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# Particularizing Patent Pleading: Pleading Patent Infringement in a Post-*Twombly* World

Jonathan L. Moore \*

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The Supreme Court's recent jurisprudence has reinvigorated the role of pleading in civil litigation. As a result, in order to survive a motion to dismiss, plaintiffs must now include more detailed allegations that demonstrate a plausible entitlement to relief.

This article examines how these changes interact with the pleading requirements for patent infringement litigation. In recent years, the number of patent infringement lawsuits has increased dramatically, in part because of lax notice pleading requirements. This patent litigation explosion imposes exorbitant costs on defendants and has a detrimental effect on innovation.

As courts begin to apply the new plausibility pleading regime, this article argues that they should seize the opportunity to rein in abusive patent litigation by requiring particularized allegations of infringement. Adopting this regime effectuates *Twombly* and *Iqbal*, reduces the number of nuisance-value patent infringement suits, and begins to address the problems that cause the patent system to inhibit, rather than promote, progress in science and the useful arts.

## **I. Introduction**

The theory behind the patent system in the United States is simple. In exchange for disclosing a novel, non-obvious, and useful invention to the public, an inventor receives the ability to exclude others from using that invention for twenty

years.<sup>1</sup> This “carefully crafted bargain”<sup>2</sup> is supposed to stimulate innovation and “promote the [p]rogress of [s]cience and useful [a]rts.”<sup>3</sup>

The operation of the patent system, however, is anything but simple. For a patent to issue, an application must endure a lengthy and complicated examination process by the Patent and Trademark Office.<sup>4</sup> If a patent is eventually obtained, it does not guarantee its holder the right to practice the patented invention.<sup>5</sup> Instead, a patent’s economic value is derived solely from the right to exclude others.<sup>6</sup> The

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<sup>1</sup> See 35 U.S.C. § 154(a) (2006); see also *id.* §§ 101–103 (stating the requirements for patentability); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998).

<sup>2</sup> *Pfaff*, 525 U.S. at 63; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150 (1989).

<sup>3</sup> U.S. CONST. art. 1, § 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”); see *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966).

<sup>4</sup> See 35 U.S.C. § 131 (2006) (“The Director shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefor[e].”). See generally Michael Risch, *The Failure of Public Notice in Patent Prosecution*, 21 HARV. J.L. & TECH. 179, 182–84 (2007) (summarizing the patent prosecution process). For a more extensive discussion of this process, see 4 DONALD S. CHISUM, CHISUM ON PATENTS § 11.03 (2008).

<sup>5</sup> See 35 U.S.C. § 154(a)(1) (2006); see also *Clair v. Kastar, Inc.*, 138 F.2d 828, 831 (2d Cir. 1943) (Hand, J.) (“[I]t is scarcely necessary at this day once more to expose the fallacy that a patent gives any right to the patentee to practice his disclosure. It merely enables him to stop others from practising it.”); JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 4 (2008) (“Patents do not actually provide an affirmative right to market an invention; they provide only a right to exclude *others* from doing so.”).

<sup>6</sup> See 35 U.S.C. § 154(a)(1) (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others . . . .”); see also *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577 (Fed. Cir. 1983) (“The grant of a patent is the grant of the right to invoke the state’s power in order to exclude others from utilizing the patentee’s discovery without his consent.”); *Little Mule Corp. v. Lug All Co.*, 254 F.2d 268, 272–73 (5th Cir. 1958) (“[I]t must be remembered that a patent is not the granting of a right to make, use, or sell. It grants only the right to exclude others from making, using or selling the patented device.”); *Chicago & Alton Ry. Co. v. Pressed Steel Car Co.*, 243 F. 883, 890 (7th Cir. 1917) (“[A] patent conveys nothing but a negative right of exclusion. It is the right to exclude others, but not the natural right to make, use, and sell, which the patentee obtains from his general ownership of the materials employed, not from the government.”).

only way for a patent holder to prevent others from violating, or “infringing,” a patent is to assert it in litigation.<sup>7</sup>

Patent infringement litigation, however, is out of control. Not only has the number of filed patent infringement cases increased dramatically in recent years, but each case requires a tremendous amount of time and money to resolve.<sup>8</sup> High costs, lengthy time commitments, and uncertainty combine to create incentives for defendants to settle patent infringement cases early, even if a case is meritless.<sup>9</sup> As a result, instead of incentivizing innovation, the current system encourages rent-seeking behavior from patent holders.<sup>10</sup>

While countless articles have outlined this problem, the proposed solutions vary significantly. Some commentators propose structural solutions, such as creating specialized trial courts to hear patent cases.<sup>11</sup> Others propose doctrinal reforms, such as altering the Federal Circuit’s approach to claim construction.<sup>12</sup> Scarce attention has been paid, however, to the role that changes in civil procedure could play in mitigating the challenges of modern patent litigation in the United States.

This article will explore changes to the pleading requirements for patent infringement actions. In theory, the Federal Rules of Civil Procedure establish a minimal pleading requirement for all civil actions.<sup>13</sup> Indeed, the appendix of official forms following the rules demonstrate that a patent infringement complaint only needs to include brief conclusory allegations, such as cursory statements about

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<sup>7</sup> See 35 U.S.C. § 281 (2006) (“A patentee shall have remedy by civil action for infringement of his patent.”).

<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> See, e.g., Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 159–60 (2009).

<sup>10</sup> See, e.g., Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 509 (2003).

