply because this approach is
an option does not provide valid reasoning for abandoning any statutory solution to the issues of joint
infringement); e.g., Alice Juwon Ahn, Finding Vicarious Liability in U.S. Patent Law: The “Control or
Direction” Standard, 24 BERKELEY TECH. L.J. 149, 171–76 (2009) (proposing an extended application of
vicarious liability to infringement cases with multiple parties performing the infringing steps).

135. Judge Linn’s opinion sets forth that instead of overruling the stable common law from BMC and
Muniauction to try to reach multiple entity actions, the courts should rely on the application of the prominent
documentary of vicarious liability. Akamai Techs., Inc., 692 F.3d at 1349 (Linn, J., dissenting). Judge Linn does
take a surprising stand in his dissent that the Court of Appeals for the Federal Circuit’s holding in Golden
Hour Data Systems, Inc. v. emsCharts, Inc. should be reversed because, although the court in the case felt that
there was insufficient proof of control or direct, the parties would have satisfied the “test for joint enterprise
based on common purpose and an equal right of mutual control.” Akamai Techs., Inc., 692 F.3d at 1348 (Linn,
J., dissenting) (citing Golden Hour Data Sys., Inc. v. emsCharts, Inc., 614 F.3d 1367 (Fed. Cir. 2010)).

136. See Akamai Techs., Inc., 692 F.3d at 1348 (Linn, J., dissenting) (“Applying traditional principles of
vicarious liability to direct infringement under § 271(a) protects patentees from a situation where a party
attempts to ‘avoid infringement . . . simply by contracting out steps of a patented process to another entity. . . . It
would be unfair indeed for the mastermind in such situations to escape liability.’” (quoting BMC Res., Inc.,
v. Paymontech, L.P., 498 F.3d 1373, 1381 (Fed. Cir. 2007)); see also, Akamai Techs., Inc., 692 F.3d at 1350
(agreeing with the BMC court that “poorly-drafted patents” is not be a valid reason to attempt to “overrule
decades of precedent”); see, e.g., id. at 1348 (Linn, J., dissenting) (referencing that direct infringement can
exist when one party’s action are “legally imputed” to another party in a manner that it can be said that a single
entity completed each step of the patented claim) (citing BMC, 498 F.3d at 1380–81). In addition to the
court’s opinion in BMC, the dissent also cites the Restatement (Second) of Torts, the Restatement (Third)
of Agency, and also the rules involving joint enterprises acting together to infringe a patent. See id. at 1348
(Linn, J., dissenting) (“For harm resulting to a third person from the tortious conduct of another, one is subject
to liability if he . . . orders or induces the conduct . . . or [or] controls, or has a duty to use care to control, the
conduct of the other . . . and fails to exercise care in the control . . . .” (quoting RESTATEMENT (SECOND) OF
TORTS § 877 (1979))) (modification in original); see also id. at 1348 (Linn, J., dissenting) (quoting
RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)) (“Agency is the fiduciary relationship that arises when one
person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s
behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”); id.
at 1349 (Linn, J., dissenting) (“[A]ny one of several persons engaged in a joint enterprise, such as to make
each member of the group responsible for physical harm to other persons caused by the negligence of any
member, is barred from recovery against such other persons by the negligence of any member of the group.”
(quoting RESTATEMENT (SECOND) OF TORTS § 491 (1965)).)
D. Judge Newman’s Dissenting Opinion

The final opinion was written by Judge Newman and, although it agreed with certain elements of Judge Linn’s approach, it generally separates itself from the other two opinions by presenting a different rule to be applied in cases of indirect patent infringement. Judge Newman bases her contention with the creation of the “inducement-only” rule on the statutory interpretations of the majority, the denouncement of direct infringement as a prerequisite for indirect infringement, and the possible consequences of the holding.

Judge Newman’s opinion gets directly to the primary issue of the rehearing by discrediting the methodology that the majority uses in coming to their conclusion involving the establishment of the “inducement-only” rule. Judge Newman claims that neither the “single-entity” rule nor the new rule of the majority opinion provides the stability and efficiency that is required to answer the issue which has been looming in the field of patent infringement since the enactment of the Patent Act of 1952: can direct infringement exist when multiple parties jointly perform all of the infringing steps.

137. Akamai Techs., Inc., 692 F.3d at 1350–51 (Linn, J., dissenting). The affirmation the prior ruling would also solidify the holding that the physician-patient relationship does not satisfy the “control or direction” standard of Muniauction and thus would not qualify for attribution of liability. See McKesson Tech., Inc. v. Epic Sys. Corp., 98 U.S.P.Q.2d (BNA) 1281, 1284 (Fed. Cir. 2011) (applying the same test as Muniauction and concluding that the physician-patient relationship was not an agency relationship or contractual obligation).

138. Akamai Techs., Inc., 692 F.3d at 1319–37 (Newman, J., dissenting) (showing that many of the issues which Judge Newman discusses in her dissenting opinion mirror those from her scathing dissent in McKesson I). E.g., McKesson Tech., Inc., 98 U.S.P.Q.2d (BNA) at 1286–90 (contesting the continual affirmation of BMC and Muniauction and claiming that the “single-entity” rule is incorrect and should be eliminated).

139. See Akamai Techs., Inc., 692 F.3d at 1322–25 (Newman, J., dissenting) (challenging the statutory readings of the majority opinion); see also id. at 1326–31 (claiming that direct infringement should always be a requirement in order to find indirect infringement liability); see also id. at 1330–33 (recognizing the issues that will arise with infringement remedies and further abuse of the joint infringement system).

140. Id. at 1321 (Newman, J., dissenting). Judge Newman points out that although the majority states that it overrules BMC and Muniauction, it still applies much of the same logic directly from those two cases in arguing their theory. Furthermore, by the end of their opinion, it has become clear that BMC and Muniauction are less overruled completely, and more of only overruled to the extent that the majority can then create their “inducement only” rule. See id. at 1321 (recognizing that the majority opinion only officially overrules a single sentence from the BMC opinion and actually cites BMC as precedent in their overruling of BMC and Muniauction).

141. See id. at 1321 (Newman, J., dissenting) (“It is apparent that his jurisprudence is in need of correction, clarification, and consistency, for neither the single-entity rule nor the majority’s newly minted inducement-only rule is in accord with the infringement statute, or with any reasonable infringement policy.”); see, e.g., id. at 1348–50 (discussing the development and issues of joint patent infringement). Newman also warns that, although there have not been any major problems resulting from the confusion emitting from joint infringement, with the ever-advancing scope of technology and industrial development, it is only a matter of time before potentially serious consequences result from the disagreement of the judicial law. Id. at 1321 (Newman, J., dissenting). While Judge Newman’s view on this may seem a bit over dramatic, there is a legitimate truth behind the continuous risk that a serious controversy or mishap will result from the fray that has become of the law involving liability for direct and indirect patent infringement. This dire need for consistency is one of the primary reasons that it is likely that the Supreme Court will eventually have to handle the problem, and finally attempt to bring order to a precedent that has been primarily established by the Court of Appeals for the Federal Circuit. However, obviously, Akamai II will not be the case which will bring this
In the process of establishing her own proposal, Judge Newman challenges the legitimacy of the two rules that have been adapted by the majority and Judge Linn.\(^{142}\) Newman first questions the “single-entity” rule’s interpretation of language of § 271(a), specifically in regards to the term “whoever.”\(^{143}\) Newman cites both Supreme Court precedent and other U.S. code provisions that include the use of the term “whoever” in attempting to show that the term refers to both single and multiple parties.\(^{144}\) Judge Newman focuses on this basis in claiming that direct infringement should be applicable no matter how many parties are taking part in the infringement.\(^{145}\)

order to the field of patent law, at least not on this issue. See generally id. (noting the lack of decision by the Supreme Court).

142. See Akamai Techs., Inc., 692 F.3d at 1322–33 (Newman, J., dissenting) (claiming that both the “single-entity” rule and the “inducement-only” rule fall short in providing a sustainable system for prosecuting joint patent infringement). For further analysis on the inapplicability of both the “single-entity” and “inducement-only” rules, see infra Parts IV.B–C (describing the flaws surrounding the two rules in modern patent law).

143. Id. at 1322–24 (Newman, J., dissenting). According to Judge Newman, the term “whoever” represents both the singular and plural when addressing the parties that may be held liable for direct infringement. See 35 U.S.C. § 271(a) (2012) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States any patented invention during the term of the patent therefor, infringes the patent.”) (emphasis added); see also Akamai Techs., Inc., 692 F.3d at 1322 (Newman, J., dissenting) (“By statutory canon the word ‘whoever’ embraces the singular and plural.”).

144. See id. at 1330–33 (Newman, J., dissenting) (“The usage ‘whoever’ appears not only in § 271 of Title 35, but in §§ 101, 161, and 171 in referring to inventors without distinguishing between singular and plural.”); see, e.g., 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties or things; . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .”); see also Barr v. United States, 324 U.S. 83, 91 (1945) (applying 1 U.S.C. § 1 to terms involving tariff acts, and affirming the rule that a term importing a singular number can be extended to include several persons or things); see also United States v. Oregon, 164 U.S. 526, 541 (1896) (“And the general rule is that ‘words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular’ . . .”).

145. See id. at 1330–33 (Newman, J., dissenting). In order to reach this conclusion, Judge Newman cites both legislative hearings and court opinions in showing the focus of infringement is that the steps of the claim are performed without permission, not that a certain entity performs each and every step by themselves. Mowry v. Whitney, 81 U.S. 620, 652 (1871) (“The exclusive use of [a patent] singly is not secured to him. What is secured is their use when arranged in the process. Unless one of them is employed in marking up the process, and as an element of it, the patentee cannot prevent others from using it.”). Judge Newman goes further with this reasoning by elaborating on the relationship of 35 U.S.C. §§ 154 and 271(a). See 35 U.S.C. § 154(a)(1) (2006) (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude other from making, using, offering for sale, or selling the invention . . .”); see, e.g., Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 522 (1972) (“Infringement is defined by 35 U.S.C. § 271 in terms that follow those of § 154 . . . [§ 154 is] the keystone provision of the patent code.”). See generally Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 29 (1997)
Judge Newman further disputes the application of the “single-entity” and “direction or control” rules by questioning the Akamai I reasoning, claiming that the Akamai I holding had no support from precedent. Finally, relying on the reasoning presented below, Judge Newman proposes an abandonment of the “single-entity” rule and thus a return to the basic principle that infringement occurs when all of the steps of a method are completed, regardless of how many parties participate in the infringement.

In the next section of her dissent, Judge Newman contests the reasoning and applicability of the majority’s newly adopted “inducement-only” rule. Claiming that the majority has completely misinterpreted the main issue before the court, Judge Newman takes the opportunity to speak on that issue and

(applying the doctrine of equivalents, and thus affirming that every step of a patented method must be performed in order for infringement to occur; Akamai Techs., Inc., 692 F.3d at 1322–23 (Newman, J., dissenting) (“Until the rulings in BMC Resources and Muniauction, it was not disputed that when a claimed method is performed without authorization, the claim is infringed.”)).

146. Akamai Techs., Inc., 692 F.3d at 1325 (Newman, J., dissenting). Judge Newman further discredits this application of agency law as being inconsistent in finding liability. She provides examples of copyright infringement to show that agency relationships are a form of attribution, which would be directly comparable to vicarious liability. This would mean that a party that can be deemed as the “respondent superior” would be responsible and liable for any act of infringement which his agents commit. Therefore, she concluded that a party that could be found liable for joint infringement under agency law should also be found to be liable under the principle of vicarious liability. See A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001) (“Vicarious liability is an ‘outgrowth’ of respondent superior . . . .” (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996))); see also RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (2006) (explaining that agency is a form of attribution, which would consist of the “respondent superior”).

147. Newman cites several other cases that also attempted to create new aspects to the “single-entity” rule, but have resulted in continual confusion instead. E.g., Centillion Data Sys., L.L.C. v. Qwest Comm. Int’l, Inc., 631 F.3d 1279, 1285 (Fed. Cir. 2011) (holding that there could be liability for direct infringement of a multi-step system even when the accused infringer did not perform nor have control or direction over the “back-end processing”); Univis USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1309 (Fed. Cir. 2011) (“[O]ther parties are necessary to complete the environment in which the claimed element functions does not necessarily divide the infringement between the necessary parties.”). But see Golden Hour Data Sys., Inc. v. emsCharts, Inc., 614 F.3d 1367, 1371 (Fed. Cir. 2010) (en banc) (holding that there was no direct infringement when two entities that “formed a strategic partnership, enabled their two programs to work together, and collaborated to see the two programs as a unit” and together performed all of the claimed steps of the patent method). Judge Newman suggests that the strategy the BMC court recommends, and that Judge Linn supports, of avoiding all of the issues raised by the “single-entity” rule by simply demanding complex patent claims is unrealistic. See Akamai Techs., Inc., 692 F.3d at 1325 (Newman, J., dissenting) (“I do not discourage ingenuity, but the presence or absence of infringement should not depend on cleverness or luck to satisfy a malfeasable single-entity rule.”).

148. Akamai Techs., Inc., 692 F.3d at 1326 (Newman, J., dissenting). Judge Linn directly disputes Judge Newman’s proposal by stating that it would cause innocent parties to be found liable for infringement and would eventually remove the need for § 271(b) and (c). See id. at 1350 (Linn, J., dissenting) (providing reasons that Judge Newman’s joint liability strategy is flawed and inappropriate).

149. Id. at 1326–33 (Newman, J., dissenting). Newman begins her analysis of the “inducement-only” rule by clearly stating her frustration with the majority for not only avoiding the primary issue which was the sole reason for the en banc hearing, but also for abandoning precedent, both judicial and legislative, in their justification for the establishment of their new rule. See id. at 1307 (Newman, J., dissenting) (“[T]he majority discards decades of precedent, refuses our en banc responsibility, and states that ‘we have no occasion at this time to revisit any of those principle regarding the law of divided infringement as it applies to liability for direct infringement.’” (quoting id. at 1307)).

150. See id. at 1327 (Newman, J., dissenting) (“The majority opinion states that ‘the problem presented by the cases before us [is] whether liability should extend a party who induces the commission of infringing conduct.’ That is not the problem presented. Liability for inducement is established by statute. The problem before the court is not whether an inducer, properly defined, is liable for infringement; the problem is whether a method patent is infringed when more than one entity performs the claimed steps of the method.” (quoting
propose that direct infringement is a requirement in order to find liability for indirect infringement.\textsuperscript{151}

Newman begins her criticism of the majority’s “inducement-only” rule by first focusing on the legislative testimony that the majority relies on, both that of G.S. Rich as well as the actual Congress members during the enactment of the Patent Act of 1952.\textsuperscript{152} In contrast to Judge Linn’s dissenting opinion, which aims to discredit the legitimacy of the Mr. Rich’s testimony,\textsuperscript{153} Judge Newman argues that the majority misinterpreted Mr. Rich’s statements, and that the testimony does not actually support an “inducement-only” rule.\textsuperscript{154}

\textsuperscript{151} The reference to the case Akamai Techs., Inc., 692 F.3d at 1325 (Newman, J., dissenting). As opposed to Judge Linn’s support for this same proposal, Judge Newman does not rely on historically distant case precedent, but instead cites several cases that apply the requirement of direct infringement in different manners, not just simple infringement. See, e.g., NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1318 (Fed. Cir. 2005) (holding that there is no liability for inducement infringement when the component is located in Canada, because direct infringement requires that all steps be performed in the United States, and without direct infringement, there can be no indirect infringement liability); Joy Tech., Inc. v. Flakt, Inc., 6 F.3d 770, 774 (Fed. Cir. 1993) (“Liability for either active inducement of infringement or for contributory infringement is dependent upon the existence of direct infringement.”); Everpure, Inc. v. Cuno, Inc., 875 F.2d 300, 302 (Fed. Cir. 1989) (“There can be neither contributory nor inducement infringement when, because of the permissible repair doctrine, there has been no direct infringement.”).

\textsuperscript{152} Akamai Techs., Inc., 692 F.3d at 1329–30 (Newman, J., dissenting). It is important to recognize that the majority only cites testimony from members of Congress when discussing the split of contributory infringement into § 271(b) and (c). The only legislative intent which it cites in support of the “inducement-only” rule is that by Mr. Rich, an attorney at the time. Id. at 1310–11.

