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# A Refresher on the Standards for Pleading Direct Patent Infringement

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It has been nearly five years since the Judicial Conference of the United States and the Supreme Court eliminated Form 18, which provided a simple way to plead direct patent infringement. Generally pleading that a defendant makes, uses, or sells products that practice a patented invention is no longer enough to meet the pleading standards. U.S. district courts now evaluate patent infringement complaints for their sufficiency under the Supreme Court's *Twombly–Iqbal* standard. This article addresses the standards for pleading direct patent infringement in U.S. District Courts based on recent decisions.

## I. Pleading Requirements under *Twombly* and *Iqbal*

Until December 1, 2015, the Federal Circuit permitted parties to plead direct patent infringement using Form 18.<sup>2</sup> The form required little more than an identification of the patent number and the invention, a statement that the defendant infringes the patent by making, using, or selling the invention, and that the defendant was on notice of the patent.<sup>3</sup> Since the U.S. Supreme Court abrogated Form 18, *Twombly* and *Iqbal* govern the federal

pleading standard under Rule 8 for all civil cases, including those for patent infringement.

A complaint for patent infringement must provide notice to the accused infringer, including “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>4</sup> “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”<sup>5</sup> Accepting the facts in a complaint as true, to survive a Rule 12(b)(6) motion to dismiss, the complaint must make a facially plausible—not probable—claim for relief.<sup>6</sup> There is no distinct test for whether a complaint makes a plausible claim for relief; it is instead “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>7</sup>

Prior to the repeal of Form 18, courts identified five elements of a patent infringement complaint: “(i) allege ownership of the patent, (ii) name each defendant, (iii) cite the patent that is allegedly infringed, (iv) state the means by which the defendant allegedly infringes, and (v) point to the sections of the patent law invoked.”<sup>8</sup> Satisfying these elements provided “‘enough detail to allow the defendants to answer’ and [] ‘Rule 12(b)(6) requires no more.’”<sup>9</sup> At least the Middle District of Florida has applied these elements after the abrogation of Form 18. *Sundesha, LLC v. JH Studios, Inc.*, No. 8:19-CV-1809-T-36AAS, 2020 WL 4003127, at \*4 (M.D. Fla. July 15, 2020) (dismissing a complaint for direct patent infringement because the aggregate of its shortcomings caused the infringement claim to fall below the plausibility threshold). Recently, other district courts have applied a less structured analysis to decide the sufficiency of claims for direct patent infringement, while some have maintained more defined tests.

## II. Pleading Direct Patent Infringement

U.S. district courts use the *Twombly/Iqbal* pleading standards to govern the sufficiency of a pleading for direct patent infringement.<sup>10</sup> But how the standards are applied

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varies somewhat from district-to-district, including districts that adjudicate large numbers of patent cases.

This year, the District of Delaware addressed pleading standards in granting a motion to dismiss.<sup>11</sup> The Court required the complaint plead facts “that plausibly indicate that the accused products contain each of the limitations found in the claim,” showing “*how* the defendant plausibly infringes by alleging some facts connecting the allegedly infringing product to the claim elements.”<sup>12</sup> Although the plaintiff attached infringement charts to its amended complaint, the Court evaluated those charts and found that the allegations for certain steps of the claimed method merely parroted the claim language without showing *how* the accused products plausibly practice those steps.<sup>13</sup> General allegations that the accused product met the claim limitations, even when included in a claim chart attached to the complaint, were insufficient to make a plausible case for infringement.<sup>14</sup>

In 2017, Judge Gilstrap in the Eastern District of Texas denied a Rule 12(b)(6) motion to dismiss an amended complaint because the defendant did not meet its burden to show the plaintiff had stated no claim for direct patent infringement.<sup>15</sup> The amended complaint identified the accused product—a specific key pair for constructing a mobile application—that purportedly practiced the claimed invention, which the Court determined was sufficient to plausibly allege direct infringement and put the defendant on notice.<sup>16</sup>

In a case granting a motion to dismiss direct infringement claims, the Northern District of California found that a complaint failed to meet the *Twombly/Iqbal* pleading standards unless it “contain[s] factual allegations that the accused product practices every element of at least one exemplary claim.”<sup>17</sup> Yet, the Court refused to make mandatory “a formal charting of patent claim elements against each accused product.”<sup>18</sup> The Court explained that “there may be instances where more generalized factual allegations may still be enough for the Court to infer that it is ‘plausible’ that every element of a patent claim is satisfied by an accused product.”<sup>19</sup> In deciding the plaintiff failed to adequately plead direct infringement, for certain of the accused products the Court noted that the amended complaint lacked any explanation of how those products operated and failed to map any of the claims to their features.<sup>20</sup> For another accused product, the plaintiff ignored critical claim limitations and included allegations that “merely parrot[ed] claim language.”<sup>21</sup> The Court decided these amounted to “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, which ‘do not suffice [to plead direct patent infringement].’”<sup>22</sup>

Applying the *Twombly/Iqbal* standard, the District of Massachusetts decided an allegation of direct

infringement of a patent to a semiconductor light-emitting device (LED) was plausible because the plaintiff “included allegations referencing each element of Claim 1 of the [Asserted] Patent, satisfying this threshold requirement.”<sup>23</sup> In reaching this decision, the Court noted the plaintiff “has alleged the patent claim that has been infringed, . . . [and] the infringed elements of that claim, . . . and identifies both the function of the infringed LEDs (television backlighting) in the Accused Products and the marketing of that function in the Accused Products’ instruction manuals.”<sup>24</sup> To survive a motion to dismiss, the Court declined to demand specificity beyond an allegation “that Defendants’ product contain all elements of one claim of the allegedly infringed patent.”<sup>25</sup>

