

PLEADING PATENTS: PREDICTING THE OUTCOME OF STATUTORILY HEIGHTENING PLEADING STANDARDS

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ABSTRACT

The tension between an extremely barebones Federal Rules of Civil Procedure Form 18 for patent infringement lawsuits and Supreme Court case law through Twombly and Iqbal has made it difficult for courts to dismiss frivolous patent litigation at the complaint stage. In this article, I look at the Federal Circuit's treatment of Twombly and Iqbal, empirically evaluate 12(b)(6) motions from various district courts, and summarize local patent rules from the Eastern District of Texas. I conclude that the biggest likely impact of statutorily heightening and defining patent pleading standards through the proposed Innovation Act would be to provide much-needed uniformity in the endeavor of gatekeeping weak lawsuits, without serious adverse impact.

INTRODUCTION

Recently, there has been growing concern that our courts have become inundated with frivolous claims of patent infringement.¹ So-called “patent trolls” bring suits while lacking any basis for believing they will actually win on their patent infringement claims, but with the hope that the defendant will settle and pay these trolls money to go away.² According to some reports, patent trolls now account for a

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¹ See James Bessen, *Patent Trolling Was Up 11 Percent Last Year*, WASH. POST (Jan. 31, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/31/patent-trolling-was-up-11-percent-last-year/> (“Is there a patent troll crisis? Conventional wisdom holds that there is.”).

² See EXECUTIVE OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 1 (2013), available at https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (noting that patent trolls focus on aggressive litigation and use tactics such as suing large numbers of companies, creating shell companies to hide the real plaintiff, and overestimating the reach of their patents).

majority of all patent assertions in the United States.³ Patent trolls, unsurprisingly, often assert weak patents.⁴ However, weak patents are not limited to non-practicing entities or patent assertion entities – several times large, operating companies also assert weak patents in litigation.⁵ The legislature has been considering various approaches to tackle the issue of frivolous lawsuits, especially patent assertion suits. The Innovation Act,⁶ sponsored by Rep. Goodlatte, is a comprehensive bill addressing different aspects of patent litigation.⁷ One of its major proposed changes is a heightened pleading requirement.⁸ The Innovation Act has already passed in the House.⁹ On February 5, 2015, Rep. Goodlatte reintroduced his patent reform bill.¹⁰

The aim of this article is to predict whether raising pleading standards for patent-related claims is a legitimate way of filtering out unmeritorious lawsuits. First, I examine the United States Supreme Court's changes to pleading requirements by surveying case law. By comparing claims of direct and indirect infringement after the key Supreme Court cases, I evaluate the effect of the new pleading standards. Then, I evaluate the proposals of the Innovation Act. Additionally, I compare the Innovation Act's proposed heightened pleading requirements to the local rules of the Eastern District of Texas. My analysis leads to the conclusion that the proposed heightened pleading standards of the Innovation Act would provide uniformity to patent pleading cases, and also likely be an efficient means of keeping out frivolous lawsuits.

³ Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2119 (2013).

⁴ *Id.* What constitutes a 'weak patent' is of course debatable. Here, I am using the term to refer to patents that are likely to be invalidated in a strong invalidation proceeding.

⁵ See generally, Ted Sichelman, *The Vonage Trilogy: A Case in "Patent Bullying"*, 90 NOTRE DAME L. REV. 543 (2014).

⁶ H.R. 3309, 113th Cong. (2013).

⁷ Dennis Crouch, *New Patent Legislation: Innovation Act of 2013*, PATENTLY-O (Oct. 24, 2013), <http://patentlyo.com/patent/2013/10/new-patent-legislation-innovation-act-of-2013.html>.

⁸ *Id.*

⁹ Timothy B. Lee, *Patent Reform Bill Passes the House 325 to 91. Here's What You Need to Know*, WASH. POST (Dec. 5, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/05/the-house-votes-on-patent-reform-today-heres-what-you-need-to-know/>.

¹⁰ Dennis Crouch, *Patent Reform: Innovation Act of 2015*, PATENTLY-O (Feb. 5, 2015), <http://patentlyo.com/patent/2015/02/patent-reform-innovation.html>.

I. TWOMBLY, IQBAL, AND MOTIONS TO DISMISS

Nuisance litigation is not unique to patent law. Various civil procedural devices exist to prevent the progress of lawsuits when it has become clear that further use of judicial resources would be wasteful.¹¹ One of the earliest points at which the judicial system can filter out unmeritorious lawsuits is at the pleading stage.¹² Although heightened pleading requirements aim to keep discovery costs low, they are not always seen as the best solution to discovery abuses.¹³

The United States Supreme Court, through the landmark decisions of *Bell Atlantic Corp. v. Twombly*¹⁴ and *Ashcroft v. Iqbal*,¹⁵ effectively raised the bar as far as the standard for what a plaintiff must allege in her complaint for a civil lawsuit to proceed beyond the pleading stage—although according to the Court, it was simply reiterating the Federal Rules of Civil Procedure (FRCP) standard.¹⁶

To dispel any conjecture that *Twombly* might be applicable only to antitrust cases, *Iqbal* affirmed the holding in *Twombly*, and made it unambiguously applicable to all kinds of civil lawsuits. *Iqbal* suggested a two prong approach, requiring: (1) the distinguishing of facts from legal conclusions; and (2) a plausibility standard, as opposed to a possibility standard.¹⁷

¹¹ Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1180 (2013).

¹² *Id.*

¹³ See, e.g., Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 751–52 (“[P]articlarized pleading is a poorly tailored response [to discovery abuses]. Broad access to discovery is often a necessity in suits by private attorneys general, especially in a country so dependent on private suits to enforce federal normative standards.”).