\textsuperscript{153} See supra text accompanying note 130 (claiming that G.S. Rich’s testimony should not be given any influence when interpreting 35 U.S.C. § 271 because he was not an actual member of Congress). Judge Linn is justified in criticizing the majority’s reliance on the testimony from a party outside of Congress. When legislation involving patents is proposed, the number of outside parties that attempt to lobby their influence onto the lawmakers is staggering. While Mr. Rich was historically a more legitimate source of reform, the judiciary must trust that the actual elected officials in Congress will perform their duties adequately. This wrestle of influences in law creation continues in patent legislation to this day. E.g., Jim Abrams, Congress Takes Up Major Change in Patent Law, WASH. POST, (Feb. 28, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/28/AR2011022800851.html (“Congress has been trying for well over a decade to rewrite patent law, only to be thwarted by the many interested parties—multinational corporations and small-scale inventors, pharmaceuticals and Silicon Valley companies—pulling in different directions.”).

\textsuperscript{154} See Akamai Techs., Inc., 692 F.3d at 1329 (Newman, J., dissenting) (“Mr. Rich never proposed the conditions of induced infringement that the court now propounds.”); e.g., Patent Law Codification and Revision: Hearing on H.R. 3760 Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 82nd Cong. 151 (1951) (statement of G.S. Rich) (“Whererever there is contributory infringement there is somewhere something called direct infringement, and to that direct infringement someone has contributed.”); Contributory Infringement: Hearing on H.R. 3866 Before Subcomm. No. 4 of the H. Comm. On the Judiciary, 81st Cong. 67 (1949) (statement of G.S. Rich) (“The law always has been that, to hold anyone for contributory infringement, there must have been somewhere a direct infringement which was contributed to.”). A vast majority of G.S. Rich’s testimony to Congress during this period was generally focused on contributory infringement as the primary form of indirect infringement. Judge Newman implies that any comment about contributory infringement can be extended to inducement infringement as well, considering they were statutorily separated until 1952, and before that point, went under the joint name of contributory infringement. See supra text accompanying notes 36, 39–40 (explaining the separation of contributory infringement into § 271(b)–(c)). Regardless of G.S. Rich’s statements, Newman claims that not a single member of Congress provided any sort of testimony that could be interpreted to supporting the majority’s radical new “inducement-only” rule. See Akamai Techs., Inc., 692 F.3d at 1325 (Newman, J., dissenting) (“Nowhere in the entire legislative effort did any supporter or sponsor of the codification of indirect infringement in § 271(b) and (c) refer to ‘practicing”
One of the crucial issues that Judge Newman identifies in the majority’s opinion and “inducement-only” rule is whether isolating the liability of infringement to the lone infringer will allow joint infringers, both direct and indirect, to avoid any type of prosecution for their acts in the infringement. Instead of creating a straight path of liability for each party found to be liable for joint infringement, Judge Newman proposes that the remedies for the infringement be apportioned based on traditional tort elements. Newman concludes by simply stating that when there is a joint participation in an act of infringement, it is just to adjust the damages to reflect the extent of the liability for each entity involved.157

Finally, just as Judge Linn does in his dissenting opinion, Judge Newman recognizes and warns of the potential for abuse and exploitation of the new “inducement-only” rule. Judge Newman’s dissent cites to the many issues

the claimed invention or ‘the acts necessary to constitute direct infringement’ as liberated from the requirement of proving direct infringement, as the majority does today.” (quoting id. at 1314–15, 1307).

155. See id. at 1330 (Newman, J., dissenting) (“[I]t appears that the patentee cannot sue the direct infringers of the patent, when more than one entity participates in the infringement. The only remedial path is by way of ‘inducement’. . . Since the direct infringers cannot be liable for infringement, they do not appear to be subject to the court’s jurisdiction.”). Unlike the majority’s opinion and Judge Linn’s dissent, Judge Newman does not believe that patent infringement should be considered as a strict liability tort, because this would create an uneven distribution of both liability and assessment of remedy. See id. at 1330 (Newman, J., dissenting) (“The court misconstrues ‘strict liability’ as requiring that every participant in an interactive or collaborative method is fully responsible for the entire harm cause by the infringement.”); id. at 1331 (“When the patent is infringed through the cooperation or interaction of more than one entity, assessment of remedy is appropriately allocated in accordance with traditional tort principles.”); id. at 1332 (“Apportionment of remedy for shared infringement permits consideration of the actual situation, and is particularly suitable in cases of divided infringement.”). This topic of remedies involved in these forms of infringement is unique to Judge Newman’s opinion. Neither the majority nor Judge Linn recognize the potential consequences from the holding on the remedies available to patent owners. Supra Part III.B–C. See id. at 25–35(summarizing the majority’s opinion and Judge Linn’s dissent in Akamai II).

156. Akamai Techs., Inc., 692 F.3d at 1311–32 (Newman, J., dissenting). Judge Newman’s discussion on the possible remedies apportionment of infringement liability is only applicable outside of the majority’s “inducement-only” rule because it would apply to multiple parties being found liable for direct infringement. RESTATEMENT (THIRD) OF TORTS § 8 (2000) (“Factors for assigning percentages of responsibility to each person whose legal responsibility has been established include: (a) the nature of the person’s risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and (b) the strength of the causal connection between the person’s risk-creating conduct and the harm.”); id. (“The nature of each person’s risk-creating conduct includes such things as how unreasonable the conduct was under the circumstances, the extent to which the conduct failed to meet the applicable legal standard, the circumstances surrounding the conduct, each person’s abilities and disabilities, and each person’s awareness, intent, or indifference with respect to risks. . . . One or more of these factors may be relevant for assigning percentages of responsibility, even though they may not be a necessary element providing a particular claim or defense.”). Judge Newman cites a number of cases involving tort liabilities as well as the Restatement in providing examples of factors that would be considered in the apportionment of damages in an infringement case. See, e.g., Birdsell v. Shaliol, 112 U.S. 485, 488 (1884) (“In the case of infringement, the liability for infringers arises out of their own wrongful invasion of his rights.”); cf. Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614 (2009) (“[A]pportionment is proper when ‘there is a reasonable basis for determining the contribution of each cause to a single harm.’”).

157. Akamai Techs., Inc., 692 F.3d at 1332 (Newman, J., dissenting). But see id. at 1332 (claiming that there is no need for the courts to worry about imposing damages on “minor participants” such as customers or, in the case of McKesson, patients that are simply trying to access their medical records).

158. Id. at 1333 (Newman, J., dissenting); see id. at 1319 (“[The “inducement-only” rule] raises new issues unrecognized by the majority, and contains vast potential for abuse.”). Newman suggests that the new rule will inevitably create even more problems in a specific field that is already muddled with confusion and abuse. See, e.g., infra note 258 and accompanying text (discussing the consequences of the Akamai II holding
and worries that were raised by the *amici curiae* in which the majority did not consider in their establishment of the new rule.\(^{159}\)

In regards to the actual holdings in *Akamai I* and *McKesson I*, Judge Newman never comes to a conclusion in whether or not the judgments should stand, but does comment on the likely result in these cases once the majority’s new rule is applied.\(^{160}\) While Judge Newman does not provide a valid judgment to the two cases on appeal, the solutions and proposals in her dissent, compared to the other two opinions, would likely provide the most reasonable and advantageous changes to the law in question.

\(^{159}\) *See Akamai Techs., Inc.*, 692 F.3d at 1333 (Newman, J., dissenting) (“The majority ignores these as cautions, as it creates new potential problems. And while many innovative industries explained how they may be affected by possible rulings on divided infringement, not one of the many *amici* suspected the inducement-only theory that is here adopted.”). There were a significant number of *amici curiae* in this case, representing a variety of different fields of science, technology, and policy. *See generally id.* at 1320 n. 1 (listing all of the *amici curiae* who filed briefs in *Akamai II*).

\(^{160}\) *Id.* at 1333–36 (Newman, J., dissenting). In *Akamai I*, Newman claims that the majority has done nothing to aid the district court’s approach on the remand, considering it never considered the issues that were the reason for the en banc hearing. In *McKesson I*, Newman actually recognizes that the “inducement-only” rule could be applied in the case and the district court’s analysis could help clarify the rule’s apparent uncertainties. *Id.* at 1335.
E. The Supreme Court’s Reversal of the Federal Circuit’s Majority Holding

The Akamai II majority’s “inducement-only” rule stood as law for less than two years before the Supreme Court finally granted certiorari after denying it the previous three petitions. This decision by the Supreme Court was widely sought due to the aforementioned confusion with the law concerning joint patent infringement, and practitioners, inventors, and lower courts alike were eager for the Supreme Court to hopefully bring some extent of stability to the area. In a short, unanimous holding, the Court reversed the holding in Akamai II, thus eliminating the “inducement-only” rule and officially stating that direct infringement must exist in order for there to be liability for indirect infringement under § 271(b).

The Court relied on precedent established from Aro I in support of requiring direct infringement. With this standard set, the Court applied the “single-entity” rule from BMC and Muniauction and concluded that not all of the steps of the method patent had been completed by a single party; therefore, there could be no direct infringement, and thus no indirect infringement. It is important to note that, while the Court did apply the “single-entity” rule, and thus affirmed its application and legitimacy, it also—once again—recognized that the rule itself had many potential negative consequences.

Although the Court did affirm the use of the “single-entity” rule and reestablish the requirement of direct infringement for indirect infringement liability, it completely avoided another one of the primary issues involved with Akamai II: whether direct infringement is a prerequisite for indirect infringement. Because the Akamai II majority did not officially discuss this issue in its own opinion, the Supreme Court chose to limit its analysis to only the topic on which they granted certiorari.

163. See id. at 2117 (discussing the basic elements of method patents and how the underlying policy behind them, combined with the law from Aro I, creates a necessity for direct infringement in order to find liability for indirect infringement).
164. Id. at 2118–19.
165. See id. at 2120 (“[R]espondents, like the Federal Circuit, criticize our interpretation of § 271(b) as permitting a would-be infringer to evade liability by dividing performance of a method patent’s steps with another whom the defendant neither directs nor controls. We acknowledge this concern.”). Although the Court did recognize this concern, it justified its holding by suggesting that the Akamai II majority’s “inducement only” rule would create a “free-floating concept of ‘infringement’ both untethered to the statutory text and difficult for the lower courts to apply consistently.” Id.
166. The Court clearly stated in the opinion that it had no intention to revisit any of the law or precedent concerning the “single-entity” rule or whether or not multiple actors can jointly directly infringe a patent under 35 U.S.C. § 271(a). See id. at 2120 (“Respondents ask us to review the merits of the Federal Circuit’s Muniauction rule for direct infringement under § 271(a). We decline to do so today . . . . [T]he question presented is clearly focused on § 271(b), not § 271(b).”).
167. Id. at 2120.
IV. Analysis

A. Overview

The doctrine of joint infringement could never have been considered a stable or consistent application of law, and after the majority’s opinion in *Akamai II*, there is even more potential for confusion and limitation when prosecuting infringing parties. Although the opportunity was ripe with potential to finally clarify several of the key issues that have been omnipresent in patent infringement prosecution for decades, the majority instead decided that it was best to attempt to establish a completely new rule of law: a rule without precedent from either past legislation or case law.

On the other hand, while the majority’s opinion acted too boldly in the establishment of a completely new rule, Judge Linn’s dissenting opinion fails in the opposite manner by remaining too conservative and, by doing so, refusing to progress the law of infringement. Judge Linn’s approach, although more technically sound than the majority’s opinion, also fails to recognize the necessity of altering the current doctrine of joint infringement at least to the extent to provide a more applicable rule for lower courts to use.

168. *See supra* Part II (discussing the historical development of the doctrines of infringement, including the eventual establishment of the doctrine of joint infringement, and the many overrulings, legislative interventions, and general confusion in district courts in applying the doctrines).

169. *See Akamai Techs., Inc.*, 692 F.3d at 1331 (Newman, J., dissenting) (“It is apparent that this jurisprudence is in need of correction, clarification, and consistency for... the majority’s newly minted inducement-only rule is [not] in accord with the infringement statute...”); *infra* note 258 and accompanying text (describing the risk to the field of patent law if the majority’s holding is retained).


171. *E.g.*, *Akamai Techs., Inc.*, 692 F.3d at 1320 (Newman, J., dissenting) (“The majority’s inducement-only rule has never been held, in any case. It has no foundation in statute, or in two centuries of precedent.”); id. at 1337 (Linn, J., dissenting) (“The majority’s approach is contrary to both the Patent Act and to the Supreme Court’s longstanding precedent...”).

172. *See infra* Part IV.B (stating the shortcomings of the majority’s opinion in relation to Judge Newman’s dissent); *infra* Part IV.C (stating the shortcomings of Judge Linn’s dissenting opinion in relation to Judge Newman’s dissent). It can be properly inferred that the rules created in *BMC and Muniauction* were incorrect or are longer applicable considering seven of the eleven judges from the court that ultimately developed the rules now believe that they should be overruled. *E.g.*, *Akamai Techs., Inc.*, 692 F.3d at 1306 (per curiam) (“Recent precedents of this court have interpreted section 271(b) to mean that unless the accused infringer directs or controls the action of the party or parties that are performing the claimed steps, the patentee has no remedy... We now conclude that this interpretation... is wrong as a matter of statutory construction, precedent, and sound patent policy”); *id.* at 1326 (Newman, J., dissenting) (“The court should simply acknowledge that a broad, all-purpose single-entity requirement is flawed, ...”).

173. Unlike the majority’s opinion, Judge Linn correctly accepts the responsibility of providing an answer to the *en banc* issue before the court; both because it was the sole reason for the provided rehearing and
Then, after recognizing these flaws and subsequently eliminating the majority’s new rule, the Supreme Court attempted to clarify and stabilize the area, but limited its own holding far too much to ever to truly fix many of the issues haunting the doctrine of joint infringement. Instead, the Court returned the law back to the holdings in *BMC* and *Muniauction*, and, as such, promptly returned joint patent infringement to a state of significant restriction and lack of application.

However, Judge Newman’s recommendation of allowing multiple entities to be capable of directly infringing a patent by jointly performing all of the steps of a method, is a necessary medium between the two extremes represented by the majority’s and Judge Linn’s opinions and would thus be the most preferential of the opinions in providing a long awaited stability to a historically unstable field of law.

This Part will first consider the majority’s opinion as compared directly with the two dissenting opinions and challenge the reasoning in which it used in coming to its holding as well as its establishment of the “inducement-only” rule. Then, the two dissenting opinions will be distinguished from each other by first recognizing that Judge Linn’s proposal, although in agreement with the Supreme Court’s affirmation of the “single-entity” rule and requirement of direct infringement as a prerequisite for indirect infringement, falters in recognizing the necessity for change from the previous holdings in *BMC* and *Muniauction*. Finally, the reasoning and proposed ideas from Judge Newman’s dissent will be elaborated on, with a focus on the legitimacy of the reasoning and interpretations which were applied in producing the opinion and how these ideas should still be favored, even after the Supreme Court’s holding.

**B. The Shortcomings of the Majority Opinion**

The majority’s opinion in *Akamai II* consisted of several egregious

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174. E.g., infra Part V.C (proposing that Judge Newman’s opinion should be adapted as precedent in loom of the majority’s opinion in *Akamai II*). The “single-entity” rule would limit infringement liability too stringently by finding it only when a single party performs all steps. On the other hand, the “inducement-only” rule restricts indirect infringement liability to only the inducer, and not the parties induced, regardless of intent or knowledge. *Akamai Techs., Inc.*, 692 F.3d at 1319 (Newman, J., dissenting). In lieu of attempting to limit the liability for infringing parties, Judge Newman favors an approach that would allow all infringing parties to be found liable, for direct or indirect infringement. *Id.* at 1326.

175. See infra Part IV.B (discussing the issues with the majority’s opinion and the applicability of the inducement-only rule).

176. See infra Part IV.C (claiming that, although Judge Linn’s opinion was successful in finding that that direct infringement is required to show indirect infringement, the reliance on the previous law of the “single-entity” and “control or direction” rules is inappropriate for the current state of the patent field).