A Magistrate Judge in the Southern District of New York used a three-factor test to decide if a complaint for direct patent infringement survived a motion to dismiss. The Judge found that a complaint would survive a motion to dismiss if it “(1) attaches the asserted patents to the complaint, (2) specifically identifies the accused products and attaches photographs of them to the complaint, and (3) alleges that ‘the accused products meet each and every element of at least one claim’ of the asserted patents.”<sup>26</sup> On the second point, naming the accused products, describing their structure, and providing Web addresses that show photographs of the accused products was also found to suffice.<sup>27</sup> The Judge recommended denying a motion to dismiss direct infringement allegations where the complaint included an element-by-element claim chart for one accused product—an exercise apparatus called the “Ab Rocket”—that provided a “detailed basis for [the] belief [that the accused product infringes claim 1] without merely reciting the elements of claim 1.”<sup>28</sup> At the pleading stage, “Plaintiff is not required to plead ‘direct infringement of each and every element of the allegedly infringed claim[].’”<sup>29</sup> As an example, although the complaint did not include as detailed an analysis for the other accused product—the “Ab Rocket Twister”—the Judge did not fault the plaintiff because the complaint “adequately compares and contrasts the Ab Rocket and the Ab Rocket Twister.”<sup>30</sup>

### III. Conclusion

Having assessed patent infringement complaints without Form 18 for nearly five years, *Twombly* and *Iqbal* generally govern the standards for pleading direct patent infringement. Some districts, however, apply the standards differently. Litigators should know how courts in their district have applied the standard and draft their complaints accordingly.

1. The authors are attorneys at the intellectual property firm of Finnegan, Henderson, Farabow, Garrett & Dunner LLP. This article is for informational purposes, is not intended to constitute legal advice, and may be considered advertising under applicable state laws. This article is only the opinion of the authors and is not attributable to Finnegan, Henderson, Farabow, Garrett & Dunner LLP, or the firm's clients.
2. *Novitaz, Inc. v. inMarket Media, LLC*, Case No. 16-cv-06795-EJD, 2017 WL 2311407, at \*1 (N.D. Cal. May 26, 2017) (citing *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1333-35 (Fed. Cir. 2012)).
3. *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d at 1334.
4. Fed. R. Civ. P. 8(a).
5. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
6. *Iqbal*, 556 U.S. at 678.
7. *Id.* at 679.
8. *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1362 (Fed. Cir. 2013) (citing *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000)).
9. *Hall*, 705 F.3d at 1362 (citing *Phonometrics*, 203 F.3d at 794).
10. One potential exception is the U.S. District Court for the District of Nevada, which applied the Form 18 standard after its abrogation. *See Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 14-cv-0772-GMN-NJK, 2016 WL 199417, at \*2 (D. Nev. Jan. 15, 2016). Other district courts have explicitly declined to follow *Hologram*. *See, e.g., Webasto Thermo & Comfort N. Am., Inc. v. Bestop, Inc.*, No. 16-CV-13456, 2017 WL 4535290, at \*4 (E.D. Mich. Oct. 11, 2017) (explaining that *Hologram* "has been disregarded by multiple courts as having been 'short on legal analysis' and also distinguished in some instances by the fact that the complaint in *Hologram* was filed before the effective date of the December 1, 2015 Amendments abrogating Form 18") (citing cases).
11. *Uniloc 2017 LLC v. Zenpayroll, Inc.*, No. CV 19-1075-CFC-SRF, 2020 WL 4260616, at \*2 (D. Del. July 23, 2020), *report and recommendation adopted sub nom. Uniloc 2017 LLC v. Zen Payroll, Inc.*, No. CV 19-1075-CFC/SRF, 2020 WL 5077416 (D. Del. Aug. 27, 2020).
12. *Id.* at \*3.
13. *Id.* at \*4.
14. *Id.*
15. *Plano Encryption Techs., LLC v. Alkami Tech., Inc.*, No. 2:16-CV-1032-JRG, 2017 WL 8727249, at \*3-4 (E.D. Tex. Sept. 22, 2017).
16. *Id.*
17. *Novitaz, Inc. v. inMarket Media, LLC*, No. 16-CV-06795-EJD, 2017 WL 2311407, at \*3 (N.D. Cal. May 26, 2017).
18. *Id.*
19. *Id.*
20. *Id.* at \*4.
21. *Id.*
22. *Id.* (quoting *Iqbal*, 556 U.S. at 678).
23. *Lexington Luminance LLC v. TCL Multimedia Tech. Holdings, Ltd.*, No. 16-cv-11458-DJC, 2017 WL 3795769, at \*4 (D. Mass. Aug. 30, 2017).
24. *Id.* at \*5.
25. *Id.*
26. *Araujo v. E. Mishan & Sons, Inc.*, No. 19-CV-5785 (GHW)(SN), 2020 WL 5371323, at \*2 (S.D.N.Y. Aug. 7, 2020), *report and recommendation adopted*, No. 1:19-CV-5785-GHW, 2020 WL 5369888 (S.D.N.Y. Sept. 8, 2020) (internal quotations and citations omitted).
27. *Id.* at \*3.
28. *Id.*
29. *Id.* (quoting *Crypto Res., LLC v. Assa Abloy, Inc.*, 236 F. Supp. 3d 671, 686 (E.D.N.Y. 2017)).
30. *Id.*

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