Pleading Standards in IP Litigation after *Twombly* and *Iqbal*

March 23, 2010
Presented by
The Patent and Litigation Committees of the
Georgia Bar Association
Intellectual Property Section
“In law it is good policy never to plead what you need not, lest you oblige yourself to prove what you cannot.”

- Abraham Lincoln
Introduction of Panelists and Topics

- Joe Gleason (Moderator)
- David M. Lilenfeld – Plaintiff’s Perspective
- Hunter Jefferson – Defendant’s Perspective, focusing on patent litigation
- Ted Davis – Trademark and Copyright Pleadings
Twombly/Iqbal 101

- *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Dismissing an antitrust suit for failure to state a claim because the complaint did not plead facts showing a required illegal agreement in restraint of trade.
Twombly/Iqbal 101

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly/Iqbal 101


The Court held that *Twombly* was not limited to the antitrust context and affirmed dismissal of a prisoner’s civil rights suit for failure to state a claim.
“A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949 (quotation omitted).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*
Case Law Review

- Patent
  - Federal Circuit
  - Ga. Dist. Cases
- Copyright/Trademark
  - Appellate
  - Ga. Dist. Cases
Twombly/Iqbal – The Patent Context

- F.R.C.P. 84 and Form 18 (pre-Iqbal)
- Rule 84: “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”
- Form 18 provides an example of a claim for direct patent infringement that is a “bare bones” allegation of patent ownership, infringement by the defendant, the plaintiff’s compliance with applicable marking requirements, actual notice to the defendant, and a request for damages, injunctive relief and costs.
Twobly/Iqbal – the Patent Context

- The Fed. Cir. reviews motions to dismiss under the applicable regional circuit law.
- “[A] plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 n.4 (Fed. Cir. 2007) (discussing Form 18 and applying Fifth Circuit law in reversing the dismissal of a *pro se* plaintiff’s patent and trademark infringement claims).
Twobly/Iqbal – the Patent Context

- Federal Circuit Cases Post-\textit{Iqbal}
- \textit{Colida v. Nokia, Inc.}, No. 2009-1326 (Fed. Cir., (S.D.N.Y.), Oct. 6, 2009) (applying Second Circuit law in dismissing a \textit{pro se} plaintiff’s design patent infringement suit where the complaint failed to include “facts relevant to the question of infringement.”)
  - The \textit{Colida} court also noted that Form 18 is not applicable to design patent claims and “was last updated before the Supreme Court’s \textit{Iqbal} decision.”
  - slip op. at n. 2.
Twombly/Iqbal 101 – 11\textsuperscript{th} Circuit

- *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009) (dismissing claim brought under Alien Tort Statute because, \textit{inter alia}, plaintiff failed to make factual allegations to support the claim that private security forces were “state actors.”)
CBT Flint Partners, LLC v. Goodmail Sys., Inc., 529 F. Supp. 2d 1376, 1379-80 (N.D. Ga. 2007) (denying motion to dismiss direct and indirect patent infringement claims and stating that Twombly “did not radically alter the elementary rules of civil procedure” and discussing the function of the district’s Local Patent Rules in detailing patent infringement claims)
Twombly/Iqbal 101 – Georgia District Courts

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- *Iguana, LLC v. Lanham*, 2009 WL 1620586 at *2 (M.D. Ga., Jun. 9, 2009) (discussing Form 18 and holding that party adequately plead patent infringement by satisfying the requirements of Form 18)

Twombly/Iqbal 101 – Georgia District Courts Non-IP cases


Twombly/Iqbal 101 Other Georgia District Court Decisions


Twombly/Iqbal 101 Other Georgia District Court Decisions


Legislative Efforts

- **Notice Pleading Restoration Act of 2009 (S. 1504)**
  - Sponsor: Arlen Specter, D-PA; Co-sponsor Russell Feingold, D-Wis.
    - Specter described *Twombly* as an “end-run” by the Supremes to amend Rule 8 without Congressional approval. 154 Cong. Rec. S7890 (July 22, 2009)
  - Seeks to return pleading standard to Pre-*Twombly* level, as set forth in *Conley v. Gibson*, 355 U.S. 41 (1957)
- Status: Referred to Judiciary Committee in July ’09.
Open Access to Courts Act of 2009 (H.R. 4115)
- Sponsor: Rep. Jerry Nadler (D-N.Y.); Co-sponsors Henry Johnson (D-Ga.) and John Conyers, Jr (D-Mich.)
- Introduced after the *Iqbal* decision
- Seeks to restore the *Conley* pleading standard
- Status: Referred to the Subcommittee on Courts and Competition Policy in December '09
Discussion

- Joe Gleason (Moderator)
- David Lilenfeld – A Plaintiff’s Perspective
- Hunter Jefferson – Pleading Indirect Infringement in Patent Cases
- Ted Davis – Trademark and Copyright Pleadings
Johnson (pro se) v. Levi Strauss et al.
2009 WL 3600328 (S.D.Ohio 2009)
Copyright Infringement Claim

- Court: allegations relate to “function and location” of pockets.

- Court: “The Complaint does not provide any allegation from which it could be inferred that [plaintiff’s] cell phone pocket contained any original pictorial, graphic or sculptural work.”
Court: “Complaint does not raise any factual allegation concerning the ornamental nature of his cell phone pocket or CD player pocket or the ornamental nature of the allegedly infringing pockets on Defendants’ clothes.”
Nemet v. Consumeraffairs.com
591 F.3d 250 (4th Cir. 2009)
Nemet v. Consumeraffairs.com

- Plaintiff pled that it could identify the writers of 12 of the posts by “date, model of car and first name.”

- As to the other 8 posts, Plaintiff alleged Consumeraffairs.com fabricated them to “attract other consumer complaints.”
Court: “this is pure speculation and a conclusory allegation of an element of the immunity claim.”

Court: the 8 post could be “anonymous, falsified by the consumer, or simply missed by Nemet.”
Dissent: As to the 8 unknown posts, we must accept allegations in complaint as true, including that the 8 posts do not relate to any Nemet customer.

Dissent: “Nemet’s explanation as to the origin of the 8 posts is just as plausible as any other explanation.”
AAA, Inc. v. AAAWS, Inc.
2009 WL 3837234 (E.D.Mich.)

- Complaint: Plaintiff has over 70 registered marks, eight of which are “particularly relevant to this action.”

- Defendant: Can’t perform likelihood of confusion test because marks allegedly infringed haven’t been identified.
Court: “Based on [] averments, and having closely examined the Complaint in the aggregate,” plaintiff is alleging that the eight marks form the basis of its trademark infringement claim.

Court: MTD was “wobbly,” but not clearly frivolous, so no Rule 11 sanctions.
Q&A
Resources

- Patent law websites and blogs:
  - www.PatentlyO.com
- Legislative Updates: http://www.govtrack.us/