

The curious case of patent-infringement pleading standards

By Deirdre M. Wells, Esq., William H. Milliken, Esq., and Dallin Glenn, Esq.,
Sterne, Kessler, Goldstein & Fox PLLC

SEPTEMBER 21, 2021

The recent case of *Bot M8 v. Sony* provided the U.S. Court of Appeals for the Federal Circuit an opportunity to address an issue it rarely confronts: the pleading standard applicable to patent-infringement allegations.

This article will use *Bot M8* as a vehicle to make one observation and one prediction. The observation is that the Federal Circuit's interpretation of Federal Rule of Civil Procedure 8 — the rule setting forth the pleading standards applicable to civil actions in federal court — in patent cases is hard to reconcile with modern U.S. Supreme Court precedent on Rule 8. The prediction is that, if this issue makes it to the Supreme Court, the Court is likely to harmonize the application of Rule 8 in the patent-infringement context with the application of Rule 8 everywhere else.

*

As a preliminary matter, it's useful to explain *why* the Federal Circuit so rarely addresses patent-infringement pleading standards. As a practical matter, only grants of motions to dismiss are appealable. (Denials are not immediately appealable under the final-judgment rule, and, by the case's end, any denial of a motion to dismiss will have been effectively subsumed by a subsequent ruling on the merits.) Patent-infringement defendants rarely file motions to dismiss on the ground that the plaintiff's infringement allegations are deficient, and the few motions that are filed are even more rarely granted. So opportunities for appeal are few and far between.

And why are these motions rarely filed and even more rarely granted? It's likely because courts apply a hyper-relaxed version of Rule 8 to patent-infringement cases — as a comparison between Supreme Court precedent and the *Bot M8* decision illustrates.

*

In the 2007 case of *Bell Atlantic Corp. v. Twombly*, the U.S. Supreme Court clarified the pleading requirements that Rule 8 imposes on plaintiffs asserting a cause of action under § 1 of the Sherman Act. *Twombly* explained, in now-canonical language, that, to survive a motion to dismiss, a complaint must “state a claim for relief that is plausible on its face.” And, to do that, the complaint must allege facts that, if true, give rise to a reasonable inference that the plaintiff will prevail on each element of its cause of action. “Threadbare

recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”

As applied in *Twombly*, this rule meant that, because conspiracy is an element of a Sherman Act § 1 claim, a § 1 complaint must include allegations “plausibly suggesting (not merely consistent with) agreement.” In the course of its decision, the Court firmly rejected the plaintiff's theory that “any statement revealing the theory of the claim will suffice.” In other words, pure notice pleading is not enough.

If this issue makes it to the Supreme Court, the Court is likely to harmonize the application of Rule 8 in the patent-infringement context with the application of Rule 8 everywhere else.

Two years later, in *Ashcroft v. Iqbal* — in which a Muslim Pakistani detainee had alleged unconstitutional actions by several federal officials — the Supreme Court confirmed that the *Twombly* plausibility standard applies in “all civil actions.” *Twombly*, the Court explained, was an interpretation of Rule 8. And the Federal Rules of Civil Procedure apply to all federal civil cases.

Now on to *Bot M8*. Bot M8 sued Sony for infringement of patents covering video games. The district court granted Sony's motion to dismiss the infringement allegations as to four patents, holding that the complaint had not plausibly alleged that Sony's accused product — the PlayStation 4 — practiced each limitation of the patent claims.

On appeal, the Federal Circuit dutifully recited the *Twombly/Iqbal* rule that a complaint must allege facts that plausibly give rise to an inference that the plaintiff can prove each element of its cause of action. But, in the Federal Circuit's view, that standard did *not* require that Bot M8 plead facts suggesting that each element of its *patent claims* was met by the PS4.

The district court had instructed Bot M8 to “explain in the complaint every element of every [patent] claim that you say is infringed and/or explain why it can’t be done.” The Federal Circuit “disagree[d]” with that approach, concluding that it amounted to requiring the plaintiff to “prove its case at the pleading stage.”

“A plaintiff,” the court held, citing its earlier decisions in *Nalco v. Chem-Mod* and *In re Bill of Lading*, “is not required to plead infringement on an element-by-element basis.” Instead, the plaintiff “must only give the alleged infringer fair notice of infringement.”

It’s hard to square Twombly’s rejection of a pure notice-pleading standard with Bot M8’s apparent endorsement of one.

It’s difficult to reconcile this analysis with *Twombly* and *Iqbal*. The Supreme Court has been quite clear that plaintiffs must indeed plead their causes of action on an element-by-element basis. To be sure, they need not *prove* that each element is satisfied, but they must allege facts that, taken as true, plausibly suggest that each element is satisfied. And, to make out a cause of action for patent infringement, a patentee must demonstrate that each element of a patent claim is met.