<sup>11</sup> See, e.g., Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035 (2003); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007).

<sup>12</sup> See, e.g., Judge James F. Holderman & Halley Guren, *The Patent Litigation Predicament in the United States*, 2007 U. ILL. J.L. TECH. & POL’Y 1; Craig Allen Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1 (2000).

<sup>13</sup> See FED. R. CIV. P. 8(a); see also *infra* Part II.A.

the ownership of the patent, manner of infringement, and that the patentee provided notice to the alleged infringer.<sup>14</sup>

In a series of recent decisions, however, the Supreme Court revised this traditional pleading standard.<sup>15</sup> These decisions require plaintiffs to plead facts that “nudge[] their claims across the line from conceivable to plausible.”<sup>16</sup> It remains unclear how this new pleading regime will apply to patent infringement actions or interact with the appendix of forms, which, by rule, sufficiently plead a cause of action.<sup>17</sup>

This article’s thesis is that in light of the current patent litigation predicament, patent infringement actions should be held to a heightened pleading requirement, beyond that espoused by the Supreme Court in *Twombly* and *Iqbal* and approaching the particularity required by Federal Rule of Civil Procedure 9(b). Practically, this change would require a patent holder to plead particularized facts to support an infringement claim, such as the specific act of infringement or infringing product, how it infringes the patent, and what claims of the patent those actions infringe.

Part I provides an overview of patent infringement litigation in the United States and its substantial costs. Part II outlines modern pleading practice in civil litigation, how this translates to patent cases, and how notice pleading facilitates nuisance-value infringement claims. Finally, Part III discusses heightened pleading and how its application in the infringement context can address the unique challenges presented by patent litigation.

## II. The Current Patent Litigation Predicament

### A. What is Patent Infringement?

Patents give their holders the right to exclude others for a twenty-year period.<sup>18</sup> The rights bestowed by a patent are defined by a patent’s “claims”—

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<sup>14</sup> See FED. R. CIV. P. Form 18.

<sup>15</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>16</sup> *Twombly*, 550 U.S. at 570. *Accord Iqbal*, 129 S. Ct. at 1950–51 (quoting and applying this language from *Twombly*).

<sup>17</sup> See FED. R. CIV. P. 84.

<sup>18</sup> See 35 U.S.C. § 154(a) (2006).

densely worded single sentences at the end of the patent document.<sup>19</sup> These rights can be infringed in two ways: directly and indirectly.

An alleged infringer is directly liable for infringement when, during the patent's term, the patented invention is made, used, offered to be sold, or sold without authority in the United States.<sup>20</sup> Direct liability also arises under the doctrine of equivalents. According to this doctrine, if a product or process does not literally infringe the patent, the alleged infringer will nonetheless be liable "if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention."<sup>21</sup>

Individuals can also be subject to indirect, or secondary, liability for the infringement of others. Secondary infringement occurs when someone induces infringement of a patent,<sup>22</sup> which requires that "an alleged infringer knowingly induce[] another to commit an infringing act."<sup>23</sup> In the case of process patents,

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<sup>19</sup> See *id.* § 112; U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 608.01(m) (7th rev. ed. 2008) (requiring claims to be in a single sentence); Christopher A. Cotropia, *Patent Claim Interpretation Methodologies and Their Claim Scope Paradigms*, 47 WM. & MARY L. REV. 49, 53–54 (2005).

<sup>20</sup> See 35 U.S.C. § 271(a) (2006); see also *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993) (noting that "[t]he making, using, or selling of a patented invention is the usual meaning of the expression 'direct infringement'"); *Tex. Instruments, Inc. v. U.S. Int'l Trade Comm'n*, 805 F.2d 1558, 1562 (Fed. Cir. 1986) ("Literal infringement requires that the accused device embody every element of the claim as properly interpreted.").

<sup>21</sup> *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997); see also *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 733 (2002) ("The doctrine of equivalents allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes."). For a thorough discussion of the doctrine of equivalents, including its historical roots and development over time, see generally 5 CHISUM, *supra* note 4, § 18.02.

<sup>22</sup> See 35 U.S.C. § 271(b). See generally Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225 (2005) (outlining inducement law).

<sup>23</sup> *E.g.*, *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1374 (Fed. Cir. 2003); see also *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1357 (Fed. Cir. 2007) (stating that "a person who provides a service that assists another in committing patent infringement may be subject to liability under section 271(b) for active inducement of infringement"); *Minn. Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304–05 (Fed. Cir. 2002) ("In order to succeed on a claim of inducement, the patentee must show, first that there has been direct infringement . . . and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement." (citations omitted)).

liability can arise from contributing to the infringement of a patent.<sup>24</sup> Both of these forms of secondary liability require proof of direct infringement by others.<sup>25</sup>

The primary method of holding an infringer accountable, and enforcing a patentee's rights, is through litigation.<sup>26</sup> The patent system is designed to deter infringement by ensuring that infringers have a lot to lose—they can be subject to potentially broad remedies including treble damages,<sup>27</sup> injunctive relief,<sup>28</sup> and attorney's fees.<sup>29</sup> Patentees are encouraged to file suit soon after they become aware of infringing activity because failure to bring a timely action can often preclude enforcement of the patent altogether.<sup>30</sup> These characteristics ensure that the patent system is self-regulating.

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<sup>24</sup> See 35 U.S.C. § 271(c); see also *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005) (“The doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe another’s patent, and so may justly be held liable for that infringement.”).