¹⁴ 550 U.S. 544 (2007).

¹⁵ 556 U.S. 662 (2009).

¹⁶ The Court instead insisted it was simply interpreting Rule 8(a) of the FRCP, which only requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). However, it is widely acknowledged that pleading standards have, in effect, changed since *Twombly* and *Iqbal*. See, e.g., Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. 1053, 1054 (2009) (discussing the “new” standard post-*Twombly*).

¹⁷ William M. Janssen, *Iqbal “Plausibility” in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 563 (2011) (“The standard will not be satisfied by what the Court denominated as bald, non-factual conclusions of law [W]ithout some further factual enhancement [these conclusions] stop[]

Iqbal and *Twombly*, although applicable to patent infringement suits equally in theory, did not have the same effect in patent suits due to Form 18 of the FRCP.¹⁸ Form 18 requires a plaintiff only to make a very barebones pleading contrary to *Iqbal*'s intentions—by only requiring cursory and conclusory statements about the patent's ownership, the act of infringement, and notice.¹⁹ Form 18 effectively supersedes *Twombly* and *Iqbal* because it comes straight from the legislature, specifically for suits of direct patent infringement.²⁰

However, Form 18 does not apply to claims of *indirect* patent infringement. Indirect infringement occurs when the accused infringer does not practice a patent himself, but rather contributes to an overall act of infringement, or induces a third party into committing an act of infringement.²¹ The elements involved in contributory infringement or

short of the line between possibility and plausibility of “entitle[ment] to relief.”” (final alteration in original) (quoting *Twombly*, 550 U.S. at 557).

¹⁸ FED. R. CIV. P. FORM 18; *see also* FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

¹⁹ FED. R. CIV. P. FORM 18. The entire text of Form 18 reads:

1. <Statement of Federal Jurisdiction>
 2. On <Date>, United States Letters Patent No. <_____> were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.
 3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.
 4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.
- Therefore, the plaintiff demands:
- (a) a preliminary and final injunction against the continuing infringement;
 - (b) an accounting for damages; and
 - (c) interest and costs.

²⁰ *See infra* Part III.A.

²¹ 35 U.S.C. § 271(b)–(c) (2012) (“Whoever actively induces infringement of a patent shall be liable as an infringer.”) *See also* *Global-Tech Appliances, Inc. v. SEB SA*, 131 S.Ct. 2060 (2011); 35 U.S.C. § 271(c) (“Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of

inducement of infringement are different from direct infringement; hence Form 18 does not provide a framework for pleading indirect infringement.²² The more stringent pleading standards of *Twombly* and *Iqbal* still apply to cases of indirect infringement.

II. PATENT INFRINGEMENT CASES SINCE IQBAL – A BRIEF LOOK

There have been many empirical studies of district court cases applying *Iqbal* to motions to dismiss.²³ One such study from 2011 argues that district and circuit courts applied *Iqbal* non-uniformly in the years following the decision.²⁴ In general, the number of 12(b)(6) motions that were filed and sustained increased significantly, with almost all of them citing to *Iqbal* or *Twombly*'s plausibility standard.²⁵

The Federal Circuit has addressed the question of applying *Iqbal* to patent pleading in two key cases – *McZeal v. Sprint Nextel Corp.*²⁶ and *K-Tech Telecommunications v. Time Warner*.²⁷

A. Federal Circuit's Approach to Patent Pleading After *Iqbal*

1. Direct Infringement

i. McZeal v. Sprint Nextel Corp.

The first time the Federal Circuit was asked to apply *Iqbal* in a patent pleading case was in *McZeal*. *McZeal* was a *pro se* plaintiff, alleging that Sprint Nextel infringed his U.S. Patent No. 6,763,226 (hereinafter “the ’226 patent”) through the Motorola i930 cellular telephone.²⁸ *McZeal* filed a “motion for a temporary restraining order, a

commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.”)

²² See FED. R. CIV. P. FORM 18 (stating only that “defendant . . . is still infringing the Letters Patent by *making, selling, and using* [the patented invention].” (emphasis added)).

²³ E.g., Colleen McNamara, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of Ashcroft v. Iqbal*, 105 NW. U. L. REV. 401 (2011).

²⁴ *Id.* at 433.

²⁵ Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 1 (2011).

²⁶ *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

²⁷ *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277 (Fed. Cir. 2013).

²⁸ *McZeal*, 501 F.3d at 1355.

preliminary injunction, a permanent injunction, and a request for an expedited hearing.”²⁹

The district court granted Sprint’s motion to dismiss the ninety-five page complaint, concluding that the complaint did not state a claim.³⁰ The district court did not even grant an opportunity for McZeal to amend the complaint, stating the complaint was irreparable because it was not just “missing facts” but lacked “any facts” at all.³¹

On appeal, the Federal Circuit reversed. It held that *Twombly* did not alter the pleading standard for patent infringement cases, specifically one brought by a pro se plaintiff.³² In the opinion by Judge Archer, the Federal Circuit referenced what might be termed conclusory allegations, to support its view that McZeal’s case was well pleaded.³³

Under the court’s reasoning, McZeal (1) asserted ownership of the ’226 patent; (2) named Sprint Nextel as defendants; (3) alleged that the ’226 patent was infringed; (4) stated that Sprint Nextel’s “machine[s] physically . . . perform[ed] all of the basic elements contained in the patent claims . . . and further alleged under the *doctrine of equivalents*”; and (5) identified the areas of patent law implicated by the case.³⁴ Accordingly, nothing more was required to survive a Rule 12(b)(6) motion.

