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Expert Analysis

Federal Circuit Clarifies Pleading Standards for Patent Infringement

The U.S. Court of Appeals for the Federal Circuit, on June 7, 2012, released its opinion in *In re Bill of Lading Transmission and Processing System Patent Litigation*, No. 2010-1493, reversing, for the most part, dismissals of six complaints brought by the same patent owner against different parties. In doing so, the Federal Circuit clarified, and likely greatly liberalized, the pleading standard for many patent infringement cases.

Background

The plaintiff in all six cases, R+L Carriers Inc., owns a patent directed to the trucking industry, specifically to “less-than-a-full-load” trucking. Carriers in the trucking industry pick up freight from different customers, often destined for different locations around the country. To enable efficient delivery, the freight is typically taken to a central terminal, re-sorted by destination, and then re-loaded onto trucks with freight that is destined for a similar location. The patent-in-suit claims a method to make this system more efficient. Specifically, it claims a method that “automates the process of receiving transportation documentation and producing advance loading manifests,” by enabling shipping documents to be sent directly from the truck to the central terminal, so billing and load planning can occur while the driver is en route with the freight.



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R+L determined that a number of industry players, and their customers, appeared to be using a method similar to that patented. After sending out cease-and-desist letters to several competitors, two brought declaratory judgment suits in their home districts. R+L then initiated infringement suits in its home district, the Southern District of

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Ohio. A total of eight suits were consolidated for pretrial proceedings in that district. After consolidation, the district court heard motions to dismiss, which it granted. It then permitted the plaintiff to amend its claims, which the Plaintiff did, in considerable detail. Six defendants then moved again to dismiss; all six motions were granted. R+L appealed.

Direct Infringement

The portion of *Bill of Lading* likely to have the most impact concerns pleading direct infringement. Although none of the appealing defendants were accused of direct infringement, it has also

long been the rule that in order to make out a case of indirect infringement (either contributory or inducement), a plaintiff must show that someone (albeit not the defendant) is directly infringing the patent. This means, the *Bill of Lading* court held, that a party pleading contributory or inducement must plead direct infringement by someone.

How specific does a party claiming direct infringement (either as its main claim, or as a predicate to an indirect infringement claim) have to be? Answered the court: not very. The Federal Circuit held that, although the Supreme Court has tightened the pleading requirements in the recent cases of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. v. Twombly*, 550 U.S. 544 (2007), those decisions did not formally amend the Federal Rules of Civil Procedure. The federal rules contain model forms for pleadings, including Form 18 for patent infringement cases. Form 18 contains bare-bones allegations; all it requires is:

- (1) an allegation of jurisdiction;
- (2) a statement that the plaintiff owns the patent;
- (3) a statement that defendant has been infringing the patent ‘by making, selling, and using [the device] embodying the patent’;
- (4) a statement that the plaintiff has given the defendant notice of its infringement; and
- (5) a demand for an injunction and damages.

Since Rule 84 states that “the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate,” it follows that, generally, a complaint which complies with the form will be immune to dismissal at the pleading stage. This means that, to the extent the forms conflict with the requirements set forth in *Twombly*, the forms control. Based on this ruling, the Federal Circuit rejected

the argument, accepted by the district court, that more detail was needed to allege direct infringement. Specifically:

- There is no need to plead facts showing that each element of an asserted claim is being infringed.
- There is no requirement to even identify which claims in the patent are asserted to be infringed.

Since the complaints identified specific customers of the defendants, briefly described their actions and alleged that such actions infringed the patent-in-suit, the amended complaints went well beyond what was required by Form 18.

These holdings were anticipated by the Federal Circuit's earlier decision in *McZeal v. Sprint Nextel*, 501 F.3d 1354 (Fed. Cir. 2007), which likewise reversed dismissal of a scanty patent infringement complaint. However, *McZeal* was a case where the plaintiff acted pro se, which require extra indulgence by the court. Some district courts limited *McZeal* to pro se cases,¹ and the dissent in the *Bill of Lading* case would take the same approach. Unlike *McZeal*, the *Bill of Lading* case was brought by a corporate plaintiff represented by counsel, so its holding that a complaint which satisfies Form 18 satisfies the pleading requirements has broader application.

