

# Trends in Delaware post-*Twombly*

Pilar G Kraman of Young Conaway Stargatt & Taylor explains how motions to dismiss in patent infringement cases have changed over the years

Since the Supreme Court's decisions in *Bell Atlantic v Twombly* 2007 and *Ashcroft v Iqbal* 2009, motions to dismiss under rule 12(b)(6) have become more commonplace in patent infringement cases across the country, including cases in the District of Delaware, one of the nation's busiest jurisdictions for patent infringement litigation. This article focuses on the District of Delaware judges' application of *Twombly* and *Iqbal* to motions to dismiss direct and indirect patent infringement claims.

## Twombly and Iqbal

In *Twombly*, the Supreme Court interpreted rule 8 of the Federal Rules of Civil Procedure to require that a plaintiff's allegations must meet a "plausibility standard". That is, the complaint must state sufficient facts "to state a claim to relief that is plausible on its face". In *Iqbal*, the Court further explained that plausibility exists on a continuum somewhere between possible and probable: "the plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief".

## The relevance of Form 18

Decisions from the District of Delaware have explained that the *Twombly* and *Iqbal* rulings did not alter the standard for pleading direct infringe-



ment as set forth in the Federal Rules' model complaint for patent infringement – Form 18. This is consistent with the directive of the Federal Rules themselves that "the forms in the appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate". It is also consistent with the Supreme Court's own express approval of reliance on the forms in *Twombly*.

The Federal Circuit case most often cited to support the adequacy of Form 18 is *McZeal v Sprint Nextel* 2007, issued four months after *Twombly*. There, the Federal Circuit held that a complaint need only mimic Form 18 in order to plead direct patent infringement adequately. Yet, *McZeal* was issued before *Iqbal*, leaving open to debate the question of its continuing relevance. In Delaware, *McZeal* continues to be consistently cited as a basis for denying motions to dismiss direct infringement allegations that comply with Form 18. That has not been the case in other districts. The Northern District of California, for example, has held that Form 18 was abrogated by *Twombly* and *Iqbal* (see for example *PageMelding v ESPN* 2012: "absent any evidence that it intended to exempt patent infringement claims from the standard set forth in *Iqbal*, . . . *McZeal* was disapproved to the extent that compliance with Form 18 was sufficient to withstand a motion to dismiss for failure to state a claim"). In any event, the Federal Circuit recently clarified the issue with its decision in *In re Bill of Lading Transmission & Processing Sys Patent Litig* 2012, holding that changes to the



Federal Rules cannot be made by judicial interpretation, and “to the extent . . . *Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control”.

In that same case, the Federal Circuit also confirmed that a plaintiff is not required to “plead facts establishing that each element of an asserted claim is met” or “even identify which claims it asserted are being infringed”. This is consistent with decisions from Delaware.

District of Delaware judges also require that a complaint adequately identify the accused products or services. The court looks to Form 18’s description of the accused products (“electric motors”) to determine if the defendant had fair notice of the particular accused product. For example, in *IpVenture v Lenovo Group*, 2012, Judge Andrews found “computers” sufficient to identify a general class of products allegedly infringing plaintiff’s patent because it was analogous to Form 18’s “electric motors”. Likewise, in *Netgear v Ruckus Wireless*, 2012, Judge Robinson found “wireless communication products” adequate. And, in *St Clair Intellectual Property Consultants v Apple Inc*, 2011, Judge Stark found “smartphones and tablets” adequate. The court, however, has held that “communication system products and/or methodologies” and “products and methods covered by the claims of the asserted patents” are inadequate descriptions of a product or method accused of infringement. See *Eidos Communications v Skype Techs* 2010 and *Fifth Market v CME Group* 2009 respectively.

### Pleading knowledge

Like other federal districts, Delaware’s treatment of indirect infringement claims has evolved in the years since *Twombly* and *Iqbal* issued. Most recently, the Delaware judges have focused on what is required to plead the knowledge element of 35 USC section 271(b) and (c).

To establish liability for inducement under 35 USC section 271(b), “a patent holder must prove that once the defendant knew of the patent, [it] actively and *knowingly* aid[ed] and abett[ed] another’s direct infringement” *DSU Med v JMS* 2006. A plaintiff must establish that the defendant had “knowledge that the induced acts [ in other words, the direct infringement of another] constitute[d] patent infringement” *Global-Tech Appliances v SEB* 2011. Similarly, to establish liability for contributory infringement under 35 USC section 271(c), a patent holder must prove “that the alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing” *Aro Mfg v Convertible Top Replacement* 1964.