Judge Dyk, in his dissent, disagreed with the majority with respect to whether there was a sufficient allegation of infringement. He discussed Form 18 (then Form 16) in detail. Importantly, he noted that Form 18 did not address the complex “doctrine of equivalents”, an essential part of McZeal’s claim.³⁵ Indeed, Judge Dyk went so far as to call McZeal’s behavior sanctionable given McZeal’s failure to investigate the accused device.³⁶

McZeal was a curious decision in that it seemed to reinterpret the precedent set by the Supreme Court in *Iqbal* and *Twombly*. It was a decision that did not specifically refer to Form 18; the Federal Circuit simply interpreted *Twombly* and *Iqbal* in a manner suggesting they had done nothing to the Rule 8 notice pleading standard.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1356–57, 1356 n.4.

³³ *Id.* at 1357.

³⁴ *Id.* (emphasis added) (citations omitted).

³⁵ *Id.* at 1361.

³⁶ *Id.* at 1363.

ii. K-Tech Telecommunications v. Time Warner

The Federal Circuit more recently took up the issue of pleading again in 2013. The procedural posture and outcome of *K-Tech* was similar to *McZeal*, with the Federal Circuit reaffirming its resistance to apply the heightened pleading standards from *Twombly* and *Iqbal*.

K-Tech filed a complaint for patent infringement against DirecTV and Time Warner Cable in the United States District Court for the Central District of California, alleging direct infringement of its four patents involving transformation of digital-broadcast-signal sub-channels into a new numbering system for cable transmission.³⁷ The district court dismissed K-Tech's infringement lawsuit by sustaining a FRCP Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, citing *Twombly* and stating:

Although Plaintiff strongly believes that Defendant "must" be infringing the Asserted Patents, Plaintiff fails to explain the basis of this belief. Plaintiff does not explain why it believes that Defendant is utilizing the methods and products protected by the Asserted Patents to update the digital signals it receives rather than using other noninfringing methods and products.³⁸

The district court also dismissed a first amended complaint for the same reasons.³⁹

On appeal, the Federal Circuit reversed and remanded, basing its reasoning on the existence of Form 18.⁴⁰ Citing to *R+L Carriers*,⁴¹ the court held that "proper use of a form contained in the Appendix of Forms effectively immunizes a claimant from attack regarding the sufficiency of the pleading."⁴² Expounding on the area of potential conflict between case law and the FRCP, the Federal Circuit noted that the forms of the FRCP would control.⁴³ However, the majority opinion also noted that

³⁷ *K-Tech*, 714 F.3d at 1280; see Dennis Crouch, *Federal Circuit Supports Bare-Bones Patent Complaints*, PATENTLY-O (Apr. 23, 2013), <http://patentlyo.com/patent/2013/04/federal-circuit-supports-bare-bones-patent-complaints.html> (describing the essence of the complaint).

³⁸ *K-Tech*, 714 F.3d at 1280.

³⁹ *Id.*

⁴⁰ *Id.* at 1284.

⁴¹ *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323 (Fed. Cir. 2012).

⁴² *K-Tech*, 714 F.3d at 1283.

⁴³ *Id.*

there was not necessarily a conflict between Form 18 and *Twombly/Iqbal*.⁴⁴

In his concurring opinion, Judge Wallach disagreed that the FRCP Forms always controlled over the Supreme Court's plausibility standard as set forth in *Twombly* and *Iqbal*.⁴⁵ Professor Dennis Crouch, in his blog, pointed out the paradox with respect to pleading uniformity:

One odd element of the decision is that the court indicated that the judgment on whether claims had been sufficiently pled is not a patent specific matter. The consequence of that is that Federal Circuit follows the lead of the appropriate regional circuit court of appeal . . . Form 18 is a national form, and any argument that [one] should interpret it differently here than [one] did in *R+L Carriers* is without merit. One trick here is that [one] ordinarily do[es] not apply common law interpretation to the Federal Rules of Civil Procedure – meaning that precedential decisions of the regional circuits have less weight in this area than in other areas of law.⁴⁶

This strange case of circularity leaves the Federal Circuit as the sole determinant of pleading standards for patent infringement because, although it is supposed to apply the law of the regional circuit on procedural matters, no such law exists for patent pleading.⁴⁷

2. Indirect Infringement

i. *Superior Industries v. Thor Global Enterprises*

The Federal Circuit took up the issue of pleading sufficiency for claims of induced and contributory infringement post-*Iqbal* in *Superior Industries, LLC v. Thor Global Enterprises, Ltd.*⁴⁸ Superior filed suit

⁴⁴ See *id.* at 1284 (“[W]e [do not] seek to create conflict where none exists. A complaint containing just enough information to satisfy a governing form may well be sufficient under *Twombly* and *Iqbal*.”).

⁴⁵ See *id.* at 1288 (comparing Form 9 for pleading negligence with Form 18 for pleading patent infringement).

⁴⁶ Dennis Crouch, *Federal Circuit Supports Bare-Bones Patent Complaints*, PATENTLY-O (Apr. 23, 2013), <http://patentlyo.com/patent/2013/04/federal-circuit-supports-bare-bones-patent-complaints.html>.

⁴⁷ See Adam Steinmetz, Note, *Pleading Patent Infringement: Applying the Standard Established by Twombly and Iqbal to the Patent Context*, 13 COLUM. SCI. & TECH. L. REV. 482, 512 (2012) (explaining that the Federal Circuit applies its own law to substantive and procedural issues that intimately involve the enforcement of a patent right).