177. See infra Part IV.D (analyzing the reasoning and logic applied by Judge Newman in her dissenting opinion, and showing that this reasoning was correct in establishing the proposals in which it did).
mishaps in coming to the conclusion that the current scope of issues in patent infringement prosecution involving joint claims could be resolved by the creation of the “inducement-only” rule—including completely avoiding the looming question that, in addition to being a consistently misunderstood concept amongst lower courts, was also the primary reasoning for the en banc rehearing of the two cases.178

The primary reasoning that the majority relied on when coming to its decision involving the inapplicability of the “single-entity” rule was its specific interpretation of § 271, and its conclusion that direct infringement is not a prerequisite for liability of indirect infringement.179 By not recognizing the defining language of subsection (a), the majority incorrectly comes to the conclusion that the term “infringement” does not refer to the same action in subsection (a) as it does in subsections (b) or (c).180

The question of whether or not direct infringement is a necessary prerequisite for liability for indirect infringement is an issue that has answered

178. See, e.g., Centillion Data Sys. v. Qwest Comm’c’n Int’l, Inc., 631 F.3d 1279, 1285 (Fed. Cir. 2011) (holding that a multistep system could be directly infringed even if the infringer did not perform the steps involved in the “back-end processing”); Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1309 (Fed. Cir. 2011) (declining to follow the “single-entity” rule and instead held that the presences of other necessary parties do not split the infringement between those parties). Both the “single-entity” and the “control or direction” rules were widely considered to be stable and essential applications for any direct patent infringement case, but simply because a rule of law is popular does not make it sound. E.g., Moy, supra note 3, at part III, §14:36 (“Yet there are various reasons to question whether the [BMC] holding is sound.”).

179. See Akamai Techs., Inc., 692 F.3d at 1321 (Newman, J., dissenting) (“The only issue for which these cases were taken en banc, the only issue on which briefing was solicited from the parties and amici curiae, was the conflict in precedent arising from the single-entity rule of BMC Resources and Manuaction.”). The Federal Circuit even recognized the prevalence of this issue in their first hearing of Akamai I when they asked for both parties to address (1) when could a method claim be considered directly infringed if separate entities each perform separate steps of the claim, and (2) the extent in which these entities could be found liable under the current law. Akamai Techs., Inc. v. Limelight Networks, Inc., 419 F. App’x 989, 989 (Fed. Cir. 2011) (per curiam). Similarly, in McKesson I, the court requested that the two sides discuss (1) when, if ever, would a third party be found liable for inducing infringement after separately performing all of the required steps of a method patent, and (2) “does the nature of the relationship between the relevant actors . . . affect the question of direct or indirect infringement liability?” McKesson Techs. Inc. v. Epic Sys. Corp., 463 F. App’x 906, 907 (Fed. Cir. 2011) (per curiam). By avoiding the responsibility that is the Court of Appeals, especially when providing a specific en banc rehearing, the majority has failed both the parties of the cases as well as the legal community as a whole. E.g., S. COMM. ON THE JUDICIARY, FEDERAL COURTS IMPROVEMENT ACT OF 1981, S. REP. NO. 97-275 at 1 (1981) (“The purpose [of establishing the Federal Circuit] is to resolve some of the myriad structural administrative and procedural problems that have impaired the ability of our Federal courts to deal with the vast range of controversies among our citizens . . . .”).

180. As noted in Part IIIA, the majority interprets the language of § 271 very differently than either of the dissenting judges. The majority does not acknowledge the possibility that the sections were to coincide with each other and share language meanings, and instead were to be considered in isolation from the potential liabilities of the other subsections. Without that connection through terms, the court reasons that there is no other connection between the sections and thus no reason for liability under (b) to require a showing of liability under (a). See Akamai, 692 F.3d at 1314 (per curiam) (stating the majority’s interpretation of the terminology of § 271); supra Part III.A (summarizing the reasoning behind the majority’s holding, including its statutory analysis).

181. The majority does not believe that § 271(a) defines infringement, but instead simply defines a “type of conduct” that would be considered infringement. Akamai, 692 F.3d at 1314; see also id. (“Nothing in the text of either subsection suggests that the act of ‘infringement’ required for inducement under section 271(b) must qualify as an act that would make a person liable as an infringer under section 271(a).”); Liebes, supra note 92, at 340–41 (describing the statutory interpretation by the majority opinion involving the limitations of the term ‘infringement’).
itself long before BMC or even the enactment of the Patent Act of 1952. However, the statutory language that Congress provided in 35 U.S.C. § 271(a)–(c) was chosen specifically to avoid any confusion, and, when properly interpreted, it completes this goal successfully. It is clear that Congress wrote § 271(a) as the first subsection of the infringement statute because it was intended to define what constitutes infringement, accordingly, any other type of infringement will have to be based, at least in its foundation, on obtaining a way of achieving the basis laid out in § 271(a). It then follows that the language of both subsections (b) and (c) were conveyed with the intention of not creating a whole new type of infringement, but rather establishing the limited circumstances outside of direct infringement in which extended forms of the liability presented in subsection (a) can occur: through inducement or through contributory action respectively.

182. E.g., Akamai, 692 F.3d at 1333 (Newman, J., dissenting) (“The panels had held that without direct infringement there cannot be induced infringement. That simple rule was confirmed over and over at the hearings leading to the 1952 Patent Act, for the legislative history plainly states the understanding that there must be direct infringement before there can be liability for inducement to infringe.”). See generally Finis Research, S.A. v. Baroid Ltd., 141 F.3d 1479, 1484 (Fed. Cir. 1998) (“[D]irect infringement is a prerequisite to inducing infringement.”); Carborundum Co. v. Molten Metal Equip. Innovations, Inc., 72 F.3d 872, 876 n.4 (Fed. Cir. 1995) (“Absent direct infringement of the claims of a patent, there can be neither contributory infringement nor inducement of infringement.”); Zenith Labs., Inc. v. Bristol-Myers Squibb Co., 19 F.3d 1418, 1423 n.5 (Fed. Cir. 1994) (“A finding that a claim is infringed is a necessary prerequisite to a finding that there has been an act constituting inducement to infringe under § 271(b);”) C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc., 911 F.2d 670, 673 (Fed. Cir. 1990) (“[A] finding of induced... infringement must be predicated on a direct infringement . . . .”).


185. Several of the other paragraphs of § 271 contain language that can be read to reflect the language in (a), which shows that these additional forms of infringement, even if they are not aiming to find infringement directly under (a), still recognizes the necessity of showing that some extent of infringement did occur and thus an extended liability for infringement can now also be found. E.g., 35 U.S.C. § 271(c) (2012) (“Whoever offers to sell or sells within the United States or imports into the United States a component of a patented [invention] . . . adapted for use in an infringement of such patent . . . shall be liable as a contributory infringer.”) (emphasis added); cf. Hilton Davis, 62 F.3d at 1527 (analyzing many of the statutory definitions of infringement since the nineteenth century, including the present day definition found in 35 U.S.C. § 271(a)).

186. See Akamai, 692 F.3d at 1338 (Linn, J., dissenting) (“Congress carefully crafted subsections (b) and (c) to expressly define the only ways in which individuals not completing an infringing act under § 271(a) could nevertheless be liable . . . .”); cf. Miller, supra note 174, at 103 (“[T]he absence of direct infringement serves as a defense in favor of one accused of inducing infringement.”). This concept can be successfully seen in Judge Linn’s discussion of positive and negative articulation involving the requirement of direct infringement. If each step of a patented method is performed then there would be liability under § 271 (a); if a party induces the completion of each step of the patented method, thus satisfying the components infringement under (a), then they are liable under (b). On the other hand, the reversal would be applicable as well. If all of the steps of a patented method are not completed, then there is no infringement under (a); if a party induces the partial completion of the steps of a patented method, therefore not satisfying the components of (a), then there is no liability under (b). See supra note 124 and accompanying text (quoting the positive and negative articulation relied upon by Judge Linn in claiming that direct infringement is required for indirect infringement).
Regardless of the majority’s intentions behind their avoidance of the \textit{en banc} issue presented in \textit{Akamai II}, the fact of the matter is that it created a rule that will not only fail to solve any of the present questions in patent infringement prosecution, but will lead to devastating consequences for patent owners.\footnote{See \textit{Akamai}, 692 F.3d at 1319 (Newman, J., dissenting) (“This new rule simply imposes disruption, uncertainty, and disincentive upon the innovation communities.”).} The first issue with the “inducement-only” rule is that it is formed under false necessity.\footnote{The majority states that the rule is essential in the present cases, and for that field itself, in order to eliminate confusion and provide a proper remedy for patent owners. \textit{See supra} Part III.B (describing the majority’s holding and the reasoning in which they used in every aspect of their opinion). Furthermore, the majority’s attempt at resolving the issues involved with the “single-entity” rule by creating the “inducement-only” rule can only be seen as replacing the previous issues with the inevitable new ones that come with basing everything on inducement. \textit{E.g.}, King et al., \textit{supra} note 102, at 289–90 (discussing the possible exploitation of international infringement in order to avoid liability under the new inducement standards); Liebes, \textit{supra} note 92, at 346 (“While Akamai provides a solution for patent [sic] holders confronting a divided infringement problem, the additional requirements for inducement liability, specifically the intent requirement, may pose an additional barricade to enforcement.”).} In reality, the issues presented in \textit{Akamai I} and \textit{McKesson I} do not require a new rule of law, but instead can be resolved by applying the precedent and legal doctrines already established.\footnote{See \textit{Akamai II}, 692 F.3d at 1321 (Newman, J., dissenting) (“The established law and precedent of 35 U.S.C. § 271 can readily reach and remedy every infringement situation that has been presented.”).} Judge Newman comes to the correct conclusion that by simply abolishing the flawed “single-entity” rule, the standards for finding direct and indirect liability become significantly simpler, including in these cases.\footnote{See \textit{Akamai}, 692 F.3d at 1336 (Newman, J., dissenting) (“The court should acknowledge that an all-purpose single-entity rule requirement is flawed, and restore direct infringement to its status as occurring when all of the claimed steps are conducted, whether by a single entity or in interaction or collaboration.”).}
The majority judges attempt to justify their new rule by relying on a very distinctive interpretation of the actual language of § 271; an interpretation that was criticized fully by both Judge Newman’s and Judge Linn’s dissenting opinions. 191

In another attempt to provide reasoning for the establishment of the radical new rule, the majority openly ignores the explicit language of the statute and replaces it instead with the intent and terminology which would best suit the requirement of the “inducement-only” rule. 192 Nowhere in the statutory language of §§ 271 or 281 does it provide that, even when multiple parties are shown to have participated in the steps of infringing a patent, only the party that induced the other can be found liable for the direct infringement. 193 The majority recognizes this and is forced to rely on the rules of criminal and tort law, as compared to any patent infringement case precedent, in order to attempt to provide some sort of basis for the “inducement-only” rule. 194 While both tort and criminal law can be applicable

191. See supra Part III.B.C (summarizing both Judge Newman and Judge Linn’s disapproval of the majority’s statutory interpretations in establishing the “inducement-only” rule). The majority responds to the dissenting opinions’ challenges to their interpretation by further explaining its approach. Yet, their repetition does little to provide clarity. See Akamai, 692 F.3d at 1314 (per curiam) (“[N]othing in the text of [§ 271(a) or (b)] suggests that the act of ‘infringement’ required for inducement under section 271(b) must qualify as an act that would make a person liable as an infringer under section 271(a).”).

192. E.g., Akamai, 692 F.3d at 1337 (Linn, J., dissenting) (“The majority opinion is rooted in its conception of what Congress ought to have done rather than what it did. It is also an abdication of this court’s obligation to interpret Congressional policy rather than alter it. When this court convenes en banc, it frees itself of the obligation to follow its own prior precedential decisions. But it is beyond our power to rewrite Congress’s laws.”). This is the exact type of behavior which Congress attempted to limit by providing such explicit language in § 271. Although there have been many significant holdings both by the Supreme Court and the Federal Circuit in relation to patent infringement, the deference to the legislature and the statutory language has always been present. For this reason, the intent of the lawmakers is always a debated topic when discussing the establishment of a new rule. However, the majority opinion in Akamai II goes further than even the courts in BMC and Muniauction by not only interpreting the language of the statute, but challenging whether the policy behind the statute is preferable. Cf. id. at 1342 (“That a majority of this court dislikes the policy that results from the statute as Congress wrote it is not a valid foundation for the action taken today.”).

193. 35 U.S.C. § 271 (2012); 25 U.S.C. § 281 (2012). The majority opinion actually acknowledges the fact that its “inducement-only” rule is not fully based on the terminology of the statute. See Akamai, 692 F.3d at 1326 (Newman, J., dissenting) (“The court holds that ‘the acts necessary to constitute direct infringement’ are different from ‘the acts specified in the statute [§ 271(a)],’ and other new theories.” (quoting id. at 1307, 1309)) (modifications alteration in original).

194. See Akamai, 692 F.3d at 1343–44 (Linn, J., dissenting) (“In an attempt to justify its statutory revision, the majority overstates and improperly analogizes to fundamental principles of criminal and tort law.”). The majority relies on the 18 U.S.C. § 2(b) to compare accomplice liability with that of indirect patent infringement, but mistakenly compares § 2(b) with § 271(b) instead of with the correct correlating section, 2(a). 2(b) is entirely concerned with inducement of actions that “would be an offense,” as compared to 2(a) which applies when the inducement leads to the performance of the actual act. 18 U.S.C. § 2(a)–(b) (2012); see also United States v. Concepcion, 983 F.3d 369, 383 (2d Cir. 1992) (“The requirements of § 2(a) . . . are somewhat different [from § 2(b)].” Whereas § 2(a) speaks in terms of procuring or aiding and abetting the commission of an “offense,” and hence requires proof that the primary actor had criminal intent, § 2(b) speaks in terms of causing the actor to perform only an “act.”). Accordingly, because patent infringement requires that all of the steps be performed, not just one of the steps or acts, in order for infringement to occur, § 271(b) would be more comparable to the criminal law of inducing the performance of actual actions under § 2(a). Akamai, 692 F.3d at 1344 (Linn, J., dissenting). Judge Linn further challenges the majority’s citation of tort law in support of their holding. See id. at 1345–46 (Linn, J., dissenting) (discussing the flaws of the majority’s reasoning and their analysis of the liability involved with “encouraged” and “innocent” parties).
when discussing patent infringement—especially indirect and joint infringement—they can never take the place of analysis of the actual precedent and rules in the field. Therefore, without statutory support, past case precedent, or correct association with criminal and tort law, the majority’s “inducement-only” rule has little foundation for not only becoming precedent, but in overruling two previous rules of law in patent infringement.

Finally, the majority’s holding falters in curing the blaring opportunities for abuse that were recognized by the court in BMC, but never formally addressed. Even though the majority abolished the “single-entity” rule, and hence could be seen to have abolished any of the problems which may go along with it, the “inducement-only” rule results in the same type of risks and possibly even more. The two rules both share the same flawed approach of holding a single party liable for what could be the combined efforts of multiple entities infringing the method. Furthermore, by providing that liability is based on inducement, the majority’s rule jumbles the language of § 271(a) and (b) to the point that confusion is nearly inevitable in lower courts, some which already struggle to comprehend the doctrines of patent infringement as they existed before Akamai II.

195. In addition to the majority’s misguided reliance on the principles of criminal and tort law, both dissenting opinions offer strong arguments against the validity of the testimonial support cited by the majority. The majority relies extensively on the musings of Giles S. Rich, but Judges Newman and Linn both denounce the applicability of Mr. Rich’s comments, which the majority produces as support for its “inducement-only” rule. See supra note 128 and accompanying text (stating Judge Newman’s argument that Mr. Rich’s statements do not provide the support that the majority claims that they do). In fact, Judge Linn goes even further than his colleagues by not only questioning the words of Mr. Rich, but also the deference which should be given to his remarks considering he was never a Congressman, and was only a regular attorney at the time of the enactment of the Patent Act of 1952. See supra note 126 and accompanying text (outlining Judge Linn’s challenge to Mr. Rich’s credibility in regards to providing support for the majority’s “inducement-only” rule).

196. See supra note 66 and accompanying text (citing the BMC court openly recognizing that its holding created loopholes that could allow abuse of the infringement system). The loopholes were not only ignored since BMC, but they were openly recognized and subsequently allowed to remain. Even Judge Linn in his dissenting opinion in Akamai II reiterates that the “single-entity” rule allows for potential abuse of the system. See Akamai, 692 F.3d at 1349–50 (Linn, J., dissenting) (recognizing the potential for “arms-length cooperation” in order to avoid liability and reiterating the same solutions as listed in BMC).

