ARE Patent Litigation Alert:
Federal Circuit Takes A Second Divided Infringement Case En Banc

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On May 26, 2011, the U.S. Court of Appeals for the Federal Circuit continued signaling its intention to reevaluate the state of the law regarding divided infringement when it agreed to hear *McKesson Technologies Inc. v. Epic Systems Corp*. *en banc* on an expedited schedule in view of the pending en banc review of *Akamai Technologies., Inc. v. Limelight Networks, Inc*., another divided infringement case.
The Federal Circuit in *McKesson* will address the following questions:
1. If separate entities each perform separate steps of a method claim, under what circumstances, if any, would either entity or any third party be liable for inducing infringement or for contributory infringement? *See Fromson v. Advance Offset Plate, Inc*., 720 F.2d 1565 (Fed. Cir. 1983).

2. Does the nature of the relationship between the relevant actors—e.g., service provider/user; doctor/patient—affect the question of direct or indirect infringement liability?
See McKesson Technologies Inc. v. Epic Systems Corp., No. 2010-1291, Order (Fed. Cir. May 26, 2011).

Before agreeing to hear *McKesson en banc*, a divided panel of the Federal Circuit, in *McKesson Technologies Inc. v. Epic Systems Corp.,* No. 2010-1291, 2011 U.S. App. LEXIS 7531, at *13-15 (Fed. Cir. Apr. 12, 2011), questioned the correctness of the "single infringer" rule and requirement of "direction or control" in joint infringement actions.

As we previously reported, a week after the *McKesson* decision, the Federal Circuit granted a petition for rehearing *en banc* in *Akamai Technologies., Inc. v. Limelight Networks, Inc*., No. 2009-1372, -1380 , -1416, -1417, 2011 U.S. App. LEXIS 8167, at *2 (Fed. Cir. Apr. 20, 2011) to address the question:
If separate entities each perform separate steps of a method claim, under what circumstances would that claim be directly infringed and to what extent would each of the parties be liable?
Akamai is one of several recent cases by the Federal Circuit requiring that all joint infringers be under the "direction or control" of a single entity in order to find direct infringement of a method claim. *See* Macedo & Rasmussen, *Federal Circuit Takes On Divided Infringement Issue*, ARELAW Litigation
Alert, April 22, 2011 (available at www.arelaw.com/publications/view/dividedinfringement).

By taking multiple cases which present different fact patterns on the same issue, the Federal

Circuit is likely to be presented with a broader range of views and perspectives on the impact of the ultimate rule to be decided by the full court.

For more information on how these recent developments may affect your organization, please contact one of our attorneys.

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Mr. Macedo is also the author of *The Corporate Insider's Guide to U.S. Patent Practice*, published by Oxford University Press in 2009.