

Client Alert **Intellectual Property**

The Latest, but Perhaps Not Last, Word on the Pleading Requirements for Direct and Indirect Infringement

Last month the Court of Appeals for the Federal Circuit issued an important, albeit relatively unnoticed, decision regarding the factual allegations necessary to support a claim of patent infringement. In a split decision, a majority panel of the Federal Circuit reaffirmed that a complaint must only include a recitation of the elements found in Form 18 of the Appendix of Forms to the Federal Rules of Civil Procedure to adequately plead direct infringement. However, the majority panel held that a “Form 18 complaint” is to limited direct infringement and should not be used to measure whether a claim of indirect infringement has been sufficiently pled. Rather, to withstand a motion to dismiss, a complaint alleging indirect infringement must satisfy the requirements of *Twombly* and *Iqbal* and plead detailed factual allegations from which reasonable inferences can be drawn to plausibly establish induced and/or contributory infringement.

Pleading Requirements - - The Basics

In federal court, “notice pleading” is required to state a claim for relief. Under Rule 8 of the Federal Rules of Civil Procedure, this generally requires only “a short plain statement” of a claim showing that the plaintiff is “entitled to relief” so that the defendant is given notice of what the claim is and the grounds upon which it rests.

In *Bell Atlantic Corp. v. Twombly*, 500 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court seemingly raised the standard to plead a cause of

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2012

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action by requiring a plaintiff to allege “enough facts” that, when taken as true, “state a claim to relief that is plausible on its face.” This plausibility standard requires “more than a sheer possibility that a defendant acted unlawfully,” and is satisfied when the “plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

The Appendix of Forms to the Federal Rules provides different pleading, including a number of sample complaints for various causes of action. Form 18 is a sample complaint for patent infringement requiring only the following elements:

- an allegation of jurisdiction;
- a statement that the plaintiff owns the asserted patent;
- a statement that the defendant has been infringing the patent by making, selling or using a device, product or method embodying the patent;
- a statement that the plaintiff has given the defendant notice of its infringement;
- and
- a demand for an injunction and damages.

Noticeably absent from the elements recited in Form 18 are allegations of the specific patent claims allegedly infringed, the particular features of the accused device or method that allegedly infringe the claims of the asserted patent, or an explanation of the theory of infringement.

The ability of a bare-bones complaint, alleging only the five elements identified in the Form 18 template, to survive a motion to dismiss under Rule 12(b)(6) was answered by the Federal Circuit in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007). In a split decision, the majority held that a complaint must only allege the elements identified in Form 18 to sufficiently plead direct infringement. In a dissenting opinion, Judge Dyk maintained that simply pleading the elements found in Form 18 was insufficient to state a claim of infringement under the doctrine of equivalents in view of *Twombly*.

The Supreme Court’s more stringent plausibility pleading requirement appeared to be at odds with the *McZeal* majority’s endorsement of a “Form 18 complaint.” Some attributed this apparent tension to the fact that, as a *pro se* litigant, *McZeal*’s complaint needed to be liberally construed.

The Federal Circuit Addresses the Pleading Requirements for Direct and Indirect Infringement

R+L Carriers accused a number of parties of indirectly infringing its method patent for receiving shipping documentation and producing load manifests used in the trucking

industry. A number of the alleged indirect infringers moved to dismiss R+L's respective complaints under Rule 12(b)(6) for failing to plausibly allege either direct or indirect infringement.

The district court dismissed R+L's claims of direct and indirect infringement for not satisfying the pleading requirements of *Twombly* and *Iqbal*. In particular, the court found that R+L failed to plead facts from which one could reasonably conclude that defendants' named and unnamed customers directly infringed the asserted patent. Since direct infringement, a necessary element for both induced and contributory infringement, was not adequately pled, and because the complaints also failed to plausibly allege a specific intent of the accused infringers to induce infringement, the district court dismissed the causes of action of induced infringement. The district court also dismissed the claims of contributory infringement because the allegations recited in the complaints, on their face, demonstrated that the accused product had substantial non-infringing uses.

On appeal Judge O'Malley, writing for a majority panel of the Federal Circuit, held that the elements of Form 18 were adequately pled, and reversed the district court's ruling that the plaintiff failed to plead direct infringement. Finding that plaintiff's factual allegations satisfied the requirements of *Twombly* and *Iqbal*, the majority rejected the argument that a specific direct infringer must be identified to adequately state a claim for indirect infringement. Since the complaints described that the allegedly infringing method also had substantial non-infringing uses, the majority affirmed the dismissal of the contributory infringement causes of action. *In re Bill of Lading Transmission and Processing Sys. Litig.*, 2012 U.S. App. LEXIS 11519 (Fed. Cir. June 7, 2012).

A. A Complaint of Direct Infringement Must Only Allege the Elements of Form 18

Relying upon *McZeal*, the majority panel rejected the argument that "*Twombly* and its progeny conflict with the Forms and create differing pleading requirements," and affirmatively stated that "the Forms control." *Id.* at *20. Based upon the five elements listed in Form 18, the majority also dismissed the argument that a complaint for direct infringement must "plead facts establishing that each element of an asserted claim is met," or "even identify which claims it asserts are being infringed." *Id.* at *21-22. As a result, the majority panel held that "[a]s long as the complaint in question contains sufficient factual allegations to meet the requirements of Form 18, the complaint has sufficiently pled direct infringement." *Id.* at *26.