<sup>25</sup> See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 526 (1972) (“But it is established that there can be no contributory infringement without the fact or intention of a direct infringement.”); *Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc.*, 554 F.3d 1010, 1024 (Fed. Cir. 2009).

<sup>26</sup> See 35 U.S.C. § 281 (2006); James Bessen & Michael J. Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1, 9 (2005) [hereinafter Bessen & Meurer, *Lessons*] (noting that “the patent premium flows from patent litigation, or, more typically, the threat of litigation”).

<sup>27</sup> 35 U.S.C. § 284 (2006); see also *King Instruments Corp. v. Perego*, 65 F.3d 941, 950 (Fed. Cir. 1995) (“Thus, the Patent Act creates an incentive for innovation. The economic rewards during the period of exclusivity are the carrot. The patent owner expends resources in expectation of receiving this reward. Upon grant of the patent, the only limitation on the size of the carrot should be the dictates of the marketplace. Section 284 attempts to ensure this result by deterring infringers and recouping market value lost when deterrence fails.”).

<sup>28</sup> See 35 U.S.C. § 283 (2006) (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”); see also *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006) (outlining the equitable principles a court should consider when determining whether injunctive relief is appropriate).

<sup>29</sup> See 35 U.S.C. § 285 (2006) (allowing “reasonable” attorney fees “in exceptional cases”).

<sup>30</sup> See, e.g., *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032–34 (Fed. Cir. 1992) (en banc) (discussing the application of the equitable doctrine of laches to patent infringement actions); *State Contracting & Eng’g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1065 (Fed. Cir. 2003) (“To successfully invoke laches, a defendant must prove that the plaintiff delayed filing suit an unreasonable and inexcusable length of time after the plaintiff knew or reasonably should have known of its claim against the defendant and that the delay resulted in material prejudice to



### B. The Costs of Patent Infringement Litigation

In recent years, there has been a marked influx in the number of patents issued by the Patent and Trademark Office.<sup>31</sup> In 2008 alone, 182,556 patents were issued.<sup>32</sup> These patents were issued from the almost five hundred thousand patent applications that were filed in 2008—the most applications *ever* filed with the PTO in a year.<sup>33</sup> Both the number of patent applications and patents issued is significantly higher than at any time in the history of the U.S. patent system.<sup>34</sup>

In light of the increase in the number of issued patents, it should come as no surprise that the number of patent infringement actions filed to enforce these rights has also dramatically increased.<sup>35</sup> For example, the probability that a patent will be involved in litigation within four years of its issuance is surging—more than double

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the defendant.”); *see also* 35 U.S.C. § 286 (2006) (“Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.”). For background on this doctrine, *see generally* Eric W. Guttag, *Laches and Estoppel: The Patentee Who Procrastinates in Filing Suit May Be Lost*, 31 AIPLA Q.J. 47 (2003).

<sup>31</sup> *See, e.g.*, BESSEN & MEURER, *supra* note 5, at 68 (noting that “over the last two decades the number of patent rights has proliferated dramatically”); Mark A. Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19, 19 (“More than 2.5 million United States patents have been issued in the last twenty years.”).

<sup>32</sup> U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2009, at 112 tbl.1 (2009), *available at* <http://www.uspto.gov/about/stratplan/ar/2009/2009annualreport.pdf>. According to preliminary data from the PTO, an even higher number of patents (190,121) were issued in fiscal year 2009. *Id.*

<sup>33</sup> *See id.*; *see also* U.S. PATENT & TRADEMARK OFFICE, U.S. PATENT ACTIVITY: CALENDAR YEARS 1790 TO THE PRESENT (2009), *available at* [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h\\_counts.pdf](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.pdf) (providing historical data on the number of patent applications filed with the PTO). The number of patent applications has tripled since 1980. *See* BESSEN & MEURER, *supra* note 5, at 69.

<sup>34</sup> *See, e.g.*, Ian Ayres & Gideon Parchomovsky, *Tradable Patent Rights*, 60 STAN. L. REV. 863, 864 (2007) (noting the “unprecedented proliferation of patents” in recent years).

<sup>35</sup> *See, e.g.*, DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 26 (2009) (“The flood of patents has been accompanied by a flood of patent lawsuits.”); ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT 13–16 (2004) (discussing the “patent litigation explosion”); Jay P. Kesano & Gwendolyn G. Ball, *How are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U.L. REV. 237, 250 (2006) (“For most of the past twenty years, the number of patent suits grew at a rapid rate that largely paralleled the growth in the total number of patents.”); Jean O. Lanjouw & Mark Schankerman, *Protecting Intellectual Property Rights: Are Small Firms Handicapped?*, 47 J.L. & ECON. 45, 56 (2004).

what it was in 1984.<sup>36</sup> Overall, since the 1980s, patent litigation has undergone steady and unparalleled growth.<sup>37</sup>

More specifically, according to recent data from the Administrative Office of U.S. Courts, from September 2008 to September 2009, almost 3,000 patent infringement suits were filed.<sup>38</sup> At the end of this period, almost 3,500 suits remained pending.<sup>39</sup> The number of suits filed represents a four percent decrease from 2008, but is less than the thirteen percent drop in intellectual property suits generally.<sup>40</sup>

This growing body of cases is different from other civil actions. Most relevant for purposes of this article are the unique costs associated with patent litigation. Specifically, these costs come in three varieties: legal costs, innovation costs, and business costs.