⁴⁸ *Superior Indus., LLC v. Thor Global Enters., Ltd.*, 700 F.3d 1287 (Fed. Cir. 2012).

against Thor for infringement of two of its patents.⁴⁹ Superior's First Amended Complaint alleged that Thor "ha[d] been and [was] directly infringing, actively inducing others to infringe and/or contributing to the infringement of one or more claims of [its] Patent[s] by its unauthorized making, using, offering to sell, selling and/or importing a telescoping conveyor having the Thor Undercarriage Technology in and/or to the United States."⁵⁰ The District Court for the District of Minnesota dismissed the complaint with prejudice.⁵¹

While reversing dismissal of direct infringement claims because of lower pleading standards, the Federal Circuit affirmed dismissal of indirect infringement claims for not meeting heightened pleading standards. It reiterated that "Form 18 does not determine the sufficiency of pleading for claims of indirect infringement. Rather, the pleading requirements set forth in *Twombly* and *Iqbal* apply to such claims. This court finds Superior's complaint falls far short of pleading facts necessary to state a plausible claim for either induced or contributory infringement."⁵² It went on to add:

Superior does not allege that the accused products are "especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use" as required by 35 U.S.C. § 271(c). Similarly, Superior does not allege any facts to support a reasonable inference that Thor specifically intended to induce infringement of the '231 Patent or that it knew it had induced acts that constitute infringement. This court therefore affirms the dismissal of Superior's claims of indirect infringement under 35 U.S.C. §§ 271(b) and (c).⁵³

Here, the Federal Circuit was unequivocal in separating claims of indirect infringement from direct infringement, indicating that Form 18 did not apply to direct infringement, and then proceeding to apply the heightened pleading requirements of *Twombly* and *Iqbal* to indirect infringement. One issue the Federal Circuit left unresolved is whether the heightened pleading requirement for indirect infringement would further depend on whether contributory or induced infringement was being alleged.⁵⁴ For example, in *Superior Industries*, it is unclear whether a

⁴⁹ *Id.* at 1290.

⁵⁰ *Id.* at 1290–91.

⁵¹ *Id.* at 1289.

⁵² *Id.* at 1295–96.

⁵³ *Id.*

⁵⁴ Induced infringement requires a scienter element. *See supra* note 22 and accompanying text.

conclusory allegation that accused products were especially adapted for use in an infringement of patent at suit would be sufficient to overcome dismissal of the contributory infringement claim.

B. Examples of District Court Applications of Iqbal

In this section, I examine district court cases from various circuits dealing with motions to dismiss of direct infringement suits. In general, the courts are split on the precise impact of *Twombly* on patent cases.⁵⁵ However, complaints of direct infringement have hardly been dismissed at the pleading stage, thanks to Form 18—irrespective of *Iqbal* or *Twombly*. David Donoghue, a practicing attorney, argues that “[w]hereas the playing field between plaintiffs and defendants was fairly and predictably level before *Twombly*, the uneven application of *Twombly* by lower courts has tilted that playing field decidedly in favor of plaintiffs.”⁵⁶

1. Atwater Partners of Texas LLC v. AT & T, Inc.

One of the hotbeds for patent activity, the Eastern District of Texas, took up an interesting pleading case which illustrates the incentives at play in allegedly frivolous litigation in 2011.

In *Atwater*,⁵⁷ defendant Adtran, Inc. (Adtran) moved to not only dismiss plaintiff Atwater’s claims of patent infringement, but also moved for Rule 11 sanctions against Atwater.⁵⁸ The court, citing Form 18, denied the 12(b)(6) motion even though Atwater had not specified what Adtran’s infringing products were.⁵⁹

Adtran further argued that Atwater had to be subject to Rule 11 sanctions. Adtran alleged that because Atwater ought to have complied with the pre-filing investigation requirements of FRCP 11, Atwater should have specified the names of specific infringing products. Therefore Adtran argued that Atwater should be reprimanded for not including that information in its pleading.⁶⁰

⁵⁵ R. David Donoghue, *The Uneven Application of Twombly in Patent Cases: An Argument for Leveling the Playing Field*, 8 JOHN MARSHALL REV. INTELL. PROP. L. 1, 2 (2008).

⁵⁶ *Id.* at 2–3.

⁵⁷ *Atwater Partners of Tex. LLC v. AT & T, Inc.*, No. 2:10-cv-175-TJW, 2011 WL 1004880 (E.D. Tex. Mar. 18, 2011).

⁵⁸ *Id.* at *1, 4; *see generally* FED. R. CIV. P. 11(c) (setting forth sanction procedures).

⁵⁹ *Atwater Partners of Tex. LLC.*, 2011 WL 1004880, at *1.

⁶⁰ *Id.* at *4.

The court disagreed with Adtran's reasoning, turning the tables against it instead:

Although this Court has mentioned Rule 11 in connection with Rule 12(b)(6) motions in the past, this Court has never held or implied that merely because a party presumably has certain information via its pre-filing investigation that it should be required to include that information in its pleading. Rule 8(a) requires only a complaint contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Rule 8(a) does not state a complaint must contain all relevant and material information that the party possesses by virtue of its pre-filing investigation that is required by Rule 11. Furthermore, the Court observes that Rule 11 cuts both ways, that is, it is also a violation of Rule 11 to file a frivolous motion. This includes a frivolous Rule 12(b)(6) motion to dismiss for failure to state a claim. As described above, not much is required to satisfy the pleading standards for patent infringement under Federal Circuit case law and Federal Rule of Civil Procedure Form 18.⁶¹

The court was seemingly more concerned about frivolous 12(b)(6) motions than about frivolous patent infringement suits.

