

## Pleading Patent Infringement in the United States: Evolving Standards

### IN SHORT

**The Situation:** Federal Rule of Civil Procedure 84, which permitted U.S. patent-infringement lawsuits to proceed on very general allegations, was withdrawn three years ago. Subsequent court decisions have considered how much detail is required.

**The Outcome:** Under recent decisions, complaints must now clearly identify the defendant's product or activity that is accused of infringement. For complex technologies (but not simple ones), the complaint must detail how the accused product/activity violates at least one of the patent's claims.

**Looking Ahead:** Future decisions will likely continue to refine the details a complaint must include in order to proceed past the pleading stage.

### The Background

Historically, complaints initiating U.S. patent lawsuits were required to state only very general allegations. Under Official Form 18, a patent complaint could simply state that the defendant sold products (e.g., "electric motors") that "embody the patented invention." Federal Rule of Civil Procedure 84 stated that this bare-bones approach "suffice[d] under these rules."

For decades, this led to lawsuits alleging direct infringement based on complaints that did not provide a clear basis for discovery, summary-judgment motions, and trial. Accordingly, Rule 84 and Form 18 were withdrawn in December 2015 so that patent cases would no longer be immunized from pre-existing U.S. Supreme Court decisions that required more detail. Under the Supreme Court's decisions, lawsuits can be dismissed at their outset if "fair notice" is not given of a "plausible" claim. (*Bell Atlantic v. Twombly*—2007; *Ashcroft v. Iqbal*—2009).

### The Issues

The rule change in 2015 raised two questions about what complaints must allege in order for a claim for direct patent infringement to proceed. First, what details must the complaint include? That is, which products or activities are alleged to infringe? Which claims of the patent are allegedly infringed? How does the product/activity infringe the claims? Second, if adequate details are provided, is the alleged infringement claim sufficiently "plausible"?



Courts tend to blur the issues of whether the complaint explains *how* the accused product or activity infringes and whether that explanation is *plausible*.



### The Developing Answers

Recent court decisions partly answer these questions. In February and May 2018, the U.S. Court of Appeals for the Federal Circuit issued three such decisions: *Nalco v. Chem-Mod*, *Disc Disease Solutions v. VGH Solutions*, and *Artrip v. Ball Corp.* (nonprecedential). About a dozen subsequent trial-court decisions elaborate. Although these decisions state that "fair notice" and "plausibility" are distinct questions, the courts tend to blur the issues of whether the complaint explains *how* the accused product or activity infringes and whether that explanation is *plausible*.

**Which Products Are Accused.** As to the need to specify the product/activity involved, the answer is straightforward: The complaint must clearly identify the accused product/activity. Referring generally to "one or more machines" at a particular factory (as in *Artrip*) will not suffice; identifying products by name and attaching photos (as in *Disc Disease Solutions*) will.

**Which Patent Claims Are Infringed.** More pleading leeway is afforded concerning the patent claims that are infringed. Trial-court decisions have usually required at least one patent claim to be identified. However, in *Disc Disease*, a case involving a "simple technology," the Federal Circuit ruled the complaint adequate without specifying a particular claim.

**How the Products Infringe.** Decisions have been less clear about what complaints must do to

explain how the accused product or activity infringes the patent claim. Under *Disc Disease*, for simple technologies, details are not required. But for complex technologies, trial courts have required moderately specific explanations that provide notice of the rationale. This allows the court to scrutinize whether the allegations are plausible enough for the lawsuit to proceed under the Supreme Court's *Twombly* and *Iqbal* decisions.

For example, a Delaware decision, *Modern Telecom v. TCL*—2017, rejected a complaint that relied only on: (i) a conclusory allegation that all limitations of a patent claim were met by a smartphone; and (ii) a statement that the smartphone operated according to an industry standard governing Wi-Fi without explaining why that meant the patent claim's limitations were satisfied. (A recent Texas ruling in *Lexington Luminance LLC v. Service Lighting & Elec. Supp., Inc.* is similar.)

But courts have refused to extend the plausibility requirement to dismiss claims based on fairly contested arguments about how the patent claims should be interpreted. As the Federal Circuit held in *Na/Co*, the plausibility requirement does not make objections to a plaintiff's proposed claim construction a "suitable" ground for a motion to dismiss. Instead, the lawsuit was allowed to proceed until claim construction could be more thoroughly considered at a later stage.

### THREE KEY TAKEAWAYS

1. Now that Federal Rule of Civil Procedure 84 and Form 18 have been withdrawn, defendants can move to dismiss complaints alleging direct patent infringement on the basis of lack of fair notice.
2. On the basis of recent decisions, patent owners must reasonably identify the accused products in a claim for direct infringement, but when the patent involves a simple technology, more detail is not required. For patents directed to more complex technologies, the patent owner must identify an infringed patent claim and provide a cogent explanation of how that claim is plausibly infringed.
3. When the court dismisses a complaint for direct patent infringement for failure to plead with the requisite specificity, however, the court will typically allow the patent owner a chance to amend its complaint to provide the required details.



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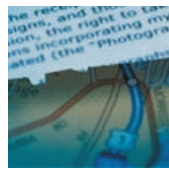
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