### *1. Legal Costs*

Patent litigation is expensive. According to the American Intellectual Property Law Association, the legal costs of a patent infringement action range from \$600,000 to \$5 million, depending on the patentee's potential recovery.<sup>41</sup> In light of these significant legal costs, it is no surprise that one survey found that litigation costs are the number one concern for a company faced with a patent infringement suit.<sup>42</sup>

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<sup>36</sup> BESSEN & MEURER, *supra* note 5, at 129 & fig.6.3.

<sup>37</sup> BESSEN & MEURER, *supra* note 5, at 127; Lanjouw & Schankerman, *supra* note 35, at 46 (noting the "very rapid growth in patent litigation over the past [two] decades, during which the number of patent suits increased almost [ten]-fold"); Gauri Prakash-Canjels, *Trends in Patent Cases: 1990–2000*, 41 IDEA 283, 284 (2001) (showing that from 1991 to 2000, the total number of filed patent infringement cases increased by 111%).

<sup>38</sup> ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 146 tbl.C-2A (2010), available at <http://www.uscourts.gov/judbus2009/JudicialBusinesspdfversion.pdf> [hereinafter 2009 ANNUAL REPORT]. Specifically, 2,792 patent cases were filed during this period. *Id.*

<sup>39</sup> *Id.* at 200 tbl.C-11.

<sup>40</sup> *Id.* at 146 tbl.C-2A.

<sup>41</sup> See AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 2007, at 25 (2007).

<sup>42</sup> See FULBRIGHT & JAWORSKI, L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 45 (2007), available at <http://www.fulbright.com/mediaroom/files/2007/FJ6438-LitTrends-v13.pdf>.

Several factors contribute to these high legal fees. First, patent cases are extremely complex.<sup>43</sup> They involve two layers of complexity: highly technical legal doctrines and procedures, plus the application of these substantive principles to complex technologies.<sup>44</sup> For example, as part of every infringement suit, a court must interpret the scope of a patent's claims.<sup>45</sup> This hearing, called a *Markman* hearing, typically occurs prior to trial, and requires a judge to analyze the patent itself and the underlying technology to define what specific words or phrases in the patent's claims mean.<sup>46</sup> Such underlying complexity, both procedurally and substantively, is pervasive throughout patent litigation.<sup>47</sup>

An additional factor driving up litigation costs is the length of time it takes to resolve patent cases.<sup>48</sup> Pretrial discovery and motions practice frequently take

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<sup>43</sup> See, e.g., Hon. S. Jay Plager, *Abolish the Court of Federal Claims? A Question of Democratic Principle*, 71 GEO. WASH. L. REV. 791, 796–97 (2003) (noting “the obscurities and peculiarities of patent law and the complexities of new technology”); Benjamin Hershkowitz & Michael Schiffer, *Are Patent Cases Too Complex?*, PAT. STRATEGY & MGMT., July 2006, at 3 (noting that “patent law is generally acknowledged as one of the more complex bodies of law”).

<sup>44</sup> See, e.g., PETER S. MENELL ET AL., PATENT CASE MANAGEMENT JUDICIAL GUIDE xxix (Lexis 2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/patent01.pdf/\\$file/patent01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/patent01.pdf/$file/patent01.pdf) (“Patent cases feature complex and dynamic technological facts to a degree rarely encountered in most other areas of litigation.”); Robin Feldman, *Plain Language Patents*, 17 TEX. INTELL. PROP. L.J. 289, 290 (2009) (“Nowhere is this dialogue more challenging than at the intersection where law and science interact in the form of patents. When the subject of the case is wrapped in complex and unfamiliar terms, it is tremendously difficult for legal actors to grapple with the theoretical content of the dispute.”).

<sup>45</sup> See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (holding that “the construction of a patent, including terms of art within its claim, is exclusively within the province of the court”). Because judges construe claims, claim construction is reviewed on appeal without deference using a de novo standard. See, e.g., *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed. Cir. 1998) (en banc).

<sup>46</sup> See, e.g., Mark A. Lemley, *The Changing Meaning of Patent Claim Terms*, 104 MICH. L. REV. 101, 101–02 (2005); Kelly Casey Mullally, *Patent Hermeneutics: Form and Substance in Claim Construction*, 59 FLA. L. REV. 333, 336–37 (2007).

<sup>47</sup> See, e.g., Hershkowitz & Schiffer, *supra* note 43, at 3 (“Patent cases . . . involve particularly complex issues of law and procedure.”). In fact, Justice Scalia, during oral argument in a case discussing one of the criteria for patentability, non-obviousness, described the doctrine as “gobbledygook.” Transcript of Oral Argument at 41, *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007) (No. 04-1350), available at 2006 WL 3422210.

<sup>48</sup> See, e.g., BESSEN & MEURER, *supra* note 5, at 131–32 (discussing how legal costs increase as litigation progresses). Because of the costs associated with patent litigation, a significant number of these cases settle quickly. See *infra* Part I.C; see also Kesan & Ball, *supra* note 35, at 272 (stating that “the vast majority of [patent infringement] cases settle”).

months, if not years, to complete.<sup>49</sup> Discovery drags out, in part because the highly confidential proprietary information typically requested in infringement cases generates highly contentious relations between the parties, often resulting in numerous discovery-related motions.<sup>50</sup> The volume of discovery also contributes to these delays, as patent cases usually necessitate at least ten depositions and well over a hundred document requests reaching into the entirety of a party's business.<sup>51</sup> As a result, discovery and pretrial proceedings alone entail substantial legal fees.<sup>52</sup>

Of the infringement cases that go to trial, in one-third of them, the trial occurs over three years from the date that the plaintiff filed the complaint.<sup>53</sup> Twelve percent take over five years to reach trial.<sup>54</sup> Further, at the end of September 2009, almost 400 patent cases had been pending for three years or more.<sup>55</sup> Overall, this complexity and duration makes defending against patent infringement litigation an expensive endeavor.