C. Indirect Infringement Claims Since Iqbal

1. Massachusetts Institute of Technology (MIT) v. Shire PLC

The District Court for the District of Massachusetts addressed a 12(b)(6) motion to dismiss a claim for inducement of infringement in *MIT v. Shire PLC*.⁶² The plaintiffs (MIT and Children's Medical Center Corporation) alleged that a product produced and sold by defendant Shire PLC, Dermagraft (a skin substitute, derived from natal foreskin tissue, used to treat foot ulcers of diabetic patients) infringed their patents.⁶³ Apart from alleging direct infringement, the plaintiffs also alleged willful inducement of infringement.⁶⁴

Sustaining the motion to dismiss, the court noted that the Federal Circuit had held that the heightening pleading standard from *Twombly* and *Iqbal* applied to indirect infringement claims.⁶⁵ The language of the

⁶¹ *Id.*

⁶² *Mass. Inst. of Tech. v. Shire PLC*, No. 1:13-CV-10020-MLW, 2014 WL 404696, at *8–10 (D. Mass. Feb. 2, 2014).

⁶³ *Id.* at *1.

⁶⁴ *Id.*

⁶⁵ *Id.* at *8.

court gives us some hint of how it would consider a direct infringement claim if not for the presence of Form 18:

The allegations in the complaint and the letters it references are not sufficient to satisfy the pleading standard established in *Iqbal* and [*Twombly*]. The allegations that the defendants are “involved in the manufacturing, marketing, and selling” of [the infringing product] might be sufficient for a claim of direct infringement. They do not, however, adequately support the more demanding specific intent requirement for a finding of induced infringement. Furthermore, these allegations, without any other support from within the complaint, *do not qualify as “non-conclusory, non-speculative” facts from which the court can draw reasonable inferences in the plaintiff’s favor.*⁶⁶

This reasoning suggests that there are two issues at play here: the specific intent requirement of inducement, which requires the pleading of specific facts (governed by FRCP Rule 9(b)); and the idea that indirect infringement is not governed by Form 18.

2. *Logic Devices, Inc. v. Apple, Inc.*

The District Court for the Northern District of California, in a recent case, applied a heightened pleading standard to allegations of contributory infringement.⁶⁷ *Logic Devices*, in a short complaint, simply alleged inducement, contributory infringement, and willful infringement of their U.S. Patent No. 5,524,244 without factual allegations to draw a reasonable inference that the defendants are liable for the misconduct alleged.⁶⁸

The court noted that “[o]ther than *Logic Devices*’ prayer for relief, *Logic Devices*’ complaint fails to allege *any facts supporting a plausible inference of contributory infringement.*”⁶⁹ The complaint lacked any description of “whether the accused products [were] capable of substantial non-infringing uses” and the court emphasized that “[o]ne sentence in the prayer for relief cannot suffice to allege contributory

⁶⁶ *Id.* at *9 (emphasis added).

⁶⁷ *Logic Devices, Inc. v. Apple, Inc.*, No. C13-02943 WHA, 2014 WL 60056 (N.D. Cal. Jan. 7, 2014).

⁶⁸ *Id.* at *1.

⁶⁹ *Id.* at *2 (emphasis added).

infringement.”⁷⁰ What this suggests is that an empty recitation of the elements of contributory infringement would be insufficient.⁷¹

D. Empirical Study of Cases Applying Iqbal

As mentioned before, because of Form 18, it is reasonable to assume complaints of direct patent infringement are hardly ever dismissed for failure to state a claim. However, based on limited data, an analysis of the indirect infringement pleadings from the major districts provides some counterintuitive results, as well as interesting clues about how different courts have been treating *Iqbal* when it comes to claims of indirect infringement.

The dataset for my analysis consisted of available the district court patent lawsuits that cited to *Iqbal*.⁷² The final dataset consisted of forty cases. Of this sample, a motion to dismiss was granted in fourteen cases. Of these fourteen cases where a 12(b)(6) motion was granted, seven were claims of direct infringement. These seven cases came from all across the country (Michigan, Texas, Missouri, New York, Puerto Rico and Louisiana), indicating that various trial courts are willing to dismiss weak suits at the 12(b)(6) stage in spite of Form 18.

Analysis of sample of cases citing to *Iqbal*:

⁷⁰ *Id.*

⁷¹ *See, e.g.,* Donoghue, *supra* note 56, at 11 (describing the United States District Court for the Western District of Wisconsin as having a “minor additional pleading requirement”—“requir[ing] plaintiffs to identify the specific claims that they assert are infringed and which products allegedly infringe them.”).

⁷² The exact procedures for creating the final dataset were as follows: Using the Westlaw database, I obtained a list of all district court cases citing to *Iqbal*. From this list, I filtered to only those cases concerning patents. Within this, I filtered to those cases whose case summary related to ‘contributory’ or ‘induced’ or ‘indirect.’

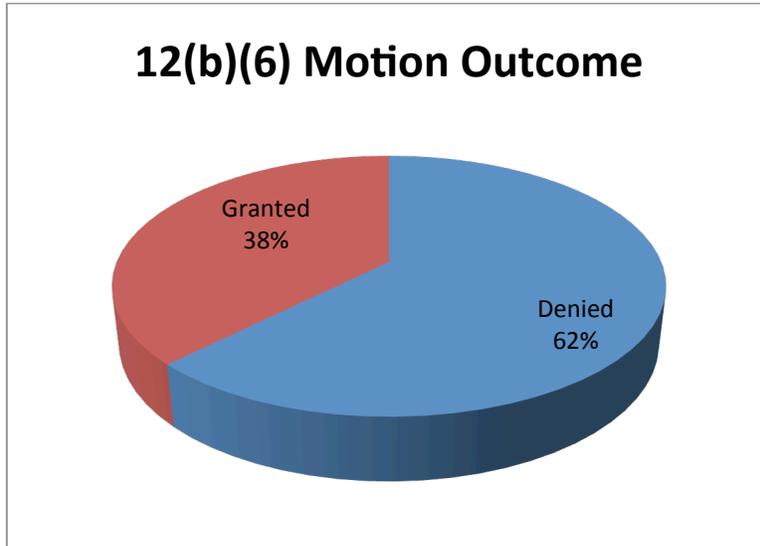


Fig. 1: Outcome of 12(b)(6) motions based on entire sample.