That means that, under *Twombly*, the patentee should be required to plead facts plausibly suggesting that each element of at least one patent claim is met. (In other words, in a patent case, each “element” of the patent claim is logically an “element” of the cause of action.) It’s hard to square those requirements with *Bot M8*’s explicit rejection of an “element-by-element pleading standard for patent infringement.” And it’s hard to square *Twombly*’s rejection of a pure notice-pleading standard with *Bot M8*’s apparent endorsement of one.

Further compounding the tension, *Bot M8* affirmed the district court’s dismissal of allegations on a different patent on the ground that, for that patent, Bot M8 had pleaded “too much rather than too little, to the point that Bot M8 has essentially pleaded itself out of court.” Specifically, Bot M8 had included in its complaint facts that were *inconsistent* with the infringement allegations.

This ruling, combined with the otherwise-permissive approach the Federal Circuit has taken with respect to pleading standards,

may well encourage patent-infringement plaintiffs to include *fewer* facts in their complaints in order to minimize the chance of an inconsistency that a court might seize upon. That would be precisely the opposite of what the *Twombly* rule is supposed to accomplish.

*

Now, for the prediction. If the Supreme Court has occasion to address this issue, there are two reasons to believe a reversal is in the cards.

First, the Supreme Court has a history of course-correction when it believes the Federal Circuit is creating special rules for patent cases without legal basis. *Dickinson v. Zurko* (concerning the deference due to factual findings of the Patent and Trademark Office under the Administrative Procedure Act), *eBay v. MercExchange* (concerning the standard for injunctive relief), and *Teva v. Sandoz* (concerning the standard of review for factual findings underlying claim construction) provide some examples. Given *Iqbal*’s insistence that *Twombly*’s interpretation of Rule 8 applies in “all civil actions,” it seems likely that the Supreme Court would take the same approach here.

Second, pleading standards have historically been a means used by the courts and Congress to control types of litigation they view as abusive. *Twombly* and *Iqbal* themselves are illustrations. *Twombly* emphasized the need for strict pleading standards to avoid subjecting defendants to the discovery burdens that attend antitrust litigation. And *Iqbal* stresses that federal officials should not be subjected to burdensome litigation without a substantially good reason. Congress, citing analogous concerns, has imposed strict pleading requirements in, for example, securities cases (see the Private Securities Litigation Reform Act), prison litigation (see the Prison Litigation Reform Act), and habeas cases (see the Anti-Terrorism and Effective Death Penalty Act).

It’s at least possible that similar concerns could persuade the Supreme Court to impose stricter pleading standards in patent cases. *eBay*’s imposition of a higher standard for injunctive relief was widely viewed as a way to combat abusive patent-troll litigation. A similar rationale underlay the passage of the America Invents Act and implementation of inter partes reviews. To the extent the Supreme Court still views this as a salient concern, it may see pleading standards as another lever for controlling excessive or meritless infringement litigation.

About the authors



Deirdre M. Wells (L) is a director in **Sterne, Kessler, Goldstein & Fox's** Trial & Appellate Practice Group. She has patent litigation experience before federal district courts, the International Trade Commission, and the Court of Appeals for the Federal Circuit, and has represented clients in fields including Hatch-Waxman Paragraph IV pharmaceuticals, chemical arts, medical devices, biotechnology, data storage devices, internet search technology, electrical connectors, wireless broadband technology, telephone systems, and mobile content delivery. She has a

continuing focus on design patent enforcement and can be reached at dwells@sternekessler.com. **William H. Milliken (C)** is a director in the firm's Trial & Appellate Practice Group. His practice focuses on patent litigation in the U.S. District Courts and the U.S. Court of Appeals for the Federal Circuit, with a particular emphasis on cases arising under the Hatch-Waxman Act. He has experience drafting appellate briefs filed in the U.S. Courts of Appeals, briefing and arguing complex motions before the federal district courts, and assisting with trial preparation in Hatch-Waxman and other patent infringement litigation. He can be reached at wmilliken@sternekessler.com.

Dallin Glenn (R) is a director in the firm's Trial & Appellate Practice Group. He frequently litigates issues at the intersection of intellectual property and agency administrative procedure, and his work includes litigation at the U.S. International Trade Commission (ITC) and in district courts, post-grant patent challenges at the USPTO, drafting patent applications and pursuing global prosecution strategies, and providing opinions on intellectual property matters. Representative technologies include biologics, pharmaceuticals, polymers, semiconductors, electrical equipment, wireless communications, construction materials, abrasive ceramics and automotive technologies. He can be reached at dglenn@sternekessler.com.

This article was first published on Reuters Legal News and Westlaw Today on September 21, 2021.