2009-1372, -1380, -1416, -1417

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AKAMAI TECHNOLOGIES, INC.
Plaintiff-Appellant

and

THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Plaintiff-Appellant

v.

LIMELIGHT NETWORKS, INC.,
Defendant-Cross-Appellant.

Appeals from the United States District Court for the District of Massachusetts in case nos. 06-CV-11109 and 06-CV-11585, Judge Rya W. Zobel.

REPLY BRIEF OF DEFENDANT-CROSS-APPELLANT LIMELIGHT NETWORKS, INC.

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March 10, 2010

CERTIFICATE OF INTEREST

Counsel for the Defendant-Cross-Appellant Limelight Networks, Inc. certifies the following:

1. The full name of every party or amicus represented by us is:

Limelight Networks, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

Limelight Networks, Inc.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are:

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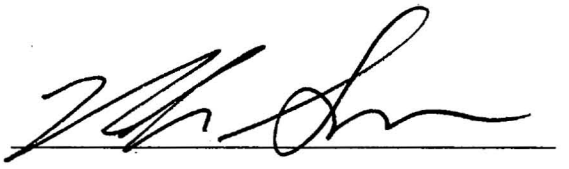

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I. INTRODUCTION

Limelight conditionally cross-appeals the jury's award of $40.1 million in lost profits because Akamai failed to present sound economic proof that Limelight's alleged infringement caused Akamai to lose any sales.

In its response, Akamai does not establish any basis on which the lost profits award can be sustained. Critically, Akamai does not dispute that:

- Akamai offered CDN services at double the prices of Limelight and other CDN competitors; and
- Akamai's damages expert chose not to use standard economic techniques to calculate the elasticity of demand for CDN services, but instead made a "judgment call" that 75% of Limelight's accused business would have gone to Akamai in the but-for world.

Therefore, under this Court's precedent, Akamai's claim for lost profits was speculative and legally unsupported. Accordingly, this Court should grant Limelight judgment as a matter of law that Akamai is not entitled to lost profits. Alternatively, the Court should order a new trial on Akamai's claim for lost profits.

II. THIS COURT SHOULD REVERSE THE LOST PROFITS AWARD

A. Akamai is Not Entitled to Lost Profits Under this Court's Precedent

This Court has held repeatedly that lost profits are unavailable as a matter of law unless the patentee shows substantial evidence establishing a reasonable

probability that "but for" any alleged infringement the patentee would have made the alleged infringer's sales. *See BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 1 F.3d 1214, 1217-18 (Fed. Cir. 1993); *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 673 (Fed. Cir. 1988).

Under those decisions, "the alleged alternative must not have a disparately higher price than" the patentee's product for the court to award lost profits. *BIC*, 1 F.3d at 1219. For example, in *BIC,* the alleged infringer sold its product at just over half the price of the patentee. *BIC*, 1 F.3d at 1218. As a result, this Court held that the patentee could not, as a matter of law, show that the infringer's customers would have gone to the patentee rather than other lower price alternatives. *BIC*, 1 F.3d at 1219.

Akamai tries to distinguish these cases on irrelevant factual differences — none of which address the basic premise that lost profits are not proper when a significant price difference exists between the products at issue in a price sensitive market. For instance, Akamai argues that *BIC* is inapposite because of alleged differences between the infringer's and patentee's products in that case. (Reply Br. at 56-57.) Yet in *BIC* this Court focused on the price difference between the products as the critical factor, concluding "without BIC in the market, BIC's customers would have likely sought boards in the same price range [as BIC's]." *Id.* at 1218. The same is true here. In the but-for market, multiple CDNs would

have competed with Akamai for Limelight's customers at prices similar to Limelight's. Even Limelight's own non-accused switch-based architecture was available as a low priced alternative. (A502:102; A714:124.) Akamai ignores the only logical conclusion, which is that customers of an infringer's low-priced product would go to other low-price alternatives in the but-for market. In fact, those customers have already demonstrated their desire to use a lower price alternative by selecting Limelight to begin with.

Akamai's expert fought this logical conclusion by arguing that the majority of customers would select Akamai despite its significantly higher price because Akamai's system "performs better." (A505:117.) According to the expert, the supposed superiority of Akamai's CDN service justifies its higher price. Under Akamai's analysis, the CDN market has two segments: higher performance and higher priced CDN service versus lower performance and lower priced services. But if Akamai's own expert is correct, then this case is indistinguishable from *BIC,* where the sailboard market was segmented between higher-end, higher-priced boards and lower-end, lower-priced boards. Thus, even if Akamai's expert were correct that Akamai's service was better, that fact defeats its lost profits claim because, under *BIC*, a lost profits award is not available when the market is segmented and those segments have significant price differences.