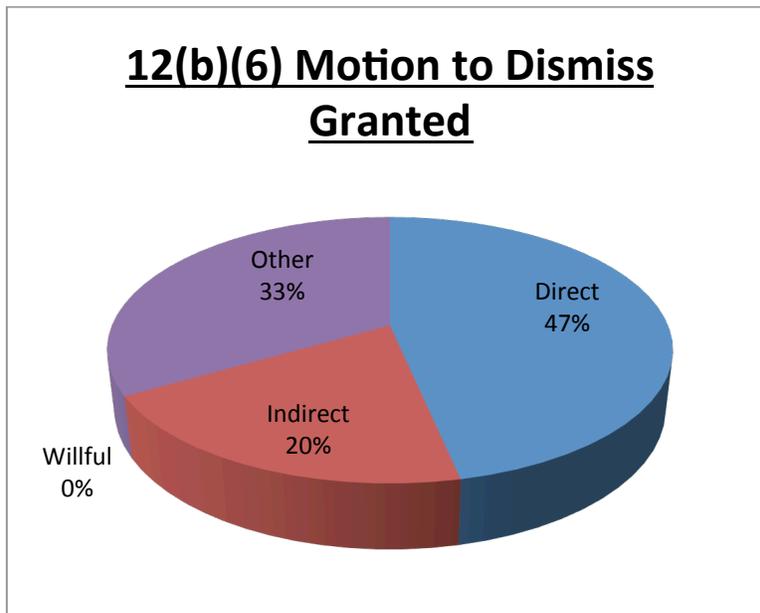


Fig. 2: Break up of cases where motion to dismiss was granted.

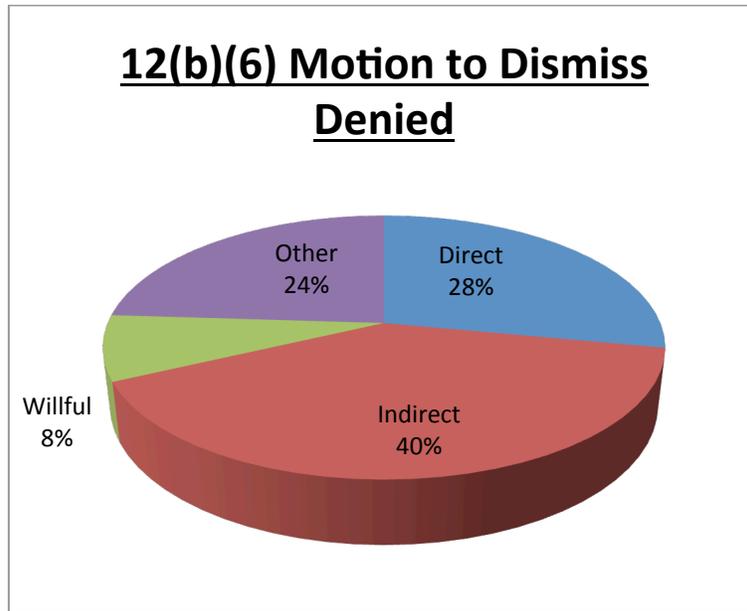


Fig. 3: Break up of cases where motion to dismiss was denied.

Obviously, the data is somewhat limited and potentially suffers from various sampling biases.⁷³ As a first look, it should be reflective of how courts have been treating *Iqbal* in patent cases.

Results from a quick empirical analysis of 12(b)(6) motions as shown above do not align with case law from the Federal Circuit. Because of the presence of Form 18, one would expect very few motions to dismiss, if any, to be granted in direct infringement cases. On the other hand, one would expect more indirect infringement cases to be dismissed at the pleading stage. Disregarding an unlikely explanation that these difference arise from stark differences in the way plaintiffs plead direct and indirect infringement, the results show that Form 18 and case law and applied non-uniformly in the district courts.

III. LOCAL RULES IN DISTRICT COURTS – E.D. TEXAS

Some district courts, particularly the Eastern District of Texas, have already been requiring parties to allege facts to make allegations of infringement more ‘plausible’ through local rules, in effect, raising the

⁷³ First, the Westlaw database is not comprehensive. Second, my method of creating the initial dataset—all cases that cite to *Iqbal*—does not involve sampling. And finally, the other manual filtering steps to limit the dataset to patent cases, and more specifically to 12(b)(6)-patent cases, is prone to some error.

pleading standards.⁷⁴ These are required typically at initial case conferences.⁷⁵

Local rules require a party alleging patent infringement to serve detailed information regarding accused products and method, including claim charts on the opposing party ten days before the Initial Case Management Conference.⁷⁶ This goes right to the heart of what might be asked of parties by a heightened pleading requirement.