197. Akamai, 692 F.3d at 1333 (Newman, J., dissenting) (“Now that this untenable theory is the law of this en banc court, potential for abuse looms large, for the majority does not require proof of direct infringement, but holds that the entity that advises or enables or recommends the divided infringement is fully responsible for the consequences of the direct infringement.”); e.g., infra note 258 and accompanying text (providing possible consequences and abuse arising from the Akamai II holding).

198. Compare BMC Resources, Inc. v. Paymentech, L.P., 498 F.3d 1373, 1379 (Fed. Cir. 2007) ("Indirect infringement requires, as a predicate, a finding that some party amongst the accused actors has committed the entire act of direct infringement."); overruled en banc by 692 F.3d 1301, 1306 (Fed. Cir. 2012) (en banc) (per curiam), with Akamai, 692 F.3d at 1306 (per curiam) (“[A]ll the steps of a claimed method must be performed in order to find induced infringement, but . . . it is not necessary to prove that all the steps were committed by a single entity."). Consequently, the “inducement-only” rule will still provide a loophole for parties that can organize their infringement in a way that avoids placing too much control in one entity’s hands, and instead spreads it out, thus avoiding falling into the category of a single party completing or inducing all of the infringing steps. See Akamai, 692 F.3d at 1320 (Newman, J., dissenting) (“The en banc majority, embracing this new rule, does not acknowledge the new problems of enforcement and compensation and defense that are also created, the new opportunities for gamesmanship and abuse and inequity.").

199. The “inducement-only” rule would find individuals that have either performed all of the steps of a method by themselves or by inducing other parties to complete all of the steps liable for direct infringement, not inducement infringement. E.g., Akamai, 692 F.3d at 1306 (per curiam) (“[W]e hold that all the steps of a
The majority’s opinion and the establishment of the “inducement-only” rule has many flaws, both in its reasoning and the disregard for the consequences that it would inevitably have on the field of patent infringement prosecution. These flaws were further recognized, and eventually eliminated, by the Supreme Court’s reversal of the majority’s holding in Akamai II.

Furthermore, the primary issue for the en banc rehearing of the case, whether multiple entities can jointly directly infringe a patent, was completely avoided by the majority—as well as the Supreme Court—and thus remains a looming issue for patent infringement cases.\textsuperscript{200} Due to these shortcomings and the additional ones presented below, the majority’s opinion was correctly stricken from precedent.\textsuperscript{201} Because of the Court’s overruling and thus elimination of the “inducement-only” rule, any analysis or critiques of the rule are now moot, and, as such, will generally not be discussed for the remainder of the Note.

\textbf{C. The Shortcomings of Judge Linn’s Dissenting Opinion}

While the majority’s opinion was unsuccessful by misinterpreting or ignoring the precedent and language of current law, Judge Linn’s dissent falters in another way, primarily by relying too heavily on the now overruled standards set by BMC and Muniauction.\textsuperscript{202} Judge Linn’s dissent first and foremost focuses on showing relevancy and correctness of the “single-entity” rule in joint patent infringement cases, and also advocates for the position that direct infringement is necessary to find liability for indirect infringement.\textsuperscript{203}

\textsuperscript{200}See Akamai Techs., Inc., 692 F.3d at 1306 (claiming that it is “not necessary” for the en banc issue to be resolved in Akamai II because the issues presented in the case can be resolved through application of the doctrine of induced infringement); supra note 150 and accompanying text (explaining Judge Newman’s disagreement with the majority’s decision to ignore the en banc issue before the court).

\textsuperscript{201}Instead, I propose that a more applicable and helpful rule be set in place of the majority or Supreme Court’s rule. See infra Part V.C (proposing a preferable rule for establishing liability for joint direct infringement and indirect infringement). Other commentators have attempted to propose possible solutions to the conundrum of joint infringement. See, e.g., Kristin E. Gerdelman, \textit{Subsequent Performance of Process Steps by Different Entities: Time to Close Another Loophole in U.S. Patent Law}, 53 \textit{Emory L.J.} 1987, Part IV (2004) (proposing a new statutory form of infringement that would cover liability for separate entities who jointly infringe a patent); Robinson, supra note 11, Part III (proposing additional factors which should be considering when determining liability for joint infringement).

\textsuperscript{202}E.g., Akamai Techs., Inc., 692 F.3d at 1337 (Linn, J., dissenting) (“In my view, the plain language of the statute and the unambiguous holdings of the Supreme Court militate for adoption en banc of the prior decisions of the court in [BMC and Muniauction] . . .”); Judge Linn’s dissenting opinion is almost a complete affirmation of the standards set forth in BMC and Muniauction to the point that the reasoning he provides is significantly similar to the reasoning provided in the opinions of the two cases. See infra note 242 and accompanying text (comparing the reasoning from BMC, Muniauction, and Judge Linn’s dissenting opinion in Akamai II).

\textsuperscript{203}See supra Part III.B (discussing Judge Linn’s dissenting opinion, including his proposal that the
Next, Linn’s misguided reliance on the “single-entity” rule falls short by avoiding the issues of the current state of patent infringement; issues that the rule has not only failed to solve but actually escalated amongst the lower courts.\(^\text{204}\)

The Supreme Court’s holding also falters in many of the same ways as Judge Linn’s dissent, as it further applies the “single-entity” rule; however, unlike Judge Linn, the Court does not extensively argue the legitimacy of this rule, but instead simply applies it as precedent.\(^\text{205}\) Because the Court does not revisit the law and applicability of the “single-entity” rule, this next section will exclusively isolate its analysis to Judge Linn’s dissent, which does attempt to justify the rule’s merits.

Both BMC and Judge Linn justify their support for the “single-entity” rule by citing the statutory language of §§ 271 and 281 as providing a precedent for extending the “all-elements” rule even further to the point of restricting it to only the actions of a single party.\(^\text{206}\) However, Judge Linn’s interpretation of the meanings behind the specific terms of § 271, especially subsection (a), are incorrect when one considers the legislative intent and the interplay between the terms of the statutes. As Judge Newman states in her dissenting opinion, the most significant invalidation of the statutory support for the “single-entity” rule lies in the exact language of § 271(a), specifically the term “whoever.”\(^\text{207}\)

“single-entity” rule should remain as the dominate precedent, and that the en banc court should once again reinforce the interpretation that direct infringement is a prerequisite of indirect infringement liability. Although Judge Linn is correct in his decision that direct infringement liability is needed for indirect infringement, much of the reasoning that he applies to come to the same conclusion as Judge Newman is legally incorrect for the situation at hand. It should be recognized that, although Judge Linn’s dissenting opinion was cited numerous times while discussing the shortcomings of the majority’s opinion, the reasoning that was referenced was proper in challenging the legitimacy of the majority’s reasoning. These challenges, although technically part of the overall reasoning for Judge Linn’s proposal, were not the part of the mishaps of Judge Linn’s opinion, and thus can be considered to be valid applications of law. E.g., Akamai Techs., Inc., 692 F.3d at 1336 (Newman, J., dissenting) (“The court has fractured into two flawed positions, each a departure from established precedent, each poorly suited to the issues and technologies that dominate today’s commerce.”).

\(^\text{204}\) Id. at 1321–22 (Newman, J., dissenting) (“Questions of divided infringement are not new, but resolution by way of the single-entity rule is plainly inadequate.”). Even though the “single-entity” rule from BMC became a staple of direct patent infringement prosecution soon after its establishment, the lower courts which were forced to apply it as precedent claimed that the rule was fundamentally flawed in its limitations. Id. at 1322 (Newman, J., dissenting) (claiming that McKesson I could have been easily decided if the district court would not have been “containted by the single-entity rule” and instead relied on the historical precedent of patent infringement); McKesson Info Solutions LLC v. Epic Sys. Corp., 2009 WL 2915778, at *7 (N.D. Ga. Sept. 8, 2009) (“[T]he single entity rule and BMC’s interpretation thereof severely limits the protection provided for patents which would otherwise be valid and enforceable.”). These issues only add to the additional elements of statutory and precedential basis that favor the abolishment of the “single-entity” rule from the doctrine of direct patent infringement. See infra Part V.C (proposing that Judge Newman’s opinion be instigated, thus eliminating the “single-entity” rule).

\(^\text{205}\) See Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111, 2120 (2014) (declining to rule on the merits of the “single-entity” rule from BMC and Manuauction).

\(^\text{206}\) See BMC Resources, Inc. v. Paymetech, L.P., 496 F.3d 1373, 1380 (Fed. Cir. 2007) (claiming that the holding “derives from the statute itself”); supra Part II.C (summarizing Judge Linn’s dissenting opinion and reliance on both statutory interpretations).

\(^\text{207}\) See supra note 143 and accompanying text (identifying the meaning of “whoever” as one of the primary issues at hand in Akamai II’s analysis); see, e.g., 35 U.S.C. § 271(a) (2012) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent...”)
Congress’s use of the term “whoever,” which has both a singular and plural meaning when applied in the sentence, significantly hinders Judge Linn’s argument. The fact that the lawmakers could have chosen to use a more specific term in order to isolate liability to single entities, but decided instead to use a term that has an additional plural meaning only provides further support for the theory that the § 271(a) can apply to both single entities performing all of the steps of a patent or to multiple entities completing the steps through collaboration or agreement.

The reading of “whoever” to include both the singular and plural meanings is further supported by use of the same term in other patent statutes and by the general statutes that encompass the language of all legal code. According to 1 U.S.C. § 1, the term “whoever” would include large groups, such as corporations, and small organizations, even to the extent of associations and partnerships, as well as individuals. Under this plain, straightforward language of one of the foundational laws of the United States, therefor, infringes the patent. (emphasis added).

208. Akamai Techs., Inc., 692 F.3d at 1322 (Newman, J., dissenting) (“The word ‘whoever’ in § 271(a) does not support the single-entity rule. By statutory canon the word ‘whoever’ embraces the singular and plural.”). The wording of § 271(a) is not unique in its decision to use a rather vague term such as “whoever” in the place of “party” or “any individual,” either of which would ensure that the courts would read the language as referring to only single entities. See, e.g., 18 U.S.C. § 2(a)–(b) (2012) (stating that “[w]hoever . . . aids, abets, counsels, commands, induces or procures” a criminal offense will be found liable as a principal).

But see Restatement (Third) of Agency § 1.01 (2006) (using specifically singular terms when stating that “when one person (a ‘principal’) manifests assent to another person (an ‘agent’)” an attribution of liability from the agent to the principal is permissible) (emphasis added).

209. Judge Linn’s interpretation of the language of § 271(a) can be considered hypocritically similar to the majority’s attempts at rewriting the statute in order to provide support for its “inducement-only” rule. By completely ignoring the possibility that a common term in the English language could actually mean all of the things that it does, Judge Linn’s argument appears heavily misleading and thus illegitimate. Furthermore, the only possible reasoning that Judge Linn could rely on in providing credibility to his interpretation is finding some support that shows that Congress used the term “whoever,” even while being aware of its dual meanings, with the intention that courts would infer that it was only to apply to the single application of the term. This is a very broad stretch of logic that is further weakened by the strong policy of preventing overextensions and misreading of the law, which Congress had when enacting § 271. Judge Linn’s restriction on the flexibility of the term “whoever” would fall into that category which Congress was hoping to avoid. See, e.g., Brief for Pharm. Research & Mfrs. of America as Amicus Curiae on Rehearing En Banc in Support of Neither Party, Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012) (en banc) (per curiam) (No. 2010-1291) (“[O]n [§ 271’s] face, this statutory prohibition is directed to ‘whoever’ has engaged in infringing conduct and says nothing about whether such conduct is be carried out by a single entity or a group of entities acting in concert with one another.”); American Heritage College Dictionary 1540 (3d ed. 1997) (defining “whoever” as “person or persons”).


211. See infra note 212.

212. 1 U.S.C. § 1, the first statute of the United States Code, is less of a law involving actions of parties and liability, and more of a tenet for interpretation of the rest of the code in the absence of explicit language within those statutes. 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to plural persons, parties, or things; words importing the plural include the singular, . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnership, societies, and joint stock companies, as well as individuals . . . .”); see, e.g., Akamai Techs., Inc., 692 F.3d at 1322 (Newman, J., dissenting) (“The usage ‘whoever’ appears not only in § 271 of Title 35, but in §§ 101, 161, and 171 in referring to inventors without distinguishing between singular and plural. Neither the defendants nor any amicus has offered any reason to view ‘whoever’ different in § 271, the patent infringement statute.”) (citations omitted).
it would show that the term “whoever” in § 271, regardless of whether it was intended to refer to singular entities or multiple entities, would encompass any number of entities when finding liability for direct infringement. 213 Regardless of what Judge Linn believes to be the meaning of the statute, 214 there are neither terms nor context in the wording of § 271(a) that could justify not allowing terms to cover both the plural and the singular meanings. 215

In addition to the relationship between §§ 1 and 271, there is also evidence against the “single-entity” rule when analyzing the connection between §§ 154 and 271. 216 The similarities between the §§ 154 and 271 are so blatant that there was a general confusion during the enactment of the Patent Act of 1952 of whether or not § 271(a) was truly necessary, especially considering it generally construed the same principle as § 154. 217 Due to their direct comparisons, and the general idea that although § 271(a) technically defines infringement, § 154 sets forth the rights which must be breached in order for infringement to occur, these two statutes are understood to consist of similar terminology and meanings for those terms. 218 Nowhere in the language

213. E.g., id. at 1323 (Newman, J., dissenting) ("Infringement is not a question of how many people it takes to perform a patented method."); In re Henriksen, 399 F.2d 253, 258 (1968) (stating that § 1 applies to the statutes of Title 35).

214. See Akamai Techs., Inc., 692 F.3d at 1348 (Linn, J., dissenting) (arguing that the reading of “whoever” as meaning both the singular and the plural would only result in the reading that multiple parties can be liable for direct infringement if they each complete all of the steps of the infringement, and that § 271(b)–(c) were created to deal with situations that involve multiple entities, so if (a) was expanded into this territory, the applicability of these two subsections are essentially eliminated); supra Part III.C (summarizing Judge Linn’s interpretation of § 271).

215. See, e.g., Barr v. United States, 324 U.S. 83, 91 (1945) (applying 1 U.S.C. § 1 to terms involving tariff acts, and affirming the rule that a term importing a singular number can be extended to include several persons or things); United States v. Oregon, 164 U.S. 526, 541 (1896) ("And the general rule is that ‘words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular’ . . .].")

216. 35 U.S.C. § 154 (2012); 35 U.S.C. § 271 (2012). Section 154 is widely considered to be the original basis of patent law and the exclusionary rights that go along with the obtaining of a patent. See 35 U.S.C. § 154(a)(1) (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.”); Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 522 (1972) ("[P]atents entitled the [patentee] to the privileges bestowed by 35 U.S.C. § 154, the keystone provision of the patent code . . .]. The § 154 right in turn provides the basis for affording the patentee [a remedy] against direct, induced, and contributory infringement . . .]. Infringement is defined by 35 U.S.C. § 271 in terms that follow those of § 154.").

217. In fact, before the codification of § 271(a), it was generally thought that there was no need for explicit language defining patent infringement considering it should be easily inferred that any breach of the exclusionary rights granted by § 154 would result in liability for infringement. See H.R. Rep. No. 82–1923, at 9 (1952) ("Section 271, paragraph (a), is a declaration of what constitutes infringement. There is no declaration of what constitutes infringement in the present statute. It is not actually necessary because the granting clause of § 154 creates certain exclusive rights and infringement would be any violation of those rights."). For more information about the connection between §§ 154 and 271, see the history of the law outlined in William Callahan Robinson, supra note 145, § 897.

