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Lost-Profits Damages Available Despite 50 Percent Price Disparity

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The U.S. Court of Appeals for the Federal Circuit found that lost-profits damages were available in a situation where the accused product sold for half the price of the patentee's product, and consequently remanded the case for reinstatement of the jury's $45 million damages award. The other remaining appeal issues, generally relating to claim construction, were resolved in Akamai's favor in a prior decision and are not further addressed here. *Akamai Techs., Inc. v. Limelight Networks, Inc*., Case Nos. 09-1372; -1380; -1416;-1417 (Fed. Cir., Nov. 16, 2015) (Linn, J.).

As the Federal Circuit has explained "[T]o collect lost profits, a patentee must show a reasonable probability that 'but for' the infringing activity, the patentee would have made the infringer's sales." In this case, Limelight argued that the district court committed legal error by allowing Akamai's expert, Dr. Ugone, to present lost profits as a measure damages. Limelight argued that Dr. Ugone's analysis of the percent of Limelight's sales that would have gone to Akamai but for the infringement lacked a causal connection and was arbitrary.

Dr. Ugone opined that even though Limelight's product was half the price of Akamai's product, 75 percent of Limelight's sales would have been made by Akamai but for the infringement. He justified his calculation in part on the relative inelasticity of demand for the product, meaning that the demand would not change much even as the price changed.

Dr. Ugone's 25 percent adjustment for market elasticity was supported by evidence that Akamai and Limelight were direct competitors, "including statements by Limelight that Akamai was its largest competitor; [that] 'Limelight and Akamai are, from a scale and quality standpoint, head and shoulders above the rest of . . . Limelight's competition'; [that] demand was driven by end-users not customers; and [that] Akamai maintained a dominant market share despite Limelight's infringing service and lower price."

The Federal Circuit rejected Limelight's argument that the price disparity necessarily meant that Limelight and Akamai were selling to different market segments. It distinguished its 1993 decision in *BIC Leisure Prods., v. Windsurfing International*, which held that lost profits were not available because the infringer and patentee sold to different market segments based on a 60 percent to 80 percent price disparity. The Court explained that in *BIC Leisure* the infringing sailboards "differed fundamentally" from the patentee's boards, over a dozen competitors sold in the sailboard market,

and demand for sailboards was relatively elastic. Here, in contrast, Akamai presented evidence that it and Limelight were direct competitors, both leaders in the field, and that demand was relatively inelastic.

Accordingly, the Federal Circuit concluded that lost-profits damages were available to Akamai and that Dr. Ugone's 25 percent adjustment for market elasticity "was sufficiently grounded in economic principles to allow it." The Federal Circuit did not, however, rule on whether the 25 percent adjustment was adequate or whether there was a sufficient evidentiary basis for the jury's damages award, because it found that Limelight did not properly raise the issue for appeal, as opposed to the distinct legal challenge on the availability of lost profits.

The current remand order additionally confirms the Federal Circuit's unanimous (per curium) *en banc* ruling on remand from the Supreme Court ruling that reinstated its affirmance of the jury's verdict of infringement against Limelight for infringing a web content delivery patent even though Limelight's customers carried out some of the steps so long as "all method steps can be attributed to a single entity."

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