In an opinion discussing the requirements of local rules vis-à-vis *Twombly* and *Iqbal*, the District Court for the Northern District of Georgia noted that the “Northern District’s Local Patent Rules require[d] plaintiffs to disclose a great deal of extremely detailed information . . . Any plaintiff filing a patent case in this district knows that these disclosures must be made early. Requiring similar detailed factual disclosures at the pleading stage would serve no useful purpose.” This suggests that statutorily requiring more at pleading might lead to early dismissal of unmeritorious lawsuits.⁷⁷

IV. RAISING PLEADING STANDARDS BY STATUTE – THE INNOVATION ACT

The Innovation Act is an attempt to reduce the number of frivolous lawsuits that are being filed.⁷⁸ The ostensible goal of the legislation, according to Rep. Goodlatte, who introduced the bill, is to “to address the abusive practices that have damaged our patent system and resulted in significant economic harm to our nation.”⁷⁹ Some authors

⁷⁴ Donoghue, *supra* note 56, at 12. Donoghue also mentions the Northern District of Georgia and the Northern District of California as examples of districts that “narrow cases even more effectively than *Twombly*’s heightened pleading requirements.” *Id.*

⁷⁵ *Id.*

⁷⁶ E.D. TEX. P. R. 3-1 (2014), available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1179.

⁷⁷ *CBT Flint Partners, LLC v. Goodmail Sys., Inc.*, 529 F. Supp. 2d 1376, 1380–81 (N.D. Ga. 2007).

⁷⁸ George M. Gould, *Congress Reintroduces Innovation Act in Hopes to Curb Frivolous Patent Litigation*, IP LAW ALERT (Apr. 7, 2015), <http://www.iplawalert.com/2015/04/articles/patent/congress-reintroduces-innovation-act-in-hopes-to-curb-frivolous-patent-litigation/>.

⁷⁹ Jeff Becker, *Intellectual Property Report: The Latest in Patent Reform: The Innovation Act (H.R. 3309)*, BAKER BOTTS (Dec. 2013), http://www.bakerbotts.com/file_upload/IPReport201312-TheLatestInPatentReformTheInnovationActHR3309.htm.

have expressed concern that the Innovation Act, in addition to or instead of stopping trolls, could potentially stifle innovation.⁸⁰

One focus of the Innovation Act is on statutorily raising pleading standards. Apart from a proposal to abandon Form 18, it contains language requiring more detail in a complaint of patent infringement.⁸¹ For example, similar to the local rules discussed in the previous section, the Innovation Act would require the complaint to include, for each accused product, an “identification of each claim of each patent . . . that is allegedly infringed,” the name or model number (if known), and a detailed explanation of where each element of the claim is found in the accused product.⁸² The complaint would also be required to explain, “with detailed specificity, how each limitation of each claim . . . is met by the accused [product].”⁸³ Other authors have likewise recommended new patent pleading standards.⁸⁴

V. WHAT CAN WE EXPECT FROM HIGHER PLEADING STANDARDS?

In this article, I have evaluated the current state of motions to dismiss patent infringement allegations through various methods, based on the Federal Circuit’s treatment of *Twombly* and *Iqbal*, empirical examination of district court patent cases, and comparison to local patent rules in the Eastern District of Texas. Because the proposed rules of the Innovation Act are similar to Supreme Court case law on the topic and to some local patent rules, it is possible to predict the impact of such a proposal to a fair extent.

Overall, it is likely that statutorily raising pleading standards will have a positive impact on patent infringement suits. I discuss the probable consequences of such a measure in three parts: uniformity of pleading standards, the effect on “troll” lawsuits, and possible adverse effects on legitimate patent litigation.

A. Uniformity to Pleading Standards

Perhaps most importantly, statutorily defining pleading standards to supplement FRCP Rule 8 will provide much-needed uniformity to the judgment of motions to dismiss. As seen in the previous sections, local

⁸⁰ E.g., Kellan Howell, *Patent Law Reform Bill to Stop Trolls Could Also Stifle Innovation, Critics Say*, WASH. TIMES (Feb. 5, 2015), <http://www.washingtontimes.com/news/2015/feb/5/patent-law-reform-bill-to-stop-trolls-could-stifle/?page=all>.

⁸¹ H.R. 3309, 113th Cong. § 6(c)(1) (2013).

⁸² *Id.* § 3(a)(1).

⁸³ *Id.*

⁸⁴ E.g., Steinmetz, *supra* note 48, at 516.

district courts vary widely in their approach to granting motions to dismiss given the differences in direction from the Supreme Court, the Federal Circuit, and the Federal Rules of Civil Procedure. Currently, with the Federal Circuit holding that virtually any complaint will overcome a 12(b)(6) motion in a direct infringement suit, there is practical difficulty in terminating suits early, however frivolous they appear to be. However, as seen from the empirical study of sample cases in the previous section, district courts have not been applying Federal Circuit precedent predictably. It is true that some local patent rules tend to be good gatekeepers, but these local rules do not exist for every district, and are not uniform throughout the country. Besides, local patent rules typically apply after the pleading stage, and significant expenses have already been incurred by parties if frivolous suits are not stopped at the pleading stage.

B. Effect on ‘Troll’ Lawsuits

The most efficient point at which weak lawsuits can be filtered is at pleading. Parties have not yet invested in significant attorney fees, the incentive to settle an extremely weak case is low, and the discovery costs are absent. Patent assertions based on hunches, where the plaintiff hopes to follow up with a “fishing expedition” would be discouraged early through heightened pleading requirements, and rightly so.⁸⁵ Hence, it is easy to see that unmeritorious, ill-researched, and ill-motivated patent infringement lawsuits would be discouraged by heightening pleadings standards. Upon statutorily raising pleading standards, weak lawsuits would uniformly be handled by district courts in a manner similar to applying *Twombly* and *Iqbal* to direct patent infringement.