218. E.g., Pioneer Hi-Bred Int’l, Inc. v. Ottawa Plant Food, Inc., 283 F. Supp. 2d 1018, 1036 (N.D. Iowa 2003) (recognizing the similarity between §§ 154(a)(1) and 271(a) in stating the patent rights and the infringement of those rights, respectively); Shubha Ghosh, Carte Blanche, Quanta, and Competition Policy, 34 J. Corp. L. 1209, 1231 (2009) ("The exclusive rights to make, use sell, and offer to sell provided by 35 U.S.C.
of § 154 does it state that there is a specific requirement that the breach of the
granted duties be by a single entity. 219 In fact, if infringement, according to
§ 154, just requires for those rights to be breached, then there is no reason to
believe that it would forbid the violation of those rights solely because multiple
parties participated in the act. 220

Judge Linn attempts to resolve the consequential issues that arise from the
“single-entity” rule by proposing that an application of the doctrine of
vicarious liability will help close the possible loopholes surrounding multiple
entities entering into arm-length agreements in order to avoid liability. 221 It is
ture that the doctrine of vicarious liability does provide a way to attribute
liability from other parties to a controlling infringer, 222 but simply because
vicarious liability is an option for actions committed by multiple entities does
not mean that it is the only way to find this liability. Even if vicarious liability
is applicable, it does not suddenly limit the scope of § 271(a) in a way
congruent to the “single-entity” rule, which, for the reasons presented below, is
flawed. 223

§ 154(a)(1) and enforced through 35 U.S.C. § 271(a) . . .

infringement; instead, it is meant to be applied in combination with § 271 when finding liability for
infringement. This provides further support for the basis that the term “whoever” is meant to be consistently
defined throughout the field of patent law. See Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 522
(1972) (“The § 154 right in turn provides the basis for affording the patentee an injunction against direct,
induced, and contributory infringement, . . . or an award of damages when such infringement has already
occurred . . . . Infringement is defined by 35 U.S.C. § 271 in terms that follow those of § 154.”).

220. Ahn, supra note 134, at 171 (“Technically, there is no statutory provision or case law that explicitly
prohibits multi-actor method claims or a finding of joint infringement.”). It is important to reiterate that the
lawmakers that crafted the Patent Act of 1952 as well as the courts before the enactment had almost
universally accepted the “all-elements” rule as a necessity for one to breach any of the granted by § 154.
Therefore, although the precise language of § 154 does not necessarily state that the right to exclude only
means the right to exclude the completion of all of the steps of a patent, it was heavily inferred by both the
courts and by Congress before and after the codification of § 271. See supra notes 52–53 and accompanying
text (discussing the “all-elements” rule and its applicability in patent infringement prosecution).

221. See Akamai Techs. Inc. v. Limelight Networks Inc., 692 F.3d 1301, 1348 (Fed. Cir. 2012) (Linn, J.,
dissenting) (“Applying traditional principles of vicarious liability to direct infringement under § 271(a)
protects patentees from a situation where a party attempts to ‘avoid infringement . . . simply by contracting out
steps of a patented process to another entity . . . . It would be unfair indeed for the mastermind in such
situations to escape liability.”) (quoting BMC Res., Inc. v. Paymentech, L.P., 498 F.3d 1373, 1381 (Fed. Cir.
2007)); supra notes 134–135 and accompanying text (claiming that vicarious liability can be applied in
scenarios with multiple entities).

222. E.g., RESTATEMENT (SECOND) OF TORTS § 877 (1979) (“For harm resulting to a third person from
the tortious conduct of another, one is subject to liability if he . . . , orders or induces the conduct . . . [or]
controls, or has a duty to use care to control, the conduct of the other . . . . and fails to exercise care in the
control . . . ”); Ahn, supra note 134, at 173–75 (claiming that the vicarious liability standard applied in
Mannheim was not adequate in properly finding liability for joint infringement and proposes an alternate
standard).

223. The existence of the doctrine of vicarious liability does not alter the language or the congressional
intent of the statute by opening another avenue in which to prosecute multiple parties for liability. The
doctrine of vicarious liability was established through agency law as a way of combating “masterminds” from
avoiding liability by sending their agents to perform the actions. Under vicarious liability, the infringement
could not only be found for the acting agents, but could also be attributed to the party in control of those
agents. E.g., Ahn, supra note 134, part IV.B (describing the doctrine of vicarious liability in determining
whether or not there is control or direction, as well as how the doctrine is under the BMC rules). Therefore,
this doctrine is more comparable to the “control or direction” rule, which was not in discussion for Akamai II,
than the “single-entity” rule. E.g., Part II.C (discussing the establishment of the “control or direction” test).
Although Judge Linn’s dissenting opinion finds a correct conclusion by proposing that direct infringement be a prerequisite of indirect infringement liability, it falters in its attempts to justify the continued applicability of the “single-entity” rule. Moreover, the reasoning and interpretation presented by Judge Linn’s dissent was statutorily inaccurate and thus inappropriate as a valid basis for upholding such a stringent law such as the “single-entity” rule.

D. The Remaining Benefits of Judge Newman’s Dissenting Opinion

While the majority’s and Judge Linn’s opinions reflect the two opposite sides of the spectrum defining what the Federal Circuit could conclude on Akamai II, Judge Newman’s dissenting opinion offers a preferential balance between eliminating flawed precedent and providing reasonable standards for future cases. Judge Newman promptly recognizes the necessity to resolve the en banc issue before the court, because not only is it a legitimate problem in the application by lower courts since the enactment of the “single-entity” rule, but also because it is the primary reason for the rehearing of these two cases.

In regards to the Supreme Court’s opinion, Judge Newman’s view was consistent with the Court in believing that there should be a direct infringement requirement in order to find liability under § 271(b). However, because the Supreme Court did not revisit any of the legal prowess behind the “single-entity” rule and its applicability but applied it as precedent, Judge Newman’s dissent would not directly conflict with any of the holding from the Court apart from the actual use of the rule. Therefore, the rest of this Part will analyze specifically why Judge Newman’s views and ideas are more successful in relation to the other two Akamai II opinions.

In response to the en banc issue resulting from the Federal Circuit’s rule established in BMC, Judge Newman correctly advocates to eliminate the “single-entity” rule from applicable precedent, and instead replaces it with a much simpler standard that allows multiple entities to be liable for direct infringement as long as they jointly perform all of the steps of the patented claim. In addition to the en banc issue concerning the “single-entity” rule,

224. See Akamai Techs., Inc., 692 F.3d at 1320 (Newman, J., dissenting) (“The en banc court has been unable to reach consensus. The dissenting opinion authored by Judge Linn adheres to the single-entity rule, and the majority opinion presents the new position that when more than one entity performs the steps of a patented invention, the only liable entity is the inducer, not those who direct infringe the claim.”); e.g., Part III.B–C (summarizing both the majority’s opinion and Judge Linn’s dissenting opinion in Akamai II).

225. See Akamai Techs., Inc., 692 F.3d at 1321, 1327 (stating that the only reason for the en banc rehearing of these cases was to answer the issues surrounding the “single-entity” rule from BMC, and also mentions that this same issue was considered the primary issue of the first hearings of both cases as well, but were not answered successfully); e.g., supra note 142 and accompanying text (recognizing the questionable legitimacy of the “single-entity” rule both in general and in the cases in Akamai II).

226. See Part III.D (summarizing Judge Newman’s dissent, including her view on requiring direct infringement in order to find liability for indirect infringement).

227. See Akamai Techs., Inc., 692 F.3d at 1326 (quoting Judge Newman’s holding that direct infringement can occur when multiple entities perform all of the steps of a claim). Judge Newman’s approach may actually be too simple for appropriate application according to Judge Linn. See id. at 1349 (Linn, J., dissenting) (claiming that allowing multiple entities to jointly infringe under § 271(a) would encompass innocent parties and would eliminate the necessity of subsections (b) and (c)).
Judge Newman also takes the time to reaffirm the long-standing rule that indirect infringement, whether by one party or more, requires a showing of direct infringement in order to establish liability.\textsuperscript{228} By not being enticed by the idea of establishing an entirely new standard for direct patent infringement like the majority was, but still realizing that the present law of BMC was not sufficient anymore, Judge Newman’s proposed decision is best suited, both for the cases involved in Akamai II, but also for the future precedent of joint patent infringement.\textsuperscript{229}

It is important to discuss that Judge Linn, even while focusing on challenging the majority’s opinion, did raise a strong question involving Judge Newman’s proposal to allow multiple entities to be liable under § 271(a).\textsuperscript{230} While Judge Linn’s worries are well justified, the reasoning which Judge Newman provides for these dramatic steps presents a valid reasoning that outweighs the risks raised by Judge Linn. The principal logic that Judge Newman provides for proposing the elimination of the strict liability of direct infringement is that it would allow for a more practical and fair distribution of

\textsuperscript{228} Cf. supra note 151 and accompanying text (comparing the reasoning of Judge Newman in coming to this conclusion with Judge Linn’s reasoning to come to the same conclusion). Citing decades of precedent and statutory interpretation, Judge Newman comes to this conclusion, and uses the same basis for challenging the reasoning that the majority has used in its creation of the “inducement-only” rule. See, e.g., id. at 1321 (discussing the shortcomings of the “inducement-only” rule and the lack of legal support for the majority’s creation of it). Judge Newman claims that not only is the rule unsupported by precedent or statute, but it does not even answer the question before the court in these cases. The majority limits its attention to parties committing active inducement, and then makes a judgment that encompasses all forms of direct infringement, not just inducement infringement. This is a severe mistake by the majority, and Judge Newman is correct in recognizing the fact that the majority almost creates its own issue in the cases in order to provide a reason for the creation of the “inducement-only” rule. See id. at 1327 (Newman, J., dissenting) (“The problem before the court is not whether an inducer, properly defined, is liable for infringement; the problem is whether a method patent is infringed when one entity performs the claimed steps of the method.”). Judge Newman also mentions that such a heavy focus on inducement not only was unnecessary, but it took the parties of both sides by surprise in the judgment. E.g., id. at 1320 (recognizing that the majority redirected the focus of the case from the “single-entity” rule and direct infringement to inducement infringement, “without briefing by the parties or notice to the amici curiae”).

\textsuperscript{229} Judge Newman correctly recognizes that, in addition to the en banc issue, the majority’s creation of the brand new “inducement-only” rule does not provide any answers to many of the concerns that were raised by the amici curiae. See id. at 1333 (Newman, J., dissenting) (“Many of the amici curiae pointed to ongoing abuses of the system of patents, and the ensuing dis incentive to innovative commerce. The majority ignores these cautions, as it creates new potential problems. And while many innovative industries explained how they may be affected by possible rulings on divided infringement, not one of the many amici suspected the inducement-only theory that is here adopted.”); e.g., id. (discussing the amici curiae).

\textsuperscript{230} Akamai Techs., Inc., 692 F.3d at 1350 (Linn, J., dissenting) (“Judge Newman’s opinion, which would permit joint actor infringement liability whenever independent parties collectively infringe a patent, is no more satisfactory as a matter of either stator interpretation or legal analysis.”). Judge Linn claims that refusing to consider direct patent infringement as a strict liability action directly contrasts the long held rule that intent and knowledge of infringement are not necessary in proving liability for direct infringement. See id. at 1350 (Linn, J., dissenting) (“Judge Newman attempts to justify this loose approach to direct infringement liability under § 271(a) by asserting that § 271(a) is not a strict liability provision after all, . . . This assertion is fallacious.”). In addition to the contesting Judge Newman’s strict liability changes, Judge Linn also claims that the allowance of multiple entity joint infringement under § 271(a) will essentially eliminate the necessity for § 271(b)-(c) because the parties that used to be liable for contributory or inducement infringement will not fall into the category of just another entity directly infringing the patent. Id. at 1350 (Linn, J., dissenting) (“Judge Newman’s joint actor liability approach under § 271(a) would also disrupt well-settled law . . . [making] the need for contributory infringement and inducement, as Congress envisioned, [] essentially eviscerated.”).
damages amongst the infringing parties.\textsuperscript{231} By eliminating the limitations involving damages set forth by strict liability, damages can instead be correctly and justifiably allocated to the infringing entities appropriately as they would in any tort case.\textsuperscript{232} However, Judge Newman does not speak on the consequences of eliminating the strict liability label, especially the fact that it would require intent and knowledge in order to show liability.\textsuperscript{233}

The concept of allocation of damages based on the party’s contribution to the infringement directly ties into a counterargument against Judge Linn’s other concern regarding the possible elimination of the other types of infringement liability.\textsuperscript{234} Although it is true that allowing multiple entities to be liable under direct infringement would likely reduce the applicability of § 271(b)–(c), this conundrum can be easily resolved by a re-categorizing of what range of actions fall under direct infringement and which fall under indirect infringement.\textsuperscript{235} This would not include rewriting the statutory language of

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\item[231.] Under the current law of strict liability, all of the parties that perform the act, no matter how significant their contribution is to the eventual completion of said act, are fully liable for the damages incurred by the plaintiff. This results in the same level of retribution for the highly-involved individual as the party that performed only a small step of the method. \textit{But see Akamai Techs., Inc.}, 692 F.3d at 1330 (Newman, J., dissenting) ("The court misconstrues 'strict liability' as requiring that every participant in an interactive or collaborative method is fully responsible for the entire harm caused by the infringement."). Judge Newman also claims that strict liability should only be applied in the situations that truly fall into the category of being “ultrahazardous activities or in products-liability cases.” \textit{Black’s Law Dictionary} 998 (9th Ed. 2009).
\item[232.] \textit{Akamai Techs., Inc.}, 692 F.3d at 1331 (Newman, J., dissenting) ("When the patent is infringed through the cooperation or interaction of more than one entity, assessment of remedy is appropriately allocated in accordance with traditional tort principles."). This determination of damages would likely be based on numerous factors including extent of intent and knowledge of the infringing parties. This would remove the strict liability standard for direct infringement, which would contradict some previous major holdings involving infringement. \textit{E.g.}, Global-Tech Appliances, Inc., 131 S. Ct. 2060, 2065 n.2 (2011) ("Direct infringement has long been understood to require no more than the unauthorized use of a patented invention. \ldots \textit{A} direct infringer’s knowledge or intent is irrelevant.").
\item[233.] Judge Newman does not discuss the unintended consequence of establishing an intent requirement for direct infringement, and thus does not provide any answer to the possibility. A remedy for this situation that could be considered successful for both Judge Newman and Judge Linn is discussed in the proposal segment of this Article. \textit{See infra} Part V.C (proposing a balanced approach to the issues raised in \textit{Akamai II}, including a solution to any strict liability concerns). However, some commentators have noted that it may be more preferential to move in the opposite direct and instead implement a strict liability standard for inducement as well. \textit{See} Soonbok Lee, \textit{Note, Induced Infringement as a Strict Liability Claim: Abolishment of the Specific Intent Requirement}, 4 \textit{Hastings Sci. & Tech. L.J.} 381, Part I.L.C (2012) (proposing that the strict liability standard should be extended to induced infringement under § 271(b)).
\item[234.] \textit{See Akamai Techs., Inc.}, 692 F.3d at 1350 (Linn, J., dissenting) (claiming that adapting Judge Newman’s approach will eliminate the purpose and use of contributory and inducement infringement). The current allocation of damages in indirect infringement claims can be described as sporadic at best, and is based almost entirely on the specific facts of each case, without any real string of reasoning between the different courts. The awarded damages are usually lost profits or a similar tort-based allocation. \textit{See, e.g.}, \textit{Richard B. Tr oxe l & William O. Kerr, Assets and Finances: Calculating Intellectual Property Damages} § 2:5 (2013) (providing a short background on both indirect patent infringement and the damages that are awarded in these cases).
\item[235.] A simple reorganizing of the categories of parties would avoid the consequence which the majority and Judge Linn’s dissent recognize involving customers and innocent parties being found liable for direct infringement. \textit{See Brief for Myriad Genetics, Inc. as Amicus Curiae in Support of Neither Party, Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012) (en banc) (per curiam) (No. 2010-1291)" ("Joint infringement will exist only when a party knows or reasonably should know that its request result in particular actions and only when the combined actions of both parties complete the claimed method. No unwitting end consumer should fall into this category."); \textit{cf. id.} (proposing other possible solutions to the overreaching liability concerns, including fashioning a rule for when combined actions "create a joint
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infringement ‘event’ which will not automatically make all parties liable, as well as enrolling the use of § 271(c)–(d) and scienter to find liability.

236. The extra effort requested from the courts would not be significant. In fact, the same type of analysis is used in almost every tort case not involving strict liability in order to properly allocate the damages and liability for the tortious act. The factors which these courts look to when determining the responsibility of each party involved in the action are mapped out in the Restatement of Torts in full. Restatement (Third) of Torts § 8 (2000); see supra note 28 and accompanying text (elaborating on the factors that are applied when determining the responsibility for parties in joint tortious acts).