The majority ruled, however, that a complaint that simply recites the elements identified in Form 18 fails to satisfy the pleading requirements for a claim of indirect infringement. Rather, to state a claim of induced or contributory infringement, a complaint must satisfy the plausibility pleading requirements of *Twombly* and *Iqbal*. *Id.* at *27.

In a dissenting opinion, Judge Newman maintained that the majority's holding was contrary to Supreme Court precedent in *Twombly* and *Iqbal*. *Id.* at *58-61. Nevertheless, Judge Newman found that the complaints complied with the Supreme Court's pleading standards and sufficiently pled both direct and indirect infringement. *Id.* at *71-72.

B. A Claim of Inducement Requires Sufficient Facts to Infer There Is at Least One Direct Infringer and a Specific Intent to Induce Infringement of the Asserted Patent

The majority rejected the argument that the claims of indirect infringement should be dismissed because a "specific" direct infringer was not named in the complaints. Rather, the majority held that to state a claim of indirect infringement, the complaint must only allege sufficient facts to allow an inference that at least one direct infringer does in fact exist. *Id.* at *24-26.

The majority panel also observed that a claim for induced infringement will survive a motion to dismiss if the complaint contains "facts plausibly showing" that the alleged infringer specifically intended its customers to infringe, and knew that its customer's actions constituted infringement. *Id.* at *35. In assessing intent, the majority stated that all reasonable inferences from the alleged infringer's statements and conduct, "in the context in which they occurred and from the standpoint of the speakers and listeners within that context," must be drawn in favor of the plaintiff. *Id.* at *37-38. To infer that the alleged infringer intended to induce its customers to infringe the asserted method patent, the majority pointed to allegations in the complaint that one of the alleged infringers distributed advertisements, after being put on notice of the asserted patent, that the product could be used in an infringing manner. *Id.* at *40-41.

C. To State a Claim for Contributory Infringement Sufficient Facts Must Be Alleged That the Material or Method Used or Sold Had No Substantial Non-Infringing Uses

In affirming the district court's dismissal of the claims for contributory infringement, the majority focused on the plaintiff's need to plead facts which would allow an inference to be drawn that the component, product, or method used, sold, or offered for sale by the alleged indirect infringer has no substantial non-infringing use. *Id.* at *28. In this case, the allegations in the complaint demonstrated that the product of the alleged indirect infringers could be used by customers in a substantially non-infringing manner. The majority panel, however, did not offer any guidance regarding the detail necessary to plead the absence of substantial non-infringing uses or the other elements of contributory infringement to withstand a motion to dismiss.

Implications, at Least for Now

To survive a motion to dismiss, a complaint for direct infringement need only plead the elements recited in Form 18. Most plaintiffs, however, rarely have difficulty alleging sufficient facts to satisfy the low bar set by Form 18. As a result, the decision of the majority panel should not dramatically affect cases in which direct infringement has been alleged.

The impact of the Federal Circuit's split decision will be more pronounced when indirect infringement is alleged. Often, allegations of induced and contributory infringement consists of little more than a recitation of the statutory language of found in 35 U.S.C. § 271 (b) and (c). Such boilerplate allegations will likely result in more alleged infringers seeking to dismiss allegations of indirect infringement as facially deficient and lacking sufficient detail to support a claim of induced and contributory infringement.

To avoid having to contend with a motion to dismiss for failing to state a claim, a plaintiff should ensure that its complaint contains sufficient factual detail to plausibly demonstrate that each of the elements of induced infringement and/or contributory infringement have been satisfied. For example, plaintiffs would be will advised to allege facts sufficient to show that the alleged infringer had a specific intent to induce infringement. This may require an extensive recitation of the alleged infringer's advertisements, promotional material or operating instructions in the complaint. Similarly, when alleging a claim for contributory infringement, the complaint should include facts sufficient to show that the accused product or method that is used, sold, or offered for sale has no substantial non-infringing uses or the plaintiff will run the risk of having to respond to a motion to dismiss for failing to state a claim under Rule 12(b)(6).

For the time being, the Federal Circuit's split decision, *In re Bill of Lading Transmission*, is the final word on the pleading requirements for claims of direct and indirect infringement. This may change, however, as questions surrounding the use of the bare-bones "Form 18 complaint" to plead direct infringement persist. On July 9, 2012 a petition seeking rehearing *en banc* of this decision was filed. If *en banc* review is granted, the Federal Circuit will be able to address the concerns regarding "Rule 18 complaints" that were raised by the dissenting opinions in not only *In re Bill of Lading Transmission*, but also *McZeal*. Also, the Federal Circuit will then have the opportunity to perhaps defuse the tension between the Federal Circuit's relaxed pleading requirements for direct infringement and the more stringent plausibility pleading requirements of *Twombly* and *Iqbal*. Should the Federal Circuit refuse to reconsider this issue *en banc*, the Supreme Court will in all likelihood be asked to review this issue.

For additional information concerning this latest development,
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