Of course, the benefit of filtering unmeritorious lawsuits has to be weighed against the cost of filtering out meritorious lawsuits from the court system.

C. Adverse Effect on Legitimate Patent Litigation?

Although one can only speculate at this juncture, it seems unlikely that heightened pleading requirements will have a serious adverse impact on legitimate lawsuits. After all, several jurisdictions, such as the Eastern District of Texas as seen above, require detailed information regarding the infringement before discovery in any event. Requiring detailed information earlier in the pleading stage would not be a serious burden to the plaintiff in such jurisdictions. Indeed, it would

⁸⁵ See, e.g., *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir.1999) (“Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.”).

give plaintiffs one less reason to go forum shopping in an attempt to get to discovery more easily.⁸⁶

However, there would be some impact on legitimate suits where detailed pleading is simply not possible until later stages of litigation, and the actual impact on such suits remains to be seen. It is true that often times a plaintiff does not have access to detailed information regarding the functioning of an accused product to make detailed assertions before discovery. The Innovation Act attempts to account for such a scenario by allowing a plaintiff to explain why detailed information was not available at pleading despite reasonable diligence.⁸⁷ This provision, while in theory allows a plaintiff to explain why a complaint was not well-pleaded, might turn out to be the exception that swallows the rule. The exception might allow for excessive judicial discretion in allowing lawsuits through the door, thereby actually worsening uniformity at motions to dismiss.

As long as the detrimental impact on frivolous suits and the advantage of uniformity vastly outweigh the impact on legitimate suits, the overall effect of heightened statutory pleading standards will be positive.⁸⁸

On a philosophical note, a plaintiff's assertion that he or she does not have access to information that is required to plead a case of infringement begs the question why the plaintiff then believes there is ongoing patent infringement. At the very least, requiring more at pleading would force a plaintiff to perform more research at the complaint stage to ascertain the legitimacy of her suit.⁸⁹ This further effort might actually lead the plaintiff to conclude that there is no strong case for patent infringement after all, thereby acting as an efficient filter to frivolous lawsuits. If the plaintiff spends considerable effort in

⁸⁶ Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to TS Tech and Genetech*, 25 BERKELEY TECH. L. J. 61, 67 (2010).

⁸⁷ H.R. 9, 114th Cong. § 3(b) (2015) ("Information Not Readily Accessible.—If information required to be disclosed under subsection (a) is not readily accessible to a party, that information may instead be generally described, along with an explanation of why such undisclosed information was not readily accessible, and of any efforts made by such party to access such information.")

⁸⁸ See Mark Andersen & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1, 20–24 (2010).

⁸⁹ See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 909 (2009) ("[S]tricter pleading treats plaintiffs who do not have access to information less favorably than plaintiffs who do have access.").

researching her case of infringement, and concludes that there is indeed ongoing infringement, requiring detail at the pleading stage will likely not discourage a suit that has a reasonable possibility of prevailing.

It is worth noting that this apparent paradox is not specific to patent pleading, and was considered in some detail by academics, legislators, and judges following *Twombly* and *Iqbal*.⁹⁰ While similar rationales hold in patent litigation as in any other lawsuits, the cost-benefit analysis for patent litigation may differ in a few areas.

D. Policy Considerations in Nuisance Patent Litigation

Arguably, civil rights under the Bill of Rights such as those litigated in *Iqbal* can be considered more fundamental than the right to assert a patent.⁹¹ Intellectual property right is after all a property right, so a colorable argument can be made that filtering out a few meritorious lawsuits might be a reasonable price to pay to avoid nuisance litigation, and more acceptable than errors in keeping away meritorious civil rights suits. Empirical studies analyzing the number of meritorious suits that are wrongly dismissed because of stringent pleading standards may throw more light on the exact value of the cost paid by the judicial system. However, such studies are hard to conduct because they often involve speculation regarding which of the dismissed suits would have ended up successful, based on very little or data.

Apart from protection of individual property rights, patent infringement lawsuits have a significant impact on the economy. Strong intellectual property rights encourage companies to do business without fear of other companies replicating their technical innovations. Strong patent rights allow companies to spend significant resources on research and development.⁹² Discouraging patent litigation heavily much may have a negative impact on the economy, when companies feel that their patent rights would not be significantly protected.

However, a significant increase in patent infringement filings, especially unmeritorious ones, has an adverse impact on judicial resources, budgets of companies, and the economy in general. Raising pleading standards to match other regular lawsuits may provide that

⁹⁰ See, e.g., Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 122 (2011).

⁹¹ 556 U.S. at 662 (The plaintiff alleged violations of his First and Fifth Amendment rights).

⁹² See Kenneth L. Sokoloff, *Intellectual Property Institutions in the United States: early development and comparative perspective*, Journal of Economic Perspectives. 15(3): 233-246 (2001).

balance, given that for most reasonable lawsuits, the information required in the complaint should be available to the plaintiff in any event.

CONCLUSION

Statutorily raising pleading standards will give district courts across the country much needed procedural uniformity with regards to patent pleading. The outcome of such a requirement can be predicted to a large extent from at least two sources: the treatment of indirect infringement pleading by the Federal Circuit and the district courts through the application of *Twombly* and *Iqbal*, and the impact of local rules.

Overall, the outlook seems promising. Such a legislative change will keep out frivolous lawsuits and “fishing expeditions” very early in the progress of a lawsuit. This is critical, and the policy reasons behind the Supreme Court decisions in *Twombly* and *Iqbal* would unequivocally be implemented in patent infringement suits as well.