## 2. Innovation Costs

Patent infringement suits have additional costs beyond the legal fees that an alleged infringer must incur to defend them. First, when faced with an infringement claim, inventors may choose to alter their research or products to simply

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<sup>49</sup> See, e.g., Holderman & Guren, *supra* note 12, at 10; JAFFE & LERNER, *supra* note 35, at 109 (“Because of this pre-trial process, it is not unusual for months or even years to pass between the filing of a complaint and a decision at the district court level.”).

<sup>50</sup> See MENELL ET AL., *supra* note 44, at 4-2.

<sup>51</sup> See MENELL ET AL., *supra* note 44, at 4-3 to 4-5.

<sup>52</sup> See, e.g., MENELL ET AL., *supra* note 44, at 4-3 (noting that document production alone “can rapidly escalate into the millions of dollars”); Holderman & Guren, *supra* note 12, at 10 (“[P]reparing and briefing a motion for summary judgment in a patent case in the district court could cost the parties hundreds of thousands of dollars.”); Kesan & Ball, *supra* note 35, at 310 (stating that “much of the expense associated with patent litigation occurs long before the parties appear before a jury”).

<sup>53</sup> See PRICEWATERHOUSECOOPERS, PATENT LITIGATION TRENDS AND THE INCREASING IMPACT OF NONPRACTICING ENTITIES 15 (2009), available at <http://www.pwc.com/us/en/forensic-services/publications/assets/2009-patent-litigation-study.pdf>. There are “significant variations” among districts. *Id.* at 17. For example, the Eastern District of Virginia’s median time-to-trial was only 0.88 years from 1995 to 2008. *Id.* By contrast, the District of Connecticut has a median time-to-trial of 4.66 years. *Id.* at 18. These figures include both bench and jury trials. *Id.* at 15.

<sup>54</sup> See *id.* at 15.

<sup>55</sup> 2009 ANNUAL REPORT, *supra* note 38, at 58 tbl.S-11.

avoid the scope of the asserted patent.<sup>56</sup> If inventors cannot easily design around a patent that has been asserted against them, the threat of a lengthy lawsuit may be enough to cause them to cease research or the manufacture of a product or technology entirely.<sup>57</sup>

Further, if an infringement suit is filed, the disruption may force a company to put research on hold until the litigation has been resolved, delaying potentially important development.<sup>58</sup> Litigation costs may also eat up resources that could have gone to research and development.<sup>59</sup> For these reasons, an infringement suit has the potential to negatively effect innovation generally.<sup>60</sup> These innovation costs are significant in light of the patent system's purpose of incentivizing innovation.<sup>61</sup>

### 3. Business Costs

Patent infringement suits also impose a variety of business costs on an alleged infringer. Initially, like any lawsuit, patent litigation disrupts a business's operations.<sup>62</sup> Employees will be called to give depositions, personnel will need to be allocated to gather and provide documents, and time will have to be set aside to dis-

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<sup>56</sup> See, e.g., Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1517 (2001) [hereinafter Lemley, *Rational Ignorance*]; Nard, *supra* note 12, at 40.

<sup>57</sup> See JAFFE & LERNER, *supra* note 35, at 76 (noting that “[e]ven the threat of being forced to defend against patent infringement will, in many cases, compel companies to . . . abandon particular products”); Ayres & Parchomovsky, *supra* note 34, at 873; Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1828–29 (2007); Nard, *supra* note 12, at 40 (noting that inventors will decide to avoid research when “the risks associated with improvement activity are too great”). As one commentator noted, however, “this is an unusual reaction.” Lemley, *Rational Ignorance*, *supra* note 56, at 1517.

<sup>58</sup> See, e.g., BESSEN & MEURER, *supra* note 5, at 133 (discussing an example of how infringement litigation delayed research and development at a start-up microprocessor firm).

<sup>59</sup> JAFFE & LERNER, *supra* note 35, at 14. Further, nuisance-value settlements for a license to use the patented technology require an alleged infringer to pay money that could have gone toward research and development. Christopher A. Harkins, *Fending Off Paper Patents and Patent Trolls: A Novel “Cold Fusion” Defense Because Changing Times Demand It*, 17 ALB. L.J. SCI. & TECH. 407, 438 (2007).

<sup>60</sup> BESSEN & MEURER, *supra* note 5, at 141–42.

<sup>61</sup> BESSEN & MEURER, *supra* note 5, at 141–42; see also *supra* notes 1–2 and accompanying text.

