

AKAMAI TECHNOLOGIES, INC. v. LIMELIGHT NETWORKS, INC., Appeal Nos. 2009-1372, -1380, -1416, -1417 (Fed. Cir. November 16, 2015). Before Linn, Prost, and Moore. Appealed from D. Mass. (Judge Zobel).

Background:

Akamai sued Limelight, alleging that Limelight's content distribution service infringed Akamai's patent. The Federal Circuit previously ruled, in an *en banc* hearing, that Limelight directly infringed Akamai's patent, overturning the district court's JMOL. The *en banc* court remanded to the original Federal Circuit panel to resolve a few remaining issues, including the issue of lost profits. To prove damages and lost profits, Akamai relied heavily on the testimony of its expert, allowed by the district court, who opined that but-for Limelight's infringement, Akamai would have collected \$74 million.

Issue/Holding:

Did the district court err by allowing Akamai to present its lost profits theory based on the testimony of Akamai's expert? No, remanded on other grounds.

Discussion:

In order to collect lost profits, a patentee must show a reasonable probability that 'but for' the infringer's sales, the patentee would have made the infringer's sales. This is done by determining the profits the patentee would have made absent the infringing product.

Akamai sold its product for twice as much as Limelight sold its infringing product. Due to the difference in price, Akamai's expert opined that, absent Limelight's infringing product on the market, some of Limelight's customers would have been unlikely to purchase Akamai's higher-priced product. Akamai's expert reasoned that some of Limelight's customers would have been "particularly price sensitive" and only purchased the infringing product because of Limelight's relatively low prices.

Akamai's expert determined that, due to Akamai's and Limelight's price difference, Akamai's lost profits should be reduced by 25%. Akamai's expert reasoned that this adjustment should not be higher than 25% because the demand for Akamai's product was relatively inelastic (relatively unaffected by a change in price). In support of this conclusion, Akamai's expert opined that Akamai and Limelight were direct competitors and that Akamai maintained a dominant market share, despite its higher prices. Based on the relatively inelastic demand, Akamai's expert reasoned that 75% of Limelight's infringing sales would potentially have been made by Akamai. Thus, Akamai's expert determined that a 25% adjustment for Akamai's lost profits is proper.

Limelight argued that the price difference between Akamai's and Limelight's products created a market segmentation, and that Akamai serviced a separate market from Limelight. Limelight further argued that lost profits are unavailable to Akamai because of the separate markets. Thus, Limelight argued that the district court erred in allowing the testimony of Akamai's expert regarding the lost profits calculation.

The Federal Circuit ruled that the 25% lost profits adjustment, as calculated by Akamai's expert, was proper. Specifically, the Federal Circuit ruled that the testimony of Akamai's expert regarding Akamai's inelastic demand is grounded in economic principles. The Federal Circuit reasoned that Akamai and Limelight do not service separate markets because they are competitors and the two prominent leaders in their field.