237. There is a strong chance, especially in many of the modern joint liability cases, that some of the parties that are considered to be contributing enough to the infringement to be found liable for direct infringement could be customers or other unknowing individual. The same logic that is applied in torts would apply here; if a party is suing for infringement, there is a very small chance that they would go through the effort to locate, identify, and sue the smaller players in these infringement claims. Accordingly, there is no reason to enact a new radical or to affirm a previous flawed one just to ensure that a court would never have to deal with the possibility of an infringement claim being brought against a regular citizen. Akamai Techs., Inc., 692 F.3d at 1332 (Newman, J., dissenting) (“Neither the single-entity rule nor the inducement-only rule is needed to protect the innocent patient who turns on his computer to access the system containing his medical records.”). This would be a perfect example of a party that could still be found to fall under § 271(b) or (c) as compared to being found liable for direct infringement. The adjustments that will be required by the court system to adapt to the allowance of multiple-entity direct infringement will be discussed further later in the Article. See infra Part V.C (elaborating on the proposed allocation of damages for direct and indirect patent infringement cases under Judge Newman’s approach).

238. See supra Part IV.B (discussing the issues surrounding the majority’s opinion in Akamai II); e.g., Robinson, supra note 11, at 103–04 (describing the difficulty of applying the majority’s standard and the new loophole it creates).

239. See supra Part IV.C (discussing the tribulations of Judge Linn’s dissenting opinion in Akamai II). Moreover, the reasoning and interpretations applied by Judge Linn are insufficient to provide enough support to justify the continued use of the “single-entity” rule, even if the opinion correctly claims that direct infringement is a prerequisite for indirect infringement. Id.

240. See Akamai Techs., Inc., 692 F.3d at 1349 (Linn, J., dissenting) (stating the risks and issues surrounding Judge Newman’s proposed approach); Robinson, supra note 11, at 100 (claiming that Judge Newman’s proposal could “ensnare innocent actors” and burden the courts to then deal with those innocent parties); supra Part IV.D (recognizing that allowing multiple entities to be capable of directly infringing a patent under § 271(a) will likely have some unforeseen consequences involving the intent requirement of infringement and the future validity of § 271(b)–(c)). But see infra note 265 (explaining the possibility of avoiding liability for innocent actors under Judge Newman’s approach).
the cases on appeal as well as the field of joint patent infringement overall.\textsuperscript{241}

V. \textbf{PROPOSAL}

\textbf{A. Overview}

In an attempt to clarify the current standards of joint patent infringement, the Court of Appeals for the Federal Circuit organized an \textit{en banc} rehearing of both \textit{Akamai I} and \textit{McKesson I}. However, what eventually ensued was far from anything that could be considered clarification. In fact, the scattered opinions of the judges, including a minimal majority, provided little help for the lower courts looking for a sustainable and consistent way of prosecuting divided infringement claims. Moreover, while the Supreme Court did bring some level of stability back to the field of joint infringement by firmly requiring direct infringement for indirect infringement to exist, its opinion was far too narrow and thus failed to truly analyze and provide an answer to the other issues raised by \textit{Akamai II}.

This Part will put forth a proposal that will provide clarity in the midst of the confusion surrounding joint patent infringement. First, it will state the reasoning and law that prove that both the majority’s opinion and Judge Linn’s dissent fail to provide any realistic solutions to the modern state of patent infringement involving multiple entities.\textsuperscript{242} Then, this Part will propose that Judge Newman’s dissent, even after the Supreme Court’s holding on the cases, would alleviate much of the erroneous interpretations of the doctrine of joint infringement as well as close the loopholes that were opened, identified, and then mistakenly affirmed from the Federal Circuit’s holding in \textit{BMC},\textsuperscript{243} and partially in the Supreme Court’s opinion. Additionally, the reasoning and precedent that supports this proposal will be set out, including the historical case law, statutory language, and policy advantages incorporated with an adaptation of Judge Newman’s opinion.\textsuperscript{244}

\textbf{B. The Inapplicability of the Majority and Judge Linn’s Opinions}

The majority’s answer to the confusion in \textit{Akamai II} was essentially to wipe the precedent involving multiple entity infringement clean and establish the new, unsupported “inducement-only” rule.\textsuperscript{245} While the majority’s
intentions were good in their attempts to provide a less sporadic rule to a doctrine that is already quite chaotic, the reasoning and foundations that it relied upon were either inconsistent with current statutory law and interpretation or simply nonexistent. Furthermore, the majority advocates for this radical new “inducement-only” rule without providing any context whatsoever in how it should actually be applied throughout the jurisprudence. The majority cannot just assume that the lower courts will easily understand a brand new rule, especially after they were finally getting to a point that they understood the “single-entity” rule. These shortcomings were further supported by the fact that the Supreme Court reversed both the final holdings of the majority as well as the creation its “inducement-only”

interpretation of one of the most solidified rules in patent infringement, and then creating a completely new standard in which to base joint infringement, the majority opinion still believes that its opinion is justified. See Liebes, supra note 94, at 339 (“The [majority] argued that [the Akamai II holding] was not a significant departure from joint infringement jurisprudence . . . ”). But see supra Part V.B (elaborating on the flaws and misinterpretations of the majority’s opinion in establishing the “inducement-only” rule).

246. The majority’s reasoning for establishing the “inducement-only” rule was based on very shaky grounds, including citing the reasoning provided by the court in BMC, the case that it would eventually overrule. Akamai Techs. Inc. v. Limelight Networks Inc., 692 F.3d 1301, 1321 (Fed. Cir. 2012) (Newman, J., dissenting) (“While the majority states that it ‘overrules[s]’ BMC Resources, . . . it is far from clear, for the majority also cites BMC Resources and Muniauction as precedent.”). Furthermore, the majority’s interpretation of § 271 was even more bizarre in finding that § 271(a), in addition to not allowing multiple parties to be found liable for direct infringement, did not actually define direct infringement at all. This itself raises some serious contradictions with the decades of precedent since the codification of the Patent Act of 1952 as well as the actual language and intent behind the enactment of the law. See id. at 1337 (Lin, J., dissenting) (“[The majority] has decided that the plain text of § 271(a) and (b) fails to accord patentees certain extended rights that a majority of this court’s judges would prefer that the statute covered. To correct this situation, the majority effectively rewrites these sections, telling us that the term ‘infringement’ was not, as was previously thought, defined by Congress in § 271(a), but instead can mean different things in different contexts.”).

247. E.g., Akamai Techs., Inc., 692 F.3d at 1321 (Newman, J., dissenting) (“The court . . . creates new liability: but the court gives no attention to accompanying new issues such as the measure of damages, or the availability of remedy against direct infringement.”). In fact, it can be questioned whether or not the majority even fully applied their own rule in their rulings on the two cases at hand in Akamai II. See King et al., supra note 102, at 281 n.13 (“The court in Akamai II adds to this confusion [involving the knowledge and intent requirements] by recognizing Global Tech’s requirement that ‘the accused inducer act with knowledge that the induced acts constitute patent infringement’ in Section II.B, but then ignoring this scienter requirement altogether in the tests it applied in Section III.” (quoting Akamai Techs., Inc., 692 F.3d at 1308 (per curiam)). If the court that created the rule is incapable of using it properly themselves, it can hardly be expected that lower courts will find a way to apply it correctly. E.g., id. at 287 n.40 (“If courts applying the tests articulated in Akamai II read the opinion as diluting or eliminating the scienter requirement, inducement liability may be read as extending to those that reasonably believe they do not infringe or ‘even [those] unaware that others are practicing some of the steps claimed in the patent.’” (quoting Akamai Techs., Inc., 692 F.3d at 1308 n.11 (per curiam))).

248. Even if the “single-entity” rule is indeed flawed, it does not change the fact that it was at least a consistently enforced rule in these cases since its establishment. The benefit of consistency in a doctrine of prosecution cannot be overstated, and the majority’s decision to completely abolish the law that has, for the last five years, as well as a majority of the reasoning, case law, and statutory certainty, become the foundation for not only joint infringement cases, but direct and indirect patent infringement cases as well. Jay W. Stein, The Hobgoblin Doctrine: Identifying “Foolish” Consistency in the Law, 29 Tex. Tech L. Rev. 1017, 1018–19 (1998) (“It is legal theory and practice . . . in an ever-changing contemporary legal world a need arises for some form of consistency, predictability, and uniformity. Without it law and adjudication would become meaningless and more irrational than ever.”). Contra id., at 1020 (“While consistency is a laudable goal in law, it must be noted that a foolish consistency in law is hardly profitable to anyone. A dangerous practice arises when both the courts and lawyers adhere to stare decisis just for the sake of having consistency within the law.”).
While the majority’s opinion fails to adequately assess the issues present in modern patent infringement, Judge Linn’s dissent is equally erroneous by considering the short use of the “single-entity” rule as justification for affirming it.\textsuperscript{249} Judge Linn’s advocacy for the applicability of the “single-entity” rule is based primarily on a misreading of the explicit language of § 271(a).\textsuperscript{250} Without a statutory precedent, Judge Linn’s support for the “single-entity” rule deflates quickly, leaving only the actual holdings of \textit{BMC} and \textit{Muniauction} as remaining support for his views. Yet, simple analysis shows that both of these holdings were also based on much of the same understanding that Judge Linn cites in his dissent.\textsuperscript{251} Without support from statutory and case law, Judge Linn’s opinion is inappropriate for the law of modern patent infringement.

Moreover, the “single-entity” rule falters in providing inadequate remedies to patent owners for infringement of their patents. By affirming the holdings and rules from \textit{BMC} and \textit{Muniauction}, Judge Linn is affirming the presence of loopholes to avoid liability that were recognized by the courts in \textit{BMC} and \textit{Muniauction},\textsuperscript{252} but still providing no new answers to the potential abuse.\textsuperscript{253} Although more specific and detailed patent claims should always be

\textsuperscript{249} While it is true that the \textit{BMC} and \textit{Muniauction} holdings have been seen as valid law since their establishment, this does little to provide support for the reasoning that they were based on in the first place. Simply because a rule is applied does not mean that it is any more correct than it was when it was created, especially when the application has been as inconsistent as it has with this rule. In the case of the “single-entity” rule, the logic used for its creation was flawed by the Federal Circuit in \textit{BMC} and, similar to Judge Linn’s dissenting opinion, this logic is still just as flawed. See Schnuck Mkt., Inc. v. Transamerica Ins. Co., 652 S.W.2d 206, 209 (Mo. Ct. App. 1983) (“The virtue of consistency in the law is axiomatic [but] ‘foolish consistency is the hobgoblin of [our] minds.’”); Stein, supra note 248, at 1024 (discussing the “Hobgoblin doctrine” of following foolish precedents of law, and claiming that there will likely always be a time when “[p]ractitioners of law should use the resources of law to usher in new rules and procedures for those particular areas “that are in need of a legal change”).

\textsuperscript{250} See supra note 144 and accompanying text (summarizing Judge Linn’s interpretation of the term “whoever” in § 271(a) and the range of liability that it creates). Judge Newman’s analysis of the term “whoever” in § 271(a) provides more than a valid basis for disproving Judge Linn’s view on the issue. E.g., supra Part IV.C (describing the flaws of Judge Linn’s reading of “whoever” and the reasons that the term includes both the singular and plural meanings).

\textsuperscript{251} Compare BMC, Res., Inc. v. Paymetech, L.P., 498 F.3d 1373, 1379–80 (Fed. Cir. 2007) (relying on statutory interpretation, the doctrine of equivalents, and vicarious liability as reasoning for the establishment of the “single-entity” rule) (emphasis added), and Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1329–30 (Fed. Cir. 2008) (affirming the reasoning provided in \textit{BMC} and also relying heavily on the “control or direction” rule in finding liability for direct infringement), with supra Part III.B (summarizing Judge Linn’s dissenting opinion and its reliance on statutory interpretation, vicarious liability, and the \textit{BMC} holding in its support for the “single-entity” rule).

\textsuperscript{252} See supra note 67 and accompanying text (citing the \textit{BMC} court openly recognizing the potential for abuse allowed by the “single-entity” rule when parties make arms-length agreements to split the steps of a method claim in order to fall outside of the requirements of the rule); e.g., Rigel Menard, \textit{A Survey of the Legal Landscape Facing Entities with Patents Reciting a Method of Using a Medical Device}, 4 CYBARI’S INTELL. PROP. L. REV. 129, 141 (2013) (“[T]he result of \textit{BMC} would immunize from liability a party (1) who performs some of the steps of a patented method himself and induces another to carry out the remaining steps or (2) who induces multiple parties to collectively perform each and every step of the patented method.” (citing \textit{Akamai Techs., Inc.}, 692 F.3d at 1305)).

\textsuperscript{253} In fact, Judge Linn, instead of attempting to find solutions for the loopholes, simply repeats the recommendation of the \textit{BMC} court in dealing with the situation; which is to put the burden and responsibility on the patent claim drafter to be more careful when crafting the claim. Compare \textit{Akamai Techs., Inc.}, 692 F.3d
promoted, they should not be the only solution to a loophole that has not only been identified, but affirmed by more than one court.\textsuperscript{254} Moreover, the Supreme Court’s use of the rule cannot be considered support for it, because the Court clearly states that it is simply applying it as precedent and not reaffirming any of the legal basis behind the rules application.\textsuperscript{255} Due to this reason, as well as those presented below, the “single-entity” rule is no longer, and was likely never, applicable for prosecution of joint patent infringement.\textsuperscript{256}

C. A Solution to the Chaos

In her dissent, Judge Newman not only recognizes the issues that are plaguing the other opinions of \textit{Akamai II}, but also the field of patent infringement as a whole.\textsuperscript{257} In fact, for as long as there has been patent infringement, there has always been a consistent amount of confusion in determining which parties are liable for infringement, and further, how exactly that liability would be denoted as under the law.\textsuperscript{258} Even with this dominating

\begin{quote}

at 1350 (Linn, J., dissenting) (“[T]he claim drafter is the least cost avoider of the problem of unenforceable patents due to joint infringement, and this court is unwise to overrule decades of precedent in an attempt to enforce poorly-drafted patents”), with BMC, 498 F.3d at 1381 (“The concerns over a party avoiding infringement by arms-length cooperation can \textit{usually} be offset by proper claim drafting. A patentee can \textit{usually} structure a claim to capture infringement by a single party.”) (emphasis added).

254. \textit{See Akamai Techs., Inc.}, 692 F.3d at 1325 (Newman, J., dissenting) (“I take note of the Linn cadre’s argument that ingenious patent claim drafting can avoid single-entity problems, and undoubtedly it would help in some situations. I do not discourage ingenuity, but the presence or absence of infringement should not depend on cleverness or luck to satisfy a maliceable single-entity rule.”). This concept of forcing the patent claim drafter to be responsible for preventing abuse may seem to make sense considering the fact that those are the parties which suffer the harm, so the least they can do to prevent that harm is to put the time and effort into crafting their claims. However, the court cannot avoid a glaring opening for abuse and permitted infringement by simply shifting the responsibility to another entity. If there is potential for abuse, the court should do what it can to attempt to close that loophole judicially, because there is no possibility that all patent claim drafting will ever achieve the level of sophistication to prevent these agreements from infringing the patents. \textit{See} Ahn, supra note 134, at 169 (“[T]he problems in BMC and \textit{Mannixaction} could have been easily avoided by drafting their claims to focus on one entity. However, it may be more natural for some invention to be written in a multi-actor claims form, considering the current stage of development of technology.”).

255. \textit{See} Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111, 2120 (2014) (applying the “single entity” rule but then denying to revisit the legal standards behind the rule).

256. \textit{See} King et al., \textit{supra} note 102, at 305 (“Unless the Supreme Court avails itself of an opportunity to revisit the holding of the Federal Circuit sitting en banc in \textit{Akamai II}, it is unlikely American courts will succeed in crafting a fair and workable joint infringement doctrine responsive to concerns raised by patent-holders.”). \textit{But cf.} Wu, \textit{supra} note 12, at 555 (“[T]here remains a temporary lack of equity where joint infringement is concerned. As more effectively drafted system claims emerge, joint infringement decisions should eventually satisfy equity concerns. However, this does little to help patentees with already-issued poorly written claims.”).