<sup>62</sup> E.g., BESSEN & MEURER, *supra* note 5, at 132.

cuss the matter with an attorney.<sup>63</sup> Unlike other types of litigation, however, the expansive nature of discovery in patent cases exacerbates these disruptive effects.<sup>64</sup>

The financial costs of patent litigation have additional consequences for an alleged infringer. A pending infringement suit may affect a company's ability to obtain credit or, at a minimum, increase its credit costs.<sup>65</sup> Investors may be hesitant to purchase a particular product or a company's stock if an infringement suit threatens to either shut the company down or prevent it from using a specific process or product.<sup>66</sup> For example, empirical data shows that the stock market negatively reacts to the announcement of a patent infringement suit.<sup>67</sup> Even if the alleged infringement pertains only to a component, if the overall product is a technology that requires significant investment, customers will be wary of making that investment because of the pending suit.<sup>68</sup> Thus, a company faces a variety of costs when confronted with allegations of patent infringement.<sup>69</sup>

### C. Resulting Behavioral Effects

The significant costs associated with patent infringement litigation have several real-world effects on the behavior of both patentees and alleged infringers. Because of these costs, an alleged infringer has an incentive to quickly settle an infringement claim, typically by purchasing a license to use the patented technology,

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<sup>63</sup> See, e.g., JAFFE & LERNER, *supra* note 35, at 14 (noting the "substantial indirect costs associated with patent litigation," including the costs of extensive document production and making employees available for "time-consuming depositions"); John R. Allison et al., *Valuable Patents*, 92 GEO. L.J. 435, 441 (2004) (noting that litigation costs for patent cases do not take into account "other costs in lost employee productivity and uncertainty"); Lemley, *Rational Ignorance*, *supra* note 56, at 1502 (noting the "indirect social costs" of patent litigation, "such as . . . the value of the time lost by corporate employees involved in the case").

<sup>64</sup> See MENELL ET AL., *supra* note 44, at 4-2 to 4-4.

<sup>65</sup> BESSEN & MEURER, *supra* note 5, at 132.

<sup>66</sup> BESSEN & MEURER, *supra* note 5, at 133.

<sup>67</sup> BESSEN & MEURER, *supra* note 5, at 133-37; see also Harkins, *supra* note 59, at 444 (noting that a company "may lower its stock prices if it takes a chance on trial instead of an early settlement").

<sup>68</sup> See BESSEN & MEURER, *supra* note 5, at 133; Harkins, *supra* note 59, at 437.

<sup>69</sup> BESSEN & MEURER, *supra* note 5, at 140.

rather than take the case to trial.<sup>70</sup> For patentees, these costs create incentives to engage in rent-seeking behavior.<sup>71</sup>

Specifically, high litigation costs create incentives for patentees to file nuisance-value infringement claims.<sup>72</sup> In recent years, nuisance-value patent suits have become a “daily fact of life for most corporate legal departments.”<sup>73</sup> In fact, the increasing prevalence of these suits has led to some commentators describing them as the newest form of the “slip and fall,”<sup>74</sup> an “innovation tax,”<sup>75</sup> and as “the business model of the new millennium.”<sup>76</sup> When faced with these suits, companies often quickly settle, even if meritorious defenses exist.<sup>77</sup> As a result, patentees begin to more aggressively assert their patents, and this cycle becomes self-perpetuating.<sup>78</sup>

One highly publicized group of patentees that engage in such rent-seeking behavior is the so-called “patent troll.”<sup>79</sup> The definition of this group varies tremen-

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<sup>70</sup> See, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 929–30 (2007); Kesan & Ball, *supra* note 35, at 280; Lanjouw & Schankerman, *supra* note 35, at 56 (“About 95 percent of all patent suits are settled by the parties before the end of trial, and most of those before the trial begins . . .”); Lemley, *Rational Ignorance*, *supra* note 56, at 1517–18; Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 163 (2006); Sudarshan, *supra* note 9, at 159–60.

<sup>71</sup> See, e.g., Meurer, *supra* note 10, at 509.

<sup>72</sup> See, e.g., Harkins, *supra* note 59, at 437; Sudarshan, *supra* note 9, at 172 (“Perhaps the greatest factor contributing to the existence of nuisance-value patent suits is the high cost of patent litigation.”).

<sup>73</sup> Sudarshan, *supra* note 9, at 160.

<sup>74</sup> Sheri Qualters, *More Firms Fight Nuisance Patent Claims*, BOSTON BUS. J., June 6, 2003, available at <http://www.bizjournals.com/boston/stories/2003/06/09/story3.html>.

<sup>75</sup> JAFFE & LERNER, *supra* note 35, at 16.

<sup>76</sup> Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not to Do)*, 48 B.C. L. REV. 149, 155 (2007) [hereinafter Lemley, *Ten Things*].

<sup>77</sup> See, e.g., Harkins, *supra* note 59, at 437; Sudarshan, *supra* note 9, at 160.

<sup>78</sup> See, e.g., Gibson, *supra* note 70, at 928–31; Debra Koker, *Fulfilling the “Due Care” Requirement After Knorr-Bremse*, 11 B.U. J. SCI. & TECH. L. 154, 158–59 n.50 (2005); Sudarshan, *supra* note 9, at 171–72.

<sup>79</sup> See, e.g., Magliocca, *supra* note 57, at 1810 (noting that “patent troll” is “a derogatory term for firms that use their patents to extract settlements rather than license or manufacture technology”); Rantanen, *supra* note 70, at 165 (noting that the group of rent-seeking patentees “encompasses,

dously.<sup>80</sup> Generally, however, the term refers to companies or individuals, usually non-practicing entities, who use a patent to extract rents from producers in a given field.<sup>81</sup> This rent-seeking behavior is enabled, in part, by the proliferation of patents with dubious validity.<sup>82</sup>

Regardless of how a patentee who brings a nuisance-value suit is described, several factors provide incentives for an alleged infringer to quickly settle. First, an alleged infringer has a lot on the line—the remedies available for patent infringement are substantial and far-reaching.<sup>83</sup> If a patentee prevails, defendants can be subject to high damage awards or even an injunction shutting down their business.<sup>84</sup> An injunction, in particular, has a high “negotiation value” because it would require an alleged infringer to stop selling and producing the infringing product immediately.<sup>85</sup> As one commentary noted, these potential remedies “encourage[] patent owners to roll the dice of litigation in hopes of reaping a large reward.”<sup>86</sup>

If a “patent thicket” exists, a single product may give rise to several potential suits that could subject a company to these severe consequences.<sup>87</sup> Additionally,

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but is not limited to, what are typically described as ‘patent trolls,’ ‘non-practicing entities,’ or ‘patent enforcement and holding companies’”).