The Federal Circuit went even further, holding that there is no requirement to identify a direct infringer. It noted that it had previously upheld claims of indirect infringement based on circumstantial evidence of direct infringement by unknown parties. Since a party can prevail at trial without ever proving the identity of any specific infringer, that certainly suffices at the pleading stage. Thus, an allegation that one defendant's "trucking customers" used that defendant's products to infringe the patents was held sufficient.

This key holding—that notwithstanding *Iqbal* and *Twombly*, the minimal requirements of the Appendix forms are sufficient to plead direct infringement—was vigorously disputed by the dissent—which would hold, essentially, that where the forms and *Iqbal* and *Twombly* conflict, the case-law standard controls. While a number of courts have to date noted the tension between the two, the Federal Circuit appears to be among

the first appellate courts to make a definitive ruling on the subject.²

Indirect Infringement

In stark contrast to its holding on direct infringement, the Federal Circuit held that the forms of pleading do not control claims of indirect infringement, since the forms contain no such model pleading. Instead, the plaintiff has to comply with the general pleading standard of *Iqbal* and *Twombly*. Whether a complaint properly pleads a "plausible" case of indirect infringement is a "very context-specific task" requiring full analysis of all the circumstances pleaded in the complaint.

'Bill of Lading' does not clarify what needs to be pleaded to make out a case of contributory infringement. The case does imply, however, that it is important to plead facts at least suggesting that the defendant's products have no significant non-infringing uses, which is not always easy.

Contributory Infringement

Under the Patent Act, contributory infringement occurs if a party sells or offers to sell, a "material or apparatus for use in practicing a patented process," which is "a material part of the invention" and which is known by the party "to be especially made or especially adapted for use in an infringement of such patent." 35 U.S.C. §271(c). Accordingly, the Federal Circuit held, to state a claim for contributory infringement, a plaintiff must plead, among other things, facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses.

R+L's complaints themselves disclosed that the same products sold by the defendants could be used for other, non-infringing uses, and that proved fatal to its claim. R+L argued, unsuccessfully, that its allegation that "as customized by [each defendant] for their trucking customers" the apparatus sold had no substantial non-infringing use. But that allegation, held the Federal Circuit, amounts to no more than asserting that "if you

use this device to perform the patented method, the device will infringe and has no non-infringing uses. The fact that a product may be unavailable for simultaneous non-infringing uses while being used to infringe, is not determinative." Since the complaints themselves stated that there were non-infringing uses that could be performed at other times, the dismissal of the contributory infringement claims was upheld.

Inducement

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. §271(b). There are two elements of an inducement claim: knowledge of the patent-in-suit and intent to cause another to infringe. To survive a motion to dismiss, the *Bill of Lading* court ruled, a complaint "must contain facts plausibly showing that [the defendants] specifically intended their customers to infringe the [] patent and knew that the customer's acts constituted infringement."

In *Bill of Lading*, the knowledge prong was easily met: R+L alleged that it had put the defendants on notice of the patent either through a cease-and-desist letter or through service of the original complaint itself. The more difficult issue was pleading intent to cause another to infringe. The Federal Circuit criticized the district court for applying too strict a standard. For one thing, there is no requirement that a plaintiff prove its case at the pleading stage; it is sufficient to raise a plausible case that will lead to a finding of liability. For another, the district court had failed to draw all reasonable inferences in the plaintiff's favor. Where several reasonable inferences can be drawn from the same facts, the plaintiff is entitled to the benefit of the most reasonable one, even if other inferences seem more likely.

Turning to the specific allegations, the Federal Circuit noted that while the plaintiff had not quoted or submitted specific documents that would instruct the user to perform acts that would infringe the patent (such as might be contained in a customer manual), the allegations did summarize marketing efforts by the defendants which touted their advantages and how they could be used in ways to achieve efficiencies very similar to that achieved by the patent.

