

# Just the Facts: Pleading Claims for Induced and Contributory Patent Infringement after *Iqbal*

By Brandon Mark

Following the United States Supreme Court's decision in *Ashcroft v. Iqbal*,<sup>1</sup> which clarified the reach of the Court's decision in *Bell Atlantic Corp. v. Twombly*,<sup>2</sup> practitioners in all areas of the law have been forced to reconsider whether allegations that were previously sufficient to state a claim for relief now pass muster under the new standards. In *Iqbal*, the Court reiterated that all claims must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>3</sup> The pressing question confronting plaintiffs is just how much "factual content"—or, as *Twombly* puts it, "further factual enhancement"—is required to avoid dismissal.

After *Twombly*, in *McZeal v. Sprint Nextel Corp.*, the Court of Appeals for the Federal Circuit held that, to state a claim for patent infringement, a plaintiff may simply follow the form complaint appended to the Federal Rules of Civil Procedure.<sup>4</sup> Although the form patent infringement complaint, Form 18, has remained largely unchanged since it was first adopted in 1938 and contains scant "factual content," Rule 84 of the Federal Rules of Civil Procedure provides that "[t]he forms in the Appendix suffice under the[] rules."<sup>5</sup> In partial dissent in *McZeal*, Judge Dyk lamented that while "a bare allegation of literal infringement using the form is inadequate to provide sufficient notice to an accused infringer," the court was constrained by Rule 84 to find that allegations that track the form are sufficient to state a claim.<sup>6</sup>

Although the form patent infringement complaint suffices, at least for now, to state a claim for literal direct infringement, the form complaint does not address any other type of infringement claim, such as infringement by equivalents or the indirect types of infringement. As Judge Dyk cautioned, "the forms should not be interpreted as going beyond the fact situation described in the form."<sup>7</sup> Therefore, while a plaintiff may seek refuge in the form complaint for routine claims of literal,

direct infringement, questions remain about the minimum allegations necessary to state claims for other kinds of infringement.

Well before *McZeal* and Judge Dyk's comments about the proper scope of the form complaint, district courts had recognized the inherent limitations of the form complaint, especially for claims of induced and contributory infringement. In *Shearing v. Optical Radiation Corp.*, for example, the court recognized that the form patent infringement complaint "does not contain the necessary allegations for [35 U.S.C.] § 271(b) and (c) liability,"<sup>8</sup> which are, respectively, the sections of the statute that establish claims for induced infringement and for contributory infringement.

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As a preliminary matter, claims for indirect infringement contain certain essential elements not required of claims for direct patent infringement.<sup>9</sup> Although the statutory language defining induced infringement is rather simple—anyone who "actively induces infringement of a patent" is also guilty of infringement—additional elements are necessary to establish such liability. In particular, liability for actively inducing another to infringe a patent "requires evidence of 'specific intent' to induce infringement."<sup>10</sup> Although Rule 9(b) permits conditions of the mind, such as "intent," to be "alleged generally," a claim for induced infringe-

ment must at least contain a general allegation of intent.

Likewise, to establish liability for contributory infringement, a plaintiff must not only show infringement by another party, but it must also demonstrate that the defendant had knowledge that a "material or apparatus" that it sells is "especially made or especially adapted for use in an infringement of [the plaintiff's] patent" and is "not a staple article or commodity of commerce suitable for substantial noninfringing use."<sup>11</sup> Absent such express allegations of knowledge, a claim for contributory infringement should fail a Rule 12(b) test.

Although the "specific intent" and "knowledge" pleading requirements may not be particularly onerous for plaintiffs because they may be alleged generally, a more difficult problem confronts plaintiffs bringing claims for indirect patent infringement. Following *Iqbal*, the important question that plaintiffs asserting claims for induced and contributory infringement must answer is how much "factual content" a complaint must contain connecting the defendants' activities to the underlying direct infringement.

Because "[a] defendant's liability for indirect infringement must relate to the identified instances of direct infringement," a plaintiff must typically allege direct infringement by a party other than the defendant accused of indirect infringement to state a viable indirect infringement claim.<sup>12</sup> For example, to establish a claim for infringement by inducement pursuant to 35 U.S.C. § 271(b), "there must have been direct infringement by someone other than the inducer."<sup>13</sup> Likewise, a claim for contributory infringement also requires direct infringement by some other party.<sup>14</sup> Hence, to state viable claims for indirect infringement, a plaintiff must allege direct infringement by one party and then connect that infringement to the acts of the defendant accused of contributing to or inducing such infringement.

However, in the wake of *Iqbal* and *Twombly*, "[a] pleading that offers 'labels

and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"<sup>15</sup> This proscription, and the manner in which the Court applied it in *Iqbal* and *Twombly*, has important implications for claims of indirect patent infringement.