<sup>80</sup> See, e.g., BESSEN & MEURER, *supra* note 5, at 159 (“‘Patent trolls’ are one of those great rhetorical confections that, unfortunately, mean different things to different people.”); Rantanen, *supra* note 70, at 163–64. See generally Terrence P. McMahon et al., *Who is a Troll? Not a Simple Answer*, 7 SEDONA CONF. J. 159 (2006).

<sup>81</sup> E.g., Brenda Sandburg, *Trolling for Dollars*, THE RECORDER (San Fran.), July 30, 2001, at 1.

<sup>82</sup> See, e.g., Bessen & Meurer, *Lessons*, *supra* note 26, at 16 (“Opportunistic suits rely on weak patents to induce licensing.”); Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, INTEL. PROP. L. BULL., Fall 2005, at 1, 3–4.

<sup>83</sup> See, e.g., BURK & LEMLEY, *supra* note 35, at 28–29; JAFFE & LERNER, *supra* note 35, at 110–15 (discussing how the Federal Circuit has vastly expanded the remedies available for patent infringement); Magliocca, *supra* note 57, at 1814–15; see also *supra* notes 27–29 and accompanying text.

<sup>84</sup> See 35 U.S.C. § 284 (2006) (providing for treble damages in patent infringement cases in certain circumstances); *id.* § 283 (providing for injunctive relief); JAFFE & LERNER, *supra* note 35, at 110–11; Lemley, *Ten Things*, *supra* note 76, at 153–54.

<sup>85</sup> Lemley, *Ten Things*, *supra* note 76, at 153–54.

<sup>86</sup> BURK & LEMLEY, *supra* note 35, at 28–29.

<sup>87</sup> Ayres & Parchomovsky, *supra* note 34, at 871–72. “A patent thicket occurs when a technology or a product is covered by multiple patents that are often held by numerous patentees.” *Id.* at 869.



once a company has developed and marketed a successful product, it has considerable sunk costs invested in that particular technology.<sup>88</sup> Thus, when faced with infringement suits, it makes more economic sense for that company to pay a royalty to patentees rather than investing in different technology.<sup>89</sup>

Besides these potential consequences, the significant costs associated with infringement actions are another key factor that incentivizes early settlement.<sup>90</sup> Notably, a patentee and an alleged infringer do not share these costs equally—the alleged infringer bears a much heavier burden.<sup>91</sup> Initially, patentees have the ability to retain counsel on a contingency fee basis.<sup>92</sup> This minimizes a patentee’s risk in filing suit and facilitates the growth of nuisance-value claims.<sup>93</sup>

One area in which this disparity is particularly pronounced is the cost of discovery. Like all lawsuits, broad discovery requests in patent cases are burdensome in terms of production costs and business disruption.<sup>94</sup> In nuisance-value infringement suits, however, if the patentee is a troll or other non-practicing entity, these burdens will not be reciprocal because the patentee will have few, if any, docu-

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<sup>88</sup> See Lemley, *Ten Things*, *supra* note 76, at 154 (noting the holdup problems created by “irreversible investments by defendants in the industry”); Magliocca, *supra* note 57, at 1814–15.

<sup>89</sup> *E.g.*, Magliocca, *supra* note 57, at 1814–15.

<sup>90</sup> See, *e.g.*, JAFFE & LERNER, *supra* note 35, at 68; Kesan & Ball, *supra* note 35, at 280; Sudarshan, *supra* note 9, at 160.

<sup>91</sup> See, *e.g.*, JAFFE & LERNER, *supra* note 35, at 152 (discussing how alleged infringers bear a disproportionate share of the legal costs in patent infringement litigation).

<sup>92</sup> See JAFFE & LERNER, *supra* note 35, at 152 (noting that contingency fees allow plaintiffs to bring infringement claims with “no cost”); Sudarshan, *supra* note 9, at 166.

<sup>93</sup> JAFFE & LERNER, *supra* note 35, at 152; see Sudarshan, *supra* note 9, at 166 (noting that “contingency fee arrangements are critical to the success of nuisance plaintiffs”).