On the other hand, if Akamai's expert's theory of a segmented market is wrong, then Akamai has provided no explanation why Akamai's price is twice as high as other non-infringing alternatives. More importantly, Akamai cannot explain why the large majority of Limelight's price-sensitive customers would have paid Akamai's higher prices in the but-for world, rather than selected one of the many lower price alternatives then available in the market.

Akamai also wrongly contends that the Court did not consider price when it reversed the lost profits award in *Water Technologies Corp. v. Calco, Ltd.* (Reply Br. at 58.) Not so. This Court held that prices were important and stated that the district court "made specific findings which tend to negate any possible assertion that [the patentee] would have made [the accused infringer's] sales. . . . [including] that [the patentee's] retail price for its [product] significantly exceeded that of [the accused infringer]." *Water Techs. Corp.*, 850 F.2d at 673. Thus, Akamai has failed to provide any basis for distinguishing *Water Technologies.*

B. Akamai's Expert's Analysis Did Not Rely on Standard Economic Techniques

1. Akamai's Expert Used an Inadequate "Judgmental Approach" to Predict the But-For Market

Akamai's expert coined the term "judgmental approach" to describe his "methodology" for predicting actions in the but-for market. (A528.) Despite

many years as a testifying damages expert, he had no support for this self-created approach. (A495:74-77.)

Yet, Akamai's expert admitted his judgmental approach was the *sole* basis for his opinion that the price elasticity of demand in the CDN market was -.25 — meaning 75% of Limelight's customers would have paid double in order to use Akamai's services rather than one or more of the other, low-price competitors. (*Id.*)

Having relied solely on personal judgment calls, Akamai's expert conceded that he did not use any objective methodology to determine the but-for market:

> So, it's not like I can say I multiplied A times B and got C. I had to make a judgment call based on the attributes and come to a conclusion what the adjustments would be. (A506:118.)

Incredibly, using his personal judgmental approach led Akamai's expert to conclude that Akamai's additional revenues in the but-for market would exceed Limelight's total actual revenue in the real world. (A516:31-32.) While the market-share approach may be used in appropriate cases, it does not justify a speculative damages award based on a made-up elasticity number in a market where a significant price difference exists between Akamai and the rest of the market including Limelight.

Akamai attempts to add a gloss of economic legitimacy to its expert's judgment calls by citing a myriad of evidence that supposedly supports the

challenged opinions. None of the cited evidence does so, and most of it has nothing to do with the key issue: elasticity of demand in the CDN market (i.e., what percentage of Limelight's customers would have been Akamai's customers at twice the price in the but-for world).

For example, Akamai refers to current market share evidence that its expert considered (Reply Br. at 51, 53), but that market data reveals nothing about how a 100% price hike would have affected Limelight's customers' purchasing decisions. Similarly, Akamai argues that its expert relied on historical variations in actual market shares and "Limelight's undisputed sales figures." However, Akamai does not supply any explanation of how this evidence could be used to predict Akamai's sales in the but-for world. Thus, Akamai cites evidence that has little or no relevance to the calculation of lost profits.

2. Akamai Relies on Illogical and Unwarranted Extensions of the Evidence to Support its Expert's Opinion

Akamai relies on two assumptions to support its expert's speculation: (1) that Akamai was the only reasonable alternative to Limelight for servicing Limelight's customers (Reply Br. at 52); and (2) that the price of Akamai's service is a "revenue generating cost" that would not have an impact on end-user usage. (Reply at 53.) Neither supports the lost profit award, and both lack any factual basis. Worse, Akamai's theory on appeal ignores the contradicting positions its expert took regarding price sensitivity to support Akamai's price erosion claim.

a. The CDN Market Included A Number of Lower Cost Alternatives Other Than Akamai

Akamai refers repeatedly to evidence that only Limelight had the scale (i.e., the ability to handle demands of large customers) to compete effectively for Akamai's customers. (Reply Br. at 4, 52-53.) Akamai then argues that the converse must also be true: According to Akamai, because only Limelight had the scale to compete with Akamai, only Akamai (and none of the other various CDN providers) could effectively compete for Limelight's customers. Neither logic nor facts support Akamai's position.