Thus, in one case, a defendant had made marketing statements to the effect that its products could be used to perform certain acts which were discrete steps in the patent. It also bragged that it had “partnered” with a software company, a leading provider of software which, again, could be used for the same functionality as portions of the patent. The court also found significant that, other than the patented method, no appellee had identified a method by which a trucking company could increase efficiency by scanning and transmitting shipping documents while the shipments were in transit. For these reasons, the marketing statements which touted achievement of the same efficiencies as achieved by the patent suggested infringement—making it at least “plausible” that the defendants had induced patent infringement by their customers.

The court rejected that particular defendant’s argument that there had been a failure to allege facts that the defendant specifically instructed its customers to perform the steps in the patent. The *Bill of Lading* court noted that all that is required is a showing of plausibility, not probability:

[Defendant] is essentially arguing that, at the pleading stage, R+L must allege facts that prove all aspects of its claims, or at the very least make those claims probable. But that is not what is required. As the Supreme Court has explained, the plausibility requirement is not akin to a “probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal” that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556.

Common sense indicates that advertising that your product can be used in conjunction with dispatch software to improve asset utilization and provide operational efficiency to the less-than-a-load shipping/trucking industry gives rise to a reasonable inference that you intend to induce your customers to accomplish these benefits through utilization of the patented method. This is sufficient to push the complaint past the line “between possibility and plausibility.” *Twombly*, 550 U.S. at 557.

Review of the other five complaints led to similar conclusions: All had allegations quoting the defendants (or in some cases, their customers) touting achievements of efficiencies in the trucking industry which suggested use of the patented method. Context was also important.

The Federal Circuit also held that there is no need to allege facts showing performance of every step of the patented method—even though that would have to be proven at trial. “[T]here is no requirement that the facts alleged mimic the precise language used in a [patent] claim; what is necessary is that facts, when considered in their entirety and in context, lead to the common sense conclusion that a patented method is being practiced.”

Impact on Future Cases

While *Bill of Lading* appears poised to become a seminal case on pleading patent claims, counsel should remember that the case is not going to be the last word on pleading standards, even in patent cases. Pleading standards are not an issue unique to patent law; in *Bill of Lading*, the Federal Circuit purported to apply regional circuit law. There is no reason, however, that other circuits, or even the U.S. Court of Appeals for the Sixth Circuit itself in a later case, might not disagree with the *Bill of Lading* decision, adopting the dissent or some other position.

Since the Federal Forms contain a number of exemplary complaints for various causes of action, it is quite possible that other courts will resolve the tension between *Twombly/Iqbal* and the Federal Forms differently. Courts may then have to apply this regional precedent, even in patent cases.

For now, however, the *Bill of Lading* case provides useful guidance for counsel pleading a patent infringement complaint:

1. Direct Infringement. Try to hew as closely as possible to Form 18, although additional details cannot hurt.

2. Contributory Infringement. Given how the case was decided, *Bill of Lading* does not clarify what needs to be pleaded to make out a case of contributory infringement. The case does imply, however, that it is important to plead facts at

least suggesting that the defendant’s products have no significant non-infringing uses, which is not always easy.

3. Inducement. Ideally, one would obtain a manual or instruction book for the defendant’s products which instruct the user to use the product in an infringing manner. In the absence of that, look for and quote (or attach as complaint exhibits) advertising and promotional statements by either the defendant or its customers which suggest performance of at least some of the patented steps.

In addition, it is important to provide context—how many other ways are there to achieve the same goal in the industry? What alternatives, if any, are there to the patent? These contextual facts may, as in *Bill of Lading*, render the promotional statements more likely to suggest a plausible case of inducement.

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1. See *Koninklijke Philips Electronics v. The ADS Group*, 694 F.Supp.2d 246, 252 n. 8 (S.D.N.Y. 2010). That same case also noted that *McZeal* preceded the Supreme Court’s *Iqbal* decision, which held that the heightened pleading standard of *Twombly* extends to all cases, not just antitrust cases. See id.

2. See, also, *Hamilton v. Palm*, 621 F.3d 816, 819 (8th Cir. 2010) (negligence complaint which satisfied the forms sufficient, even if conclusory under *Iqbal* and *Twombly*.)