<sup>94</sup> See Sudarshan, *supra* note 9, at 173; see also MENELL ET AL., *supra* note 44, at 4-2 (“Thus, patent litigation discovery tends to be broad and demanding, touches highly sensitive information, and is extremely expensive.”); R. David Donoghue, *The Uneven Application of Twombly in Patent Cases: An Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 6 (2008) (“Corporate defendants routinely spend hundreds of thousands of dollars collecting and analyzing documents just to respond to document requests in the beginning of a [patent infringement] case.”).

ments in existence or business to disrupt.<sup>95</sup> Therefore, an alleged infringer normally bears a disproportionate share of discovery costs.<sup>96</sup>

More significantly, however, a typical defense to infringement is invalidity.<sup>97</sup> To establish this defense, an alleged infringer must incur substantial costs, as it requires exhaustive prior art searches and significant analysis.<sup>98</sup> Further, a defendant has the burden of overcoming the statutory presumption that an issued patent is valid.<sup>99</sup>

Another contributing factor is that non-practicing entities, such as patent trolls, are immune from many of the defensive litigation strategies that a defendant typically employs.<sup>100</sup> For example, one typical defense, a counterclaim for infringement of a patent owned by the defendant, is unavailable when the patentee is not producing anything.<sup>101</sup> Many companies assemble vast patent portfolios to deter business competitors from filing patent infringement claims, since, if a suit is

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<sup>95</sup> E.g., Harkins, *supra* note 59, at 443 (“Discovery burdens are unequal and mostly one-sided in favor of the patent troll who commonly has few documents beyond the patent and prosecution history.”); Sudarshan, *supra* note 9, at 174.

<sup>96</sup> E.g., Harkins, *supra* note 59, at 443–44; Sudarshan, *supra* note 9, at 173 (stating that “the onus of discovery production, with regard to infringement, is largely on the defendant in nuisance suits”).

<sup>97</sup> See 35 U.S.C. § 282 (2006); Paul H. Heller & Michael A. Gollin, *Discovery in Patent Cases*, in 5 INTELLECTUAL PROPERTY COUNSELING & LITIGATION § 70.01 (Matthew Bender 2009) (stating that invalidity is a commonly asserted defense to a patent infringement action); Lemley, *Rational Ignorance*, *supra* note 56, at 1502 (“Virtually every patent infringement lawsuit includes a claim that the patent is either invalid or unenforceable due to inequitable conduct (or commonly both).”).

<sup>98</sup> See JAFFE & LERNER, *supra* note 35, at 152 (noting that proving invalidity requires significant cost and effort); Kesan & Ball, *supra* note 35, at 277 (stating that “obtaining a pre-trial ruling—particularly pertaining to invalidity—can be very expensive”); Lemley, *Rational Ignorance*, *supra* note 56, at 1502 (noting that, when establishing invalidity during patent litigation, “lawyers and technical experts will spend hundreds and perhaps even thousands of hours searching for and reading prior art, poring over the specification and prosecution history, and preparing . . . invalidity arguments”).

<sup>99</sup> See 35 U.S.C. § 282 (2006).

<sup>100</sup> Harkins, *supra* note 59, at 442–44; M. Craig Tyler, *Patent Pirates Search for Texas Treasure*, TEX. LAW., Sept. 20, 2004, at 1, available at [http://www.wsgr.com/news/PDFs/09202004\\_patentpirates.pdf](http://www.wsgr.com/news/PDFs/09202004_patentpirates.pdf) (stating that “the patent pirate is impervious to two of the most relied-upon defensive litigation tactics”).

<sup>101</sup> See Harkins, *supra* note 59, at 442–43; Sudarshan, *supra* note 9, at 167 (“Nuisance plaintiffs, however, who almost always exist solely for the purpose of enforcing a patent portfolio, have no ongoing business operations which subject them to the risk of a countersuit.”).

filed, the business could then counterclaim for infringement of one of the patents in its portfolio.<sup>102</sup> As a result, disputes are often resolved through cross-licensing agreements rather than litigation.<sup>103</sup> With trolls or non-practicing entities, however, this deterrent function is ineffective, since the patentee is not producing any products that could infringe any patents in the defendant's patent portfolio.<sup>104</sup>

The significant amount of uncertainty surrounding patent litigation also encourages early settlement.<sup>105</sup> One key area of uncertainty is with regard to the scope of a patent's claims.<sup>106</sup> Because it is difficult to determine this scope when the case is initially filed, an alleged infringer cannot reliably predict the probability of success, and is therefore unwilling to risk going to trial.<sup>107</sup> Additionally, even if an alleged infringer prevails at trial, the patentee can appeal to the Federal Circuit, which has a well-documented reversal rate, particularly on the issue of claim construction.<sup>108</sup> Thus, this uncertainty, combined with the other factors mentioned,

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<sup>102</sup> See, e.g., Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1, 34–36 (2005) (describing how vast patent portfolios avoid costly litigation, improve bargaining position, and improve defensive positioning by increasing the likelihood of a successful counterclaim for infringement of a patent in the portfolio).

<sup>103</sup> See, e.g., John R. Barton, *Antitrust Treatment of Oligopolies with Mutually Blocking Patent Portfolios*, 69 ANTITRUST L.J. 851, 854–55 (2002); Harkins, *supra* note 59, at 443; Magliocca, *supra* note 57, at 1816–17.

<sup>104</sup> See, e.g., Harkins, *supra* note 59, at 442–43; Magliocca, *supra* note 57, at 1817; Chan & Fawcett, *supra* note 82, at 4 (“A company’s own patent portfolio, a shield or bargaining chip in a traditional IP dispute, has little value when dealing with a patent troll. And because patent trolls do not make or sell products the target company has no basis for filing a countersuit, and thus has no leverage to create an incentive for a cross-license or any other business resolution.”).

<sup>105</sup> E.g., JAFFE & LERNER, *supra* note 35, at 15; Magliocca, *supra* note 57, at 1830. According to one patent litigator, “You’re never really more than 80 percent sure you’re going to win.” Qualters, *supra* note 74.

<sup>106</sup> E.g., Sudarshan, *supra* note