Indeed, undisputed evidence showed that Akamai was not the only CDN that could effectively compete for Limelight's customers in the but-for world. Akamai's own marketing executive admitted that, even with Limelight as a main competitor, a number of other companies competed with Akamai in the CDN market on a regular basis:

> We have a number of competitors. Some of them have been around as long as I have, and there's been several new entrants into the market over time. (A467.)

Indeed, Limelight's expert provided uncontradicted testimony that 86% of Limelight's customers had not used Akamai before starting with Limelight. (A701:78.) Most of Limelight's customers came from numerous other sources — not from Akamai.

Data that Akamai provided to the U. S. Government also belies the assumption that Limelight's customers would have no meaningful alternative in the but-for world except to buy from Akamai. As part of a merger review, Akamai informed the Department of Justice that 90% of its business losses occurred when customers chose to do their own web hosting, also known as do-it-yourself, or "DIY." (A700:77.) Akamai's expert ignored these admissions that Limelight's customers would have done it themselves (if they did not use a lower price service) rather than pay Akamai's high prices.

Akamai further reported to the Government that it faced substantial competition in the CDN market, including (i) AT&T which provided CDN services to ESPN, Adobe, and Disney; (ii) Mirror Image which provided CDN services to TV Guide, Orvis, Hasbro and Budweiser; and (iii) Savvis which provided CDN services to Microsoft. (A525:68; A701-02:81-82; A20942-47; A20967-70; A20977.) After looking at these submissions to the government, even Akamai's expert had to concede: "So, no one is denying there's competitors out there." (A525:69.)

Perhaps most egregiously, Akamai's expert also reached the conclusion that Limelight's non-infringing switch architecture would have only received 3% to 4% of ***Limelight's own*** revenue. (A502:103.) Put differently, Limelight, which had growing revenue and a successful customer-base with its switch-based architecture

would somehow only have been able to retain 3-4% of its own revenue if it had continued with the switch-based architecture. Nothing supports such a conclusion. No evidence exists that Limelight's customers were even aware of Limelight's technical infrastructure, whether it be switch-based or non-switch-based, when deciding on a CDN provider. A customer with the known propensity to purchase services from Limelight at half the price of Akamai would have been no less motivated to purchase the services from Limelight at its lower price using Limelight's switch-based architecture rather than pay double for Akamai.

Even if Limelight was unique in having the scale necessary to compete for Akamai's large customers, that fact does not prove that other CDNs would not have competed for Limelight's customers. Indeed, for the expert to substantiate such an opinion, he would have had to first analyze what Limelight's customers required from their CDN provider, and then he would have had to compare those requirements to the capabilities of competing CDNs as well as the customers' ability to self-host their own content. Akamai's expert did not do that analysis or comparison.

b. No Factual Evidence Supports That Limelight's Customers Would Have Been Willing to Pay Double for Akamai's Service

Akamai also asserts that "CDN delivery cost is considered by content providers to be a 'revenue generating cost' because it makes their business more

efficient. (A505; A523.) . . . [B]ecause the demand is driven by the end-user, who does not directly pay for the service, and not the content provider, there is little or no impact on the end-user's usage as a result of the different pricing of CDN delivery services. (A505; A528.)" (Reply Br. at 53.)

No fact testimony or exhibit in evidence supports the supposition that customers consider the cost of purchasing CDN services to be "revenue-generating" with no impact on usage of the services. Nor was there any record evidence that use of Akamai's higher-priced service resulted in customers' increased revenues from content delivery services. Indeed, the only citation that Akamai provides for this proposition is its expert's testimony. This theory is nothing more than speculation. Furthermore, if Akamai's expert were right that there is little or no impact on the end-user's usage as a result of the different pricing of CDN delivery services, then what logical reason would there be for any Limelight customer to pay Akamai twice as much for the same end-user usage?

c. Akamai's Price Erosion Claim Belies Its Argument that the Market is Not Price Sensitive

Akamai's contention that CDN customers would not react to price changes (despite its expert's admission that the market is "price sensitive" (A505:117)) runs directly contrary to Akamai's claim for price erosion — a claim for which the jury awarded it four million dollars. To support its price erosion claim, Akamai presented evidence that it had no choice but to reduce its prices by 50% in response

to competition from Limelight because it would otherwise have lost customers due to the price differential. (A470-71:146-152.) The same Akamai expert who opined that the CDN market was insensitive to price changes when it came to lost profits, testified that Akamai had suffered millions of dollars in price erosion damages because "Akamai was forced to lower its price [by 50%] to keep these customers." (A511:12.) And that expert — who testified that there would be "little or no impact on the end-user's usage as a result of the different pricing of CDN delivery services" (Reply Br. at 53) — also maintained in the context of price erosion that "because of the higher price, there's the likelihood that these customers would not have had as much traffic flow over Akamai's system." (A513:18.)