257. \textit{See} McKesson Tech., Inc. v. Epic Sys. Corp., 98 U.S.P.Q.2d (BNA) 1281, 1286 (Fed. Cir. 2011) (Newman, J., dissenting) (explaining the risks and consequences which a restrictive approach to infringement prosecution will have, including the chance that it will dampen the interest of modern technology companies in the obtaining patents and this inhibiting innovation in the future); \textit{supra} Part III.D (summarizing Judge Newman’s opinion in \textit{Akamai II}, including her proposed solutions to the issues presented by the case as well as the shortcomings of the other two opinions).

258. The history of patent infringement has basically been a pattern of major holdings by the Supreme Court or Federal Circuit, followed by an extended period of the lower courts struggling to apply the new rules and standards, and then either legislative interception or another judicial holding reversing and abolishing the previous rules. \textit{See} supra Part II (summarizing the history of the evolution of the doctrines of direct and indirect patent infringement). There have really only been a couple rules that have survived the toll of time and the pattern of overruling, and remain in existence to this day. \textit{See generally} supra Part II.C (defining and
history, the Federal Circuit had the unique opportunity before it to finally establish some level of stability in a field of law that is very void of consistency. Instead, the majority only continued the trend of rule creation and abolishment with the “inducement-only” rule. Even worse, the majority’s decision does not just eliminate a gradually stable precedent and replace it with something new; it wipes the slate clean and establishes an even more confusing rule that is unsupported by any level of precedent; a fact that is made clear by the Supreme Court’s opinion. On the other hand, the proposed changes and standards set forth in Judge Newman’s dissenting opinion have the potential to finally produce the steady and applicable law which the courts have been seeking for decades.

By instead focusing on the middle ground between the two ends of the infringement spectrum, Judge Newman’s proposal provides the specific changes to the doctrine of joint infringement which will eliminate the potentials of abuse produced by the “single-entity” rule, and also remains conservative by avoiding the potential upsetting of any well-established precedent. Therefore, Judge Newman’s view and recommendations in Akamai II are not only the most reasonable and preferable of the three opinions, but are the best overall route for the future application and advancement for the doctrines of direct and indirect infringement. For the remainder of this Article, I will strongly advocate that the majority’s opinion should be abandoned and Judge Newman’s opinion instead should become the precedent from this case.

Looking towards the most beneficial future for the doctrine of joint infringement, both in applicability as well as clarity, it is clear that two key realizations must be recognized. First, the precedent ranging back from before the enactment of the Patent Act and the statutory language of §§ 154 and 271 both show that there must be an existence of direct patent infringement in order for there to be any sort of liability for indirect infringement, and, thus, the Supreme Court was correct in establishing this in its opinion. Secondly, isolating liability for direct infringement to inducement will not provide an adequate way for patent owners to obtain remedies for the infringements in which they have suffered.

Both of these concepts must be accepted and describing the “all-elements” and “doctrine of equivalents” rules and their application). It could be argued that the requirement that the existence of direct infringement be shown before liability for indirect infringement can be proven could also fall into the category of the historically accepted rules. However, with the majority’s holding in Akamai II and the reasoning which it relies on, this rule is confusingly altered. See Akamai Techs., Inc., 692 F.3d at 1308–09 (per curiam) (“Requiring proof that there has been direct infringement as a predicate for induced infringement is not the same as requiring proof that a single party would be liable as a direct infringer.”).

259. See id. at 1319 (Newman, J., dissenting) (“This new rule is not in accordance with statute, precedent, and sound policy. It raises new issues unrecognized by the majority, and contains vast potential for abuse.”). In addition to the weak support for case precedent, the legislative analysis which the majority provides is also questionable, both in its actual meaning and its influence. See supra Part IV.B (explaining the erroneous aspects of the majority’s legislative support).

260. See Akamai Techs., Inc., 692 F.3d at 1338 (Linn, J., dissenting) (“Divorcing liability under § 271(a) from liability under § 271(b) is unsupported by the statute, subverts the statutory scheme, and ignores binding Supreme Court precedent.”); supra note 67 and accompanying text (providing extensive case precedent which favors direct infringement as a prerequisite for indirect infringement liability).

261. See supra note 247 and accompanying text (claiming that the majority’s inducement-only rule will
included in any type of reformation of the doctrine of joint infringement, and it is clear that Judge Newman’s opinion takes both into consideration when coming to a conclusion.\textsuperscript{262}

One of the main supporting conclusions that the majority came to in \textit{Akamai II} is the removal of the rule that direct infringement by a single party is required before liability for indirect infringement can exist.\textsuperscript{263} The majority’s statement is incredibly muddled, and thus attempts to overcomplicate what is—and should be—an uncontested staple of patent infringement law.\textsuperscript{264} Accordingly, the Supreme Court officially overruled the majority’s holding on this subject by agreeing with Judges Linn and Newman that this rule should reaffirmed for the last and final time in hopes that it becomes as universally applied as it should have been in the first place.\textsuperscript{265}

Although the Supreme Court correctly recognized the necessity of requiring direct infringement for indirect infringement liability, it must be acknowledged that an affirmation of the “single-entity” rule, such as Judge Linn’s dissent, would also lead to many of the same problems as the “inducement-only” rule. The “single-entity” rule expands the possibilities of prevent injured parties from obtaining the compensation that they deserve from the infringement of their patents. Similar to the “single-entity” rule, the “inducement-only” rule is once again completely based on the relationship between the parties instead of the actual acts of infringement. This was a major flaw in the “single-entity” rules application and will continue to be one in the implementation of the new rule. E.g., Robinson, \textit{supra} note 11, at 65 ("The Federal Circuit’s focus on the nature of the relationship between relevant actors ignores other practical factors that should be considered in determining liability for a joint infringement claim. Accordingly, the law should prescribe a more flexible procedure to analyze joint infringement liability.").

\textsuperscript{262} Judge Newman’s approach not only reiterates the fact that direct infringement is a necessary component in finding indirect infringement liability, but also is the only opinion of the \textit{en banc} rehearing to even recognize the possible impact on the remedies of patent owners from the “inducement-only” rule. E.g., \textit{Akamai Techs., Inc.}, 692 F.3d at 1320 (Newman, J., dissenting) ("The \textit{en banc} majority, embracing this new rule, does not acknowledge the new problems of enforcement and compensation and defense that are also created . . . . For example, if the direct infringers are not liable for infringement, one wonders whether they are subject to damages or injunction. These and other critical issues should be considered before a new law of inducement-only infringement is adopted."); \textit{supra} Part III.D (summarizing Judge Newman’s proposal and the remedies it would allow for patent owners).

\textsuperscript{263} \textit{Akamai Techs., Inc.}, 692 F.3d at 1308–09 (per curiam) (noting that proof that direct infringement has occurred is different that proof that a single party would be liable for direct infringement); see King et al., \textit{supra} note 102, at 281–82 (explaining the distinction which the majority made between “liability for direct infringement under § 271(a)” and “the act of direct infringement supporting a claim of inducement under § 271(b)").

\textsuperscript{264} \textit{See Akamai Techs., Inc.}, 692 F.3d at 1328 (Newman, J., dissenting) ([The majority] hedge, and while acknowledging that ‘there can be no indirect infringement without direct infringement,’ . . . the court holds that there need not be direct infringers. I need not belabor the quandary of how there can be direct infringement but no direct infringers."). \textit{supra} note 66 and accompanying text (stating that proof of direct infringement is a foundational requirement that is necessary in order to produce liability under the doctrine of indirect infringement).

\textsuperscript{265} \textit{Akamai Techs., Inc.}, 692 F.3d at 1328 (Newman, J., dissenting) ("For all forms of indirect infringement liability, it is necessary to establish that the claimed invention is directly infringed."). The rule itself has its foundation in a simple reasoning that there cannot be indirect infringement if there was never actual infringement. The base act of infringement is not a separate element, it is one all liability stems from, and thus must be present in order to connect any form of indirect infringement to the actions. Cf. Jason A. Rantanen, \textit{An Objective View of Fault in Patent Infringement}, 60 Am. U. L. Rev. 1575, 1591 (2011) ("As a general matter, society would prefer to have patentees sue direct infringers. After all, direct infringers are the ones engaging in the infringing conduct, and any harm ultimately flows from their direct infringement.").
infringers avoiding liability by simply splitting the steps of an infringement.\footnote{This is almost identical to the loophole created by the majority’s opinion in \textit{Akamai II}, except the “single-entity” rule would have one small benefit in comparison to the “inducement-only” rule: it ensures that at least one of the infringing parties will be found liable for the infringement.\footnote{The apparent acceptance by the panel of schemes intended to subvert the purposes of the patent system is troubling, particularly in view of the follow on disincentives that are likely to flow from such a policy. . . . [A] rule of law that \textit{invites} competitors of a patent owner to engage in clever ways of avoiding infringement through the use of schemes . . . is incompatible with the purpose of the patent system.”}; \textsuperscript{266} Ahn, supra note 134, at 171 (“The concerns over a party avoiding infringement by arms-length cooperation can usually be offset by proper claim drafting.”). This may seem like a small difference, but in regards to the policy of proving a remedy for the infringement of a patent, it is a significant step in the correct direction.\footnote{In addition to the basic policies of ensuring that the time and effort of these inventors is both rewarded and subsequently protected, there is also the probability that denying them this protection could be unconstitutional. See Brief for Pharm. Research & Mfrs. of America as Amicus Curiae on Rehearing En Banc in Support of Neither Party, Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012) (en banc) (per curiam) (No. 2010-1291) (“The apparent acceptance by the panel of schemes intended to subvert the purposes of the patent system is troubling, particularly in view of the follow on disincentives that are likely to flow from such a policy. . . . [A] rule of law that \textit{invites} competitors of a patent owner to engage in clever ways of avoiding infringement through the use of schemes . . . is incompatible with the purpose of the patent system.”); \textsuperscript{268} Ahn, supra note 134, at 171 (“The concerns over a party avoiding infringement by arms-length cooperation can usually be offset by proper claim drafting.”).} Yet, even if the “single-entity” rule benefits from the small fact that it actually challenges the infringing actors, this small aspect of the rule does not compensate for the rest of the negative consequences that arise from its application.\footnote{In addition to the basic policies of ensuring that the time and effort of these inventors is both rewarded and subsequently protected, there is also the probability that denying them this protection could be unconstitutional. See Brief for Pharm. Research & Mfrs. of America as Amicus Curiae on Rehearing En Banc in Support of Neither Party, Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012) (en banc) (per curiam) (No. 2010-1291) (“The apparent acceptance by the panel of schemes intended to subvert the purposes of the patent system is troubling, particularly in view of the follow on disincentives that are likely to flow from such a policy. . . . [A] rule of law that \textit{invites} competitors of a patent owner to engage in clever ways of avoiding infringement through the use of schemes . . . is incompatible with the purpose of the patent system.”); \textsuperscript{268} Ahn, supra note 134, at 171 (“The concerns over a party avoiding infringement by arms-length cooperation can usually be offset by proper claim drafting.”).} There are no other permanent solutions to this issue other than abolishing the rule in favor of a more flexible prosecution strategy.

Apart from the two opinions of the majority and Judge Linn in \textit{Akamai II}, the Supreme Court’s holding on the cases must obviously be considered when determining the ideal solution to the issues involved in joint patent infringement. Firstly, the Supreme Court agrees with, and therefore officially affirms the opinions of Judges Linn and Newman on the concept of requiring direct infringement for indirect infringement liability. However, because of how the Court decided to limit its opinion, this is the extent that the Court’s opinion applies to the actual law of joint patent infringement.

\footnote{\textit{See} BMC Res., Inc. v. Paymentech, L.P., 498 F.3d 1373, 1381 (Fed. Cir. 2007) (“This court acknowledges that the standard requiring control or direction for a finding of joint infringement may in some circumstances allow parties to enter into arms-length agreements to avoid infringement.”); \textit{Ahn}, supra note 189 and accompanying text (comparing the “single-entity” and “inducement-only” rules); see, e.g., Akamai Techs., Inc. v. Limelight Networks Inc., 692 F.3d 1301, 1321 (Fed. Cir. 2012) (Newman, J., dissenting) (“Cases of divided infringement have not caused past turmoil, as the majority announces. However, turmoil will surely be created, to the detriment of innovative commerce.”).}
Similar to the Federal Circuit’s en banc panel, the Supreme Court had the opportunity in front of them to finally solidify the law regarding multiple actor direct infringement under § 271(a), but, just like the Akamai II majority, the Court dodged this opportunity under the excuse that it was not the primary issue of the certiorari. By narrowing its opinion to the question of direct infringement being necessary for indirect infringement, the Supreme Court has completely failed in providing any guidance on one of the most significant issues concerning patent infringement. Due to this lack of guidance, Judge Newman’s views and proposals remain an ideal option to these issues, and, as such, should still be adopted in order to answer these looming issues.

Moreover, while the Court did technically apply the “single-entity” rule in its holding, it explicitly states that it did not revisit any of the law behind the rule, and, as such, its use cannot be considered support for the “single-entity” rule, because the Court never analyzes the actual legal precedent and theory. In fact, the Court actually suggests that, if the issues involving multi-actor direct infringement are significant enough, then the Federal Circuit can analyze and rule on the concept, and then the Supreme Court would consider it if necessary. Therefore, with the Supreme Court failing to fill the void of the joint patent infringement, Judge Newman’s proposals and the reasoning behind them must still not only be acknowledged, but accepted and implemented in order to offer a clearer, more applicable choice for the area.

As compared to the “inducement-only” and “single-entity” rules, Judge Newman’s proposed standard to allow infringement to exist from the actions of multiple entities provides a much more applicable rule to combat the modern forms of common infringement, especially complex method patents which require multiple entities to complete the entire process. By finding all parties that jointly complete all of the steps of a claim liable, Judge Newman’s approach would allow the doctrine of joint infringement to reach all of the

271. Lower courts have already ran into issues with parties citing and referencing the Supreme Court’s holding in Akamai as support that multiple actors could be found liable for direct infringement. E.g., Nalco Co. v. Turner Designs, Inc., No. 13-cv-02727, 2014 WL 3943456, at *2–3 (N.D. Cal. Aug. 11, 2014) (discussing that the Supreme Court did not rule on multi-actor direct infringement under § 271(a) in its reversal of Akamai II).
272. See Limelight, 134 S. Ct. at 2120 (“Our decision on the § 271(b) question necessitates a remand to the Federal Circuit, and on remand, the Federal Circuit will have the opportunity to revisit the § 271(a) question if it so chooses.”).
273. E.g., Akamai Techs., Inc., 692 F.3d at 1321 (Newman, J., dissenting) (“[N]either the single-entity rule nor the majority’s newly minted inducement-only rule is in accord with the infringement statute, or with any reasonable infringement policy.”); Ahn, supra note 134, at 171 (recognizing that unless protection against all multi-actor infringement claims is made possible, then “many thousands of patents may become worthless . . . .” (citing Brief for Intell. Prop. Owners Ass’n as Amicus Curiae in Support of Petition for Panel Rehearing and Rehearing En Banc at 5, Muniauction, Inc. v. Thomason Corp., 532 F.3d 1318 (Fed. Cir. 2008) (No. 2007-1485)).
274. See, e.g., Ass’n’s Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2112–13 (2013) (considering a patent for the method of isolating a specific genetic sequence of human DNA); Gobeli Research Ltd. v. Apple Computer, Inc., 384 F. Supp. 2d 1016, 1020 (E.D. Tex. 2005) (considering a method for “accommodating complex (and multiple) peripheral devices” through computer code and large external devices); Menard, supra note 252 at part IV–V (discussing off-label medical device infringement possibilities, including the extent required in order to satisfy inducement infringement).
individuals that participated in the acts, and ensure that they are punished for their contributions to the infringement.\footnote{275}

Each of the opinions in Akamai II attempt to interpret the terminology and intentions of the § 271(a)–(b);\footnote{276} however, Judge Newman’s analysis of the language of § 271(a) is both the most supported by other statutes and legislation as well as supported by a lineage of cases interpreting § 271(a) in the same way. It has been commonly accepted since the enactment of the Patent Act of 1952, and remains true to this day, that § 271(a) was intended by Congress to define direct patent infringement.\footnote{277} With this in mind, the rest of the language of the statute stands as generally uncontroversial, except for the term “whoever.”\footnote{278} The term itself can refer to both the singular and the plural, and this is exactly how the term should be considered during the application of the statute.\footnote{279} Under this definition then, the language of direct infringement would allow infringement to be established by any number of entities, as long as they perform all of the steps of a patented claim.\footnote{280} This

\footnote{275} Akamai Techs., Inc., 692 F.3d at 1326 (Newman, J., dissenting) (aiming to reestablish the doctrine of joint infringement to include any situation where all of the steps of an method are committed, regardless of the number of parties who jointly perform the steps). It is vital to note that adaptation of Judge Newman’s approach would require some steps to ensure that innocent parties, such as customers and medical patients, are immunized from the liability, even though there is a remarkably small chance that patent owners would seek to prosecute those minor parties compared to the devious companies who are likely performing a majority of the infringement. See Robinson, supra note 11, at 108 (“The law could easily exempt innocent actors from liability, though, innocent actors were rarely involved in the cases that have been litigated. Instead, the parties involved in the joint infringement are usually sophisticated businesses. Accordingly, a flexible test that exempts innocent actors from liability, but still prevents misappropriation of an invention by sophisticated parties, is ideal.”).