While a plaintiff asserting such claims can arguably recite just the allegations of the form patent infringement complaint to establish the underlying direct infringement, the plaintiff must then aver facts linking that direct infringement to the acts constituting inducement or contribution. Such allegations would seem to be necessary, at a minimum, to support a "reasonable inference that the defendant is liable for the misconduct alleged."<sup>16</sup> Moreover, it is likely that the "factual content" of the allegations connecting the defendant's conduct to the underlying infringement will be the most vulnerable to an *Iqbal*-style challenge.<sup>17</sup>

Indeed, the allegations found wanting in both *Iqbal* and *Twombly* involved a very similar factual issue: the defendants' alleged connection to the conduct of other defendants. In both *Iqbal* and *Twombly*, establishing such a nexus was a necessary element of the defendants' liability. In *Twombly*, for example, the plaintiffs, to sustain their antitrust claims, were required to plead facts demonstrating an illegal agreement between the defendants. Although the plaintiffs alleged that defendants engaged in parallel business behavior consistent with a conspiracy, the Supreme Court emphasized the need "for allegations plausibly suggesting (not merely consistent with) agreement" between the defendants.<sup>18</sup> Absent factual averments establishing "plausible grounds to infer an agreement," the Court was unwilling to permit the plaintiffs the right to conduct discovery, often an expensive exercise in antitrust cases.<sup>19</sup>

In *Iqbal*, the crucial allegations centered on whether the defendants "themselves acted on account of a constitutionally protected characteristic."<sup>20</sup> While the plaintiff had adequately "allege[d] that various other defendants . . . may have [targeted plaintiff] . . . for impermissible reasons," the plaintiff had no factual allegations linking the defendants at issue—high-ranking officials—to the impermissible policies executed by lower level personnel.<sup>21</sup> Because those high-ranking officials were not, as a matter of law, vicariously liable for the actions of

their subordinates, the plaintiff's failure to draw a factual nexus from the allegedly unconstitutional policies to the defendants themselves required the dismissal of the claims against them.

For similar reasons, it would appear that plaintiffs asserting claims for induced and contributory patent infringement must be prepared to allege facts that plausibly establish a connection between the defendant's actions and the underlying direct infringement. Although this may be an easy obstacle to surmount in the typical case, there are certainly occasions when a plaintiff has a reasonable, good-faith suspicion of such a connection but has no basis upon which to allege facts to support that suspicion without the opportunity to conduct discovery. Nevertheless, absent such allegations, courts will be reluctant to "unlock the doors of discovery"<sup>22</sup>—a paradox that plaintiffs in all types of cases will likely face after *Iqbal*.

According to statistics cited by Judge Dyk in *McZeal*, the median cost of discovery in patent infringement litigation is now between \$350,000 and \$3 million.<sup>23</sup> Because discovery in patent infringement cases is a time-consuming and expensive proposition, especially, perhaps, in those cases in which indirect infringement is alleged, plaintiffs must be prepared to allege enough facts to persuade the district courts that there is a "reasonable expectation that discovery will reveal evidence" to sustain the plaintiffs' claims.<sup>24</sup> This will require plaintiffs to allege facts sufficient to satisfy the courts that their indirect infringement claims are "plausible" and, thus, that discovery will be more than an expensive fishing expedition. To do so, plaintiffs asserting claims for induced and contributory patent infringement must, to paraphrase *Twombly*, allege facts suggestive of, and not simply consistent with, intentional inducement of the underlying infringement and knowledgeable contribution to it.

As practitioners begin to understand the full impact of *Iqbal*, it is likely that plaintiffs, including those asserting patent infringement claims, will face a wave of new Rule 12(b) challenges. Because *Iqbal* is a potential trap for the unprepared, a plaintiff bringing claims for patent infringement, especially claims for induced and contributory infringement, must carefully consider how much factual enhancement the claims require to convince the district court of their plausibility. ●

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## Endnotes

1. 129 S. Ct. 1937 (2009).
2. 550 U.S. 544 (2007).
3. 129 S. Ct. at 1949.
4. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).
5. *See id.* at 1360–61 (Dyk, J., dissenting).
6. *Id.* at 1360; *see also* *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531, 2009 WL 2972374, at \*2 (N.D. Cal. Sept. 14, 2009) ("It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a 'short and plain statement,' it offers little to 'show' that the pleader is entitled to relief.").
7. *Id.* at 1361.
8. *Shearing v. Optical Radiation Corp.*, CV-5-93-870, 1994 WL 382444, at \*2, 30 U.S.P.Q.2d 1878 (D. Nev. Mar. 24, 1994).
9. *Elan Microelectronics*, 2009 WL 2972374, at \*2 ("Both types of indirect infringement include additional elements, none of which Form 18 even purports to address.").
10. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007).
11. 35 U.S.C. § 271(c).
12. *Dynacore Holdings Corp. v. U.S. Phillips Corp.*, 363 F.3d 1263, 1274 (Fed. Cir. 2004).
13. *Shearing*, 1994 WL 382444, at \*2 (emphasis added).
14. *RF Del., Inc. v. Pac. Keystone Techs., Inc.*, 326 F.3d 1255, 1268 (Fed. Cir. 2003) ("[L]iability for either active inducement of infringement or for contributory infringement is dependent upon the existence of direct infringement by" others.).
15. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. 544, 555 (2007)).
16. *Id.* at 1949.
17. *Cf. Pegasus Imaging Corp. v. Northrop Grumman Corp.*, No. 8:07-CV-1937, 2008 WL 5099691, at \*2 (M.D. Fla. Nov. 25, 2008) (holding that the plaintiff's claim for contributory copyright infringement "fails, under the dictates of *Twombly*" because it "includes only vague and conclusory allegations with respect to direct involvement by" the defendant).
18. *Twombly*, 550 U.S. at 556–57.
19. *Id.*
20. *Iqbal*, 129 S. Ct. at 1952.
21. *Id.*
22. *Id.* at 1950.
23. *McZeal v. Sprint Nextel Corp.*, 501 F.3d at 1362 n.13 (Dyk, J., dissenting) (citing AIPLA, REPORT OF THE ECONOMIC SURVEY 2007, 25 (2007)).
24. *Twombly*, 550 U.S. at 556.