With no benchmark in the evidence of record, Akamai and its expert freely presented conflicting economic "judgments" depending on what damages were being sought. Such flip flopping by an expert — under the guise of a judgmental approach — is anything but the sound economic evidence of the type necessary to support a lost profits analysis.

3. Akamai's Expert's Ad Hoc Adjustments to his Speculative Damages Claim Do Not Save Akamai's Failure of Proof

Akamai also tries to justify the lost profits award by citing adjustments made by its expert to his lost profits opinion, indicating they were done "generously" and "for conservatism." (Reply Br. at 52.) Whatever magnanimous intent the expert

may have had, a speculative opinion minus adjustments still equals a speculative opinion. That is particularly true where the expert did not base his adjustments on accepted economic analysis but instead on his own ad hoc judgments.

For example, Akamai's expert dropped the smallest 25% of Limelight's customers from Akamai's but-for sales because "he was comfortable with the adjustment." (A528:81.) He also admitted, however, that the deduction could have been 10%, 20% or even 30%. (*Id.*) The adjustment that made him comfortable reduced Akamai's but-for sales by just 1/2% ($460,000 out of the $87,000,000 base). (A521.)

Similarly, Akamai's expert assumed another competitor would have entered the but-for market, and then he arbitrarily assigned a 3% market share to that unidentified company without any analysis of what actual CDN competitors would have done in the market. (A529:82.)

In the end, it matters little how Akamai's expert determined his adjustments. Regardless of the methodology used for the adjustments, the expert applied them to a lost sales figure that lacked a sound economic basis to link lost sales to any Limelight allegedly infringing activity. No amount of adjustments can make up for the legal insufficiency of Akamai's proof.

4. The Jury's Award of Less than Akamai's Highly Speculative Request Does Not Remedy Akamai's Legally Inadequate Arguments

Finally, a plaintiff cannot present a legally inadequate proof of damages with the hope that its case will be saved if the jury awards only a percentage of what was sought. Akamai argues that, because the jury's lost profits award was less than Akamai sought, it must have a legitimate claim to lost profits. (Reply Br. 58.) The jury's award indicates nothing of the sort. The jury did not and could not supply the missing proof and sound economic analysis linking Akamai's lost sales to Limelight's allegedly infringing activity. The jury should not have been allowed to reach a compromise verdict in order to remedy Akamai's flawed and speculative arguments, and the district court should have denied lost profits in this case.

C. Limelight Properly Preserved Its Jury Instruction Argument

Limelight did not waive its jury instruction arguments on damages or any other topic. First, Limelight proposed a complete set of pre-trial instructions that included each of Limelight's requested instructions. (A20843-97.) When Akamai proffered arguments at trial that "could not reasonably have been anticipated," Limelight filed supplemental instructions in accordance with Rule 51(a). (A21005-14.)

Second, Federal Rule of Civil Procedure 51(b)(1) provides that the trial court "*must* inform the parties of its proposed instructions and proposed actions on

the requests [for instructions] *before instructing the jury* . . . ." The district court failed to comply with Rule 51 and only gave the parties an outline of certain instructions during the charge conference. (A730-35.) And the court's summary at the charge conference failed to summarize the content of its lost profits instructions. (A735:41). Where the court indicated its proposed instructions, Limelight objected. (*See* A738-41 ("tagging"); A737:49 (obviousness); A737:48 (joint infringement and discussion of steps of claim); A728-30:12-20 (damages discussion).) Limelight's objections were timely under Rule 51(c) and transcribed so as to be on the record. *See* Fed. R. Civ. P. 51(c)(2) ("An objection is timely if: a party objects at the opportunity provided under Rule 51(b)(2)"). The district court, however, never ruled on numerous requested instructions Limelight submitted, including Limelight's requested instructions on lost profits.