\footnote{276} See generally Akamai Techs., Inc., 692 F.3d passim (discussing § 271 throughout the opinion).

\footnote{277} See generally Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc., 617 F.3d 1296, 1308 (Fed. Cir. 2010) (recognizing that “[s]ection 271(a) defines infringing conduct . . .”); Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294, 1304 (11th Cir. 2003) (stating that 35 U.S.C. § 271(a) (2012) defines infringement); H.R. Rep. No. 82-1923, at 9 (1952) (“Section 271, paragraph (a), is a declaration of what constitutes infringement.”); Rich, supra note 145, at 537 (“Paragraph (a) of § 271 defines direct infringement and is present only for the sake of completeness. We got along without it for 162 years and we could again. Its omission would change nothing.”).

\footnote{278} The contrasting interpretations of the term by both Judge Linn and Judge Newman perfectly represent how two parties can both have supportive material resulting in complete opposite conclusions. Compare supra Part III.B (describing Judge Linn’s interpretation of the term “whoever” to only refer to a singular party), with supra Part III.C (describing Judge Newman’s contrasting interpretation of “whoever” as encompassing both singular and plural parties). However, it is clear from the language of the actual cited support that Judge Linn’s view quickly collapses as inappropriate. See supra Part IV.C (discussing the flawed statutory reliance by Judge Linn in interpreting the term “whoever” in regards to indirect patent infringement).

\footnote{279} See supra note 143 and accompanying text (providing interpretation as proof that the term “whoever” refers to both the singular and the plural meaning of the word); cf. supra note 249 and accompanying text (describing the flawed elements of Judge Linn’s interpretation of the term “whoever” in § 271(a) to be strictly limited to single parties).

\footnote{280} It should be recognized that the wording of § 271(a) shows that the legislation did not intend for the discussions involving prosecution for direct infringement to focus on the number of parties which are liable, but instead should focus on whether or not the actual infringement was completed. If infringement can be shown to have occurred from the joint performance of each of these entities, then direct infringement has occurred, regardless of the number of parties which performed the act. See Akamai Techs., Inc., 692 F.3d at 1322 (Newman, J., dissenting) (“Direct infringement requires that every claimed step of a patented method or system is performed in accordance with the limitations stated in the claim. Thus, when more than one entity performs all of the steps, the claim is directly infringed.”); supra Part IV.C (describing that the proper interpretation of § 271 provides that the infringement can be performed by single or multiple entities).
statutory meaning would then provide a simple inference that if multiple entities jointly perform the steps of the claim, then these parties can be found liable for direct infringement because the statute itself does not limit the application of § 271(a).”

In addition to the specific language and meanings of § 271(a), case precedent along with the general policy set forth by Congress during the enactment of this law also affirm this reasoning and conclusion. Before BMC and Muniauction altered the doctrine of joint infringement, many of the cases since the codification of § 271 held that a single entity is not a necessary component in order to find liability.281 Once the Federal Circuit established the “control or direction” and “single-entity” rules, this case precedent was incorrectly abandoned because they did not support these two rules.282 Yet, Akamai II provided an ideal opportunity to reverse this change in precedent and reincarnate the common law that was so well recognized before 2007. Regrettably, the court did not take advantage of this opportunity,283 and instead added to the confusion by overruling the original reversal to something completely different.284

281. See generally On Demand Mach. Corp. v. Ingram Indus., Inc., 442 F.3d 1331, 1344–45 (Fed. Cir. 2006) (“It is not necessary for the acts that constitute infringement to be performed by one person or entity. When infringement results from the participation and combined action(s) of more than one person or entity, they are all joint infringers and jointly liable for patent infringement.”); Ahn, supra note 134, at 154–55 (discussing the “some connection” theory of finding liability for joint infringement); Sriranga Veeraraghavan, Joint Infringement of Patent Claims: Advice for Patentees, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 211, 222–32 (2006) (describing the development of the “some connection” theory of liability for multiple parties infringing a method patent).


283. With the theoretical option available then, there is even more to question of why the majority felt that Akamai II was not the correct time to make a ruling on the issue of the divided direct infringement liability. There are a few possible explanations that could provide valid reasoning for the majority’s decision. Firstly, the majority could simply be telling the truth in their statement on the issue: that the present cases before the court did not concern the question and thus was not the time in which to make a holding on the topic. Akamai Techs., Inc., 692 F.3d at 1306 (per curiam). The other possible reason for the majority’s decision to avoid the en banc issue is far more unlikely, as it focuses less on the Federal Circuit’s power to decide patent cases and instead focuses on the idea that the majority was simply attempting to stall in making a precedential decision in hopes that the Supreme Court would instead take on the responsibility. Even if the Federal Circuit’s strategy was to attempt to present enough confusion in order to catch the Supreme Court’s eye, it obviously did not work considering the parties’ petitions for writs of certiorari were both denied. Petition for Writ of Certiorari, Epic Sys. Corp. v. McKesson Techs., Inc., 2013 U.S. LEXIS 2046 (2013) (No. 12-800); Petition for Writ of Certiorari, McKesson Techs., Inc. v. Epic Sys. Corp., 2013 U.S. LEXIS 2047 (2013) (No. 12-970). However, this theory likely fails considering that the Federal Circuit has had such a major effect on the field of patent infringement that a vast majority of the major holdings from the last two decades have arisen from the Federal Circuit, not the Supreme Court. See generally supra Part I.I.C (describing the development of indirect patent infringement since the Patent Act of 1952). Moreover, if the Federal Circuit was indeed attempting to “stall” the precedent surrounding joint direct infringement, then it would most definitely not take the route it did by abolishing two rather solidified rules of the law and create an entirely new one. See Akamai Techs., Inc., 692 F.3d at 1306 (overruling both the “control or direction” and “single-entity” rules in inducement infringement).

284. As mentioned below, the court system has a pattern in handling the doctrines of patent infringement, usually consisting of establishment of new rules and thus overruling of past rules, followed by the adaptation of the new rules by the lower courts, and then clarification by either the legislation or Supreme Court involving the issue. However common this pattern is, it does not make it the correct system. See supra
Finally, the abolishment of the “single-entity” and “inducement-only” rules in favor of Judge Newman’s standard greatly supports the policy set forth by Congress for patent infringement. The primary policies for providing remedies for patent owners is not just to deliver justice upon those that have infringed, but mainly to inspire innovation in the numerous fields of science and technology with the guarantee that, if a patent is infringed, then the patent owner will have some remedy available against those infringers. Under either the “single-entity” or “inducement-only” rules, there is a very strong chance that a party can infringe the patent, but by purposely remaining outside of the scope of the rules, avoid any applicable liability for their infringement. On the other hand, by embracing Judge Newman’s approach, there are no barriers in prosecuting the parties that jointly infringed the patent owner’s method, because these parties can all be prosecuted under § 271(a); thus ensuring that patent owners will always have a form of action and remedy against direct infringers, regardless of the number and inducement of those infringers.

In combination with her proposal for multiple entity direct infringement liability, Judge Newman relies heavily on the benefit and concept of allocation of damages against the infringing parties, something that does not technically exist under either of the other two rules. Although direct infringement is considered to be a strict liability tort, this does not mean that it should automatically designate the amount of damages which a liable party would be

Part II (discussing the patterns in the evolution of patent infringement law). The majority in Akamai II strays from the pattern by overruling the past law without any support from the legislation or the Supreme Court, and creating a completely new standard that is based on generally nothing from the past precedent. See supra Part V.B (claiming that the new rule has no basis in precedent, statute, or legislative intent).

285. See supra Part V.B (recognizing the loopholes resulting from both the “single-entity” and “inducement-only” rules and the inevitable consequences of their use). Judge Newman was the only opinion author to recognize the issue of remedies involved in joint infringement. She cited the confusion which the “single-entity” and “inducement-only” rules bring to the remedy decision for infringement. See Akamai Techs., Inc., 692 F.3d at 1330 (Newman, J., dissenting) (“According to the court’s new ruling, . . . the only remedial path is by way of ‘inducement.’ We are not told how compensation is measured. The only thing that is clear, is that remedy is subject to new uncertainties.”).

286. See, e.g., Robinson, supra note 11, at 100 (“[T]he Federal Circuit [in Akamai II] has acknowledged that a rule based solely on the relationship between relevant actors creates a legal loophole. This loophole is a roadmap for perceptive entities, allowing them to reap the benefit of a patent that cannot be enforced.”); supra note 263 and accompanying text (discussing the policy contradiction of allowing infringing parties to avoid liability by scheming to involve multiple entities during the performance of claimed steps).

287. E.g., Akamai Techs., Inc., 692 F.3d at 1332 (Newman, J., dissenting) (“When the several steps of a process claim are performed by more than one entity, whether the entities operate under common direction or control, or jointly or independently or interactively, remedy for infringement is appropriately allocated based on established criteria of culpability, benefit, and the like.”); cf. id. at 1330 (“According to the court’s new ruling, it appears that the patentee cannot sue the direct infringers of the patent, when more than one entity participates in the infringement . . . . Since the direct infringers cannot be liable for infringement, they do not appear to be subject to the court’s jurisdiction.”).

288. Both the “inducement-only” and “single-entity” rules rely on finding a single principal liable for direct infringement, regardless of the other parties involved and their specific amounts of contribution to the infringement. This is based on the reasoning that direct infringement is a strict liability tort, and therefore would result in full damages for any liability. Chimut, supra note 34, § 20.01 (explaining the basic remedies available for patent infringement: monetary damages or injunction) (citing 35 U.S.C. § 283). But see supra Part IV.D (explaining that Judge Newman does not believe that strict liability provides an applicable remedy for joint infringement claims).
charged; instead, it should only establish liability for the tort, with the actual remedy to be determined by the court’s analysis of several factors of allocation of damages. Furthermore, Judge Linn’s fear about allowing multiple entities to be directly liable—while understandable—is not plausible if liabilities and damages are apportioned based on the designated factors and on a case-by-case basis. Under Judge Newman’s new standards, liability would still exist under both § 271(a) and (b), but the remedies and extent of liability would be changed based on factors of tort law and the determined degree of infringement of each party.

289. E.g., supra note 155 and accompanying text (recognizing that strict liability does not necessarily have to result in the fullest of remedies against the parties, especially in cases where there are multiple entities). The fact that strict liability actually ignores the intent and knowledge aspect which specific intent analysis, such as for present indirect infringement, can actually hinder the possible remedies for patent owners. Courts have typically found that willful infringement deserve higher damages in order to both further punish the infringer as well as deter future intentional infringement. See Robert L. Harmon, Patents and the Federal Circuit 1082–83 (9th ed. 2009) (explaining that willful infringement is generally a condition for enhancing damages for infringement); Rantanen, supra note 265, at 1604–05 (“[A] patentee may seek enhancement of damages of up to three times its actual damages. The basis for this enhancement is not stated in the authorizing statute, but courts have long trebled damages when an infringer ‘willfully infringes a patent.’”).

290. See, e.g., supra note 156 and accompanying text (discussing the number of factors that a court can consider when determining the apportionment of liability, and thus damages, for a patent infringement claim). In addition to present facts that can be considered in this analysis, other less prominent factors can be introduced and used as well. E.g., Robinson, supra note 11, at Part III (describing some of the factors that have been applied in order to show infringement as well as proposing additional factors which could aid the decision making).

291. Regardless of the consequences which Judge Linn believes will occur, Judge Newman still recognizes the distinction between direct and indirect infringement and the liability involved with both. See Akamai Techs., Inc., 692 F.3d at 1332 (Newman, J., dissenting) (“Whether the infringement is direct or indirect, the allocation of remedy is a case-specific determination. . . . The law has always permitted allocation of remedy when multiple parties are responsible for civil wrongs.”). Moreover, there are methods which can be enacted in order to further prevent the possible infringement prosecution of innocent parties. See supra note 275 and accompanying text (discussing the possibility of avoiding liability for innocent parties while extending liability to multiple entities).

292. See, e.g., supra note 156 and accompanying text (discussing the number of factors that a court can consider when determining the apportionment of liability, and thus damages, for a patent infringement claim). Thus, entities that are found to perform all the steps of a specific method together will be held liable for direct infringement, with their specific extents of liability determined by the factors and facts of the case; on the other hand, entities that are found to have not performed full steps in the infringement of the patent would still be could still be found liable for inducement or contributory infringement under § 271(b) and (c), respectively, while their remedies would also be allocated depending on the factors mentioned below. Cf. Akamai Techs., Inc., 692 F.3d at 1332 (Newman, J., dissenting) (“Apportionment of remedy for shared infringement permits consideration of the actual situation, and is particularly suitable in cases of divided infringement.”). The parties that would be prosecuted under § 271(b) and (c) would be significantly smaller players in the overall scheme of the infringement, which would satisfy the name of indirect infringement. In some cases, these parties could be considered such minimal contributors to the infringement that liability may be waived while the principal infringers are focused on instead. E.g., id. at 1332 (“When there is combined participation in direct infringement, there is a fair concern for imposing damages on minor participants. Law and precedent do not so require, and experience makes clear that the target is the deep-pocket commercial participant, not the occasional customer.”). While it is true that, unlike the “inducement-only” and “single-entity” rules, Judge Newman’s new standards would reach all infringing parties, big or small, this does not necessarily mean that all of these parties are actually innocent or will suffer irreparable harm. The aim of protecting these smaller parties is not a justifiable reason for enacting a rule that will affect significantly more than just those parties’ liability. See id. at 1332 (Newman, J., dissenting) (“Neither the single-entity rule nor the inducement-only rule is needed to protect the innocent patient who turns on his computer to access the system containing his medical records.”).
For the various reasons detailed, it is clear that the standards proposed in Judge Newman’s dissenting opinion are not only the most reasonable and preferable of the three opinions, but allow for the best overall route for future application and advancement of the doctrines of direct and indirect patent infringement.

VI. CONCLUSION

While the historical evolution of the doctrine of indirect infringement has been far from a simple progression, specifically involving policy changes and disagreements between the judiciary and the legislation, the confusion reached a climax in Akamai II. The minimal majority in Akamai II set out to attempt to stabilize the field of law involving both direct and indirect patent infringement, specifically where there are multiple parties involved; however, instead of providing stability, the majority has instead ignored one of the major issues looming over the courts and overruled the only two standards that have become consistent in relating to these forms of infringement. Both parts of the majority’s opinion thus fall short in the scope of aiding the doctrines of patent infringement in advancing towards a state of stability and applicability for the courts and the industries that are involved in the claims.

The shortcomings of the Akamai II majority were officially recognized by the Supreme Court in its reversal of Federal Circuit’s holding and subsequent elimination of the majority’s new rule. While the Court did rule that direct infringement is required for indirect infringement liability to exist, its opinion was far too narrow, and, as such, completely avoided the looming issue of whether or not multiple parties can jointly directly infringe a patent under § 271(a).

With these questions still in the air, Judge Newman’s opinion offers a significantly stronger proposal for advancing the state of indirect infringement by establishing the rule that multiple parties that partake in committing all of the steps of a method patent can each be held jointly liable under the doctrine of direct patent infringement. This approach would not only clarify some of the most controversial issues in the field, but also provide a strong foundation in which courts and legislature can continue to build the law. This benefit will be seen by the courts themselves in their decisions as well as among the many fields of technology that participate daily in the patent field.