Until 2012, Delaware’s judges generally rejected the argument that a plaintiff sufficiently pleads knowledge by asserting that the defendant knew of the patent from at least the filing date of the complaint (see for example *Eon Corp IP Holdings v FLO TV* 2011; *Xpoint Techs v Microsoft*; *Mallinckrodt v E-Z-EM* 2010). The court has now revised that position, holding that “if a complaint sufficiently identifies, for purposes of Rule 8, the patent at issue and the allegedly infringing con-

duct, a defendant's receipt of the complaint and decision to continue its conduct despite the knowledge gleaned from the complaint satisfies the requirements of *Global-Tech v. Apeldyn v. Sony* 2012 (see also *SoftView v. Apple* 2012; *Pragmatus Telecom v. Ford Motor* 2012; *Walker Digital v. Facebook* 2012). In *Apeldyn* and *Walker Digital*, Judge Robinson recently explained the rationale for the change in the court's view:

"Given the ease of amendment, the limitation of damages to post-knowledge conduct, and in the interests of judicial economy, the court [found] that the better reasoning [was] to allow a complaint that satisfies Rule 8 to proceed to discovery rather than dismissing it for lack of pre-filing knowledge when, by the time the motion to dismiss has been filed, defendant in fact has the requisite knowledge as pled by plaintiff."

If a plaintiff pleads knowledge of the patent as of the filing of the complaint, Delaware's judges generally do not require the plaintiff to plead extensive facts regarding knowledge of a defendant's activities. For example, in *CyberFone Systems v. Cellco P'ship* 2012, Judge Robinson held that "insofar as inducement may have occurred from the date of suit, the court does not require CyberFone to yet have (or plead) knowledge of defendant's activities". In *SoftView v. Apple* 2012, Judge Stark also held that knowledge of the patent as of the filing of the complaint was sufficient, and that to hold otherwise would prohibit a plaintiff from asserting indirect infringement on the same date that a patent issues. While Judge Stark did not indicate what additional facts must be pled to support indirect infringement claims, he did note that along with pleading knowledge of the patent, a plaintiff must successfully prove (as opposed to plead) "the remaining legal elements of indirect infringement" to recover damages for post-filing infringement.

One exception is *Pragmatus Telecom v. Ford Motor* 2012. There, the plaintiff sufficiently alleged knowledge as of the filing of the complaint, but Judge Andrews dismissed the plaintiff's inducement claim, finding that it had not alleged adequate facts of the defendant's infringing conduct. In support of inducement, the plaintiff had alleged that the defendant "encouraged others, including its customers, that go on [defendant's] website and engage in the infringing functionality, to infringe the Patents".



### ***Pilar G Kraman***

**Pilar Kraman is an associate in Young Conaway Stargatt & Taylor's IP litigation section, and co-author of the Delaware IP law blog, [delawareiplaw.com](http://delawareiplaw.com), which reports on patent infringement litigation decisions and news from the District of Delaware. She focuses her practice primarily on patent infringement litigation, trade secret and complex corporate and commercial litigation matters in the US District Court for the District of Delaware.**

The court's analysis has been different for claims of contributory infringement, as indicated by the *CyberFone* and *Walker Digital* decisions. In *CyberFone Systems v. Cellco P'ship*, 2012, Judge Robinson held that the plaintiff's "general allegations that defendants knew of the patents as of the filing of its complaint (or amended complaint) was insufficient notice of contributory infringement". CyberFone alleged that "[t]hose whom [the defendant] induces to infringe and/or whose infringement to which [the defendant] contributes are the end users of the above-referenced products. [The defendant] has had knowledge of the '382 patent at least as early as the filing of the original complaint". On the other hand, in *Walker Digital v. Facebook* 2012, the plaintiff's allegations of post-complaint knowledge were deemed sufficient to plead contributory infringement.

One difference between the plaintiffs' claims in *CyberFone* and those in *Walker Digital*, is that CyberFone failed to allege that the defendant's accused products were not staple articles or commodities of commerce suitable for substantial non-infringing use, or that they were especially made for or adapted for use in infringing these patents. Further, while CyberFone did generally plead that the defendant knew of the patent, at least as early as the filing of the complaint, CyberFone did not plead that the defendant "knew that the combination for which [its product] was especially designed was both patented and infringing". Walker Digital did so plead.

### **Evaluating claims in your case**

In sum, it is clear that Form 18 governs claims of direct infringement in Delaware, and a motion to dismiss claims that conform to Form 18 is likely to be a losing proposition. Regarding indirect infringement, however, there is some variation as to what other facts, besides knowledge of the patent as of filing the complaint, are required in order for the claims to survive. If pleading knowledge as of the filing of the complaint, inducement claims must, at a minimum, contain general allegations of another's direct infringement that the defendant allegedly aided and abetted. When pleading contributory infringement, however, a plaintiff must also allege at least general facts relating to the defendant's knowledge of the infringing use of its products, in addition to knowledge of the patent at the filing of the complaint.



YOUNG CONAWAY  
STARGATT & TAYLOR, LLP

*Attorneys at Law*



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For more information contact:

**Adam W. Poff**  
302.571.6642  
apoff@ycst.com

[www.youngconaway.com](http://www.youngconaway.com)  
[www.delawareiplaw.com](http://www.delawareiplaw.com)