Third, the district court did not provide the parties with advance notice of which instructions it would give; the parties heard the court's instructions for the first time as they were given to the jury. Those instructions contained many material additions and changes to what had been summarized during the charge conference, and they included instructions on lost profits that the court had never provided to the parties. Thus, the court did not substantially inform the parties of the proposed instructions before instructing the jury, did not rule on the parties'

requested instructions, and did not give an opportunity to review and object to the full set of proposed instructions before the jury charge. *See* Fed. R. Civ. P. 51(b).

Immediately after the charge with the jury still seated, the district court called a side bar that began "Plaintiff first." After extensive comments led by Plaintiffs' counsel, Plaintiffs' counsel stated: "We don't have anything further, your Honor," but then continued to speak. The court interrupted Plaintiffs' counsel, explained what the court planned to correct in the jury instructions previously read, and moved back to the center of the bench, away from sidebar. The court did not call for comments from Limelight's counsel (as it had for Plaintiffs). (A823:41.) In light of Limelight's lack of opportunity to respond and the court's disregard of Rule 51, Limelight's earlier proposed instructions and its comments and objections at the charge conference were certainly adequate to preserve those issues.

Fourth, it was not necessary for Limelight to repeat its objections and requested instructions after the jury charge, given the district court's repeated statements at the charge conference that the parties' objections would be "reflected . . . in the questions. It will be reflected in the charge," that the case had become too "arcane" to accommodate further briefing, and that "I will not be able to deal with you this afternoon on this; . . . [i]t's a little late to start reworking this case yet again . . . I can't keep changing." (A764:84-85; A788-89:173-77; A741:64.) *See Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 6-9 (1st. Cir. 1998) (objection

preserved when court "discouraged the defendants' counsel from rehashing the objections repeatedly"); *Ouimette v. E.F. Hutton & Co., Inc.*, 740 F.2d 72, 76 (1st Cir. 1984) (no waiver where plaintiffs' counsel discussed the requested instructions with the trial judge in chambers at length); *Cipes v. Mikasa, Inc.*, 439 F.3d 52, 59 n. 1 (1st Cir. 2006) (unlike the present case, the district court complied with Rule 51 when it "inform[ed] the parties about the content of its anticipated jury instructions prior to summations and charge . . ." and "painstakingly addressed each of the parties' proposed instructions at the charge conference . . . .").

Akamai's cites no case that addresses these issues. (Reply Br. at 36-38.) In *Rivera*, not only did the party challenging a district court's instruction fail to make any objection at trial, it did not even submit proposed instructions. *Rivera Castillo v. Autokirey, Inc.*, 379 F.3d 4, 10 (1st Cir. 2004). Similarly, in *Smith v. Mass. Inst. of Tech.*, 877 F.2d 1106, 1109-10 (1st Cir. 1989), counsel waived its objection by failing to appear and object to supplementary instructions. Finally, *Callipari* simply notes that the charge conference in that case was not on the record based on the practice of that court, not that transcribed statements made at a charge conference are not "on the record" as Akamai asserts. *U.S. v. Callipari*, 368 F.3d 22, 42 n.6, n.8 (1st Cir. 2004), *vacated*, 543 U.S. 1098 (2005).

D. Alternatively, a New Trial Should be Ordered on the Issue of Lost Profits

If the Court does not grant Limelight judgment as a matter of law on Akamai's lost profits claim, then it should vacate the lost profits award and remand for a new trial. The lost profits award was impermissibly based on Akamai's expert's pure speculation and was not substantiated by evidence as shown above. That problem was exacerbated by the district court's refusal to provide the standard instruction that lost profits may not be based on speculation.

Akamai tries to soften this error by arguing that a different instruction advised the jury regarding speculation. (Reply Br. at 59.) But the instruction Akamai references concerned the *amount* of lost profits to be awarded, not the foundational question whether or not to award lost profits in the first place. (*Id.*) It is critical that entitlement to lost profits be established without speculation. By the time the jury reached the amount of lost profits, prejudicial error had already occurred because the jury was not aware that speculation could not justify the decision to award lost profits at the outset. Because of this error, the issue of lost profits should be retried with fair and accurate instructions.

III. CONCLUSION

This Court should vacate the $40.1 million lost profits award because it was based on legally insufficient speculation and improper expert testimony. Alternatively, the Court should order a new trial on Akamai's claim for lost profits.

Dated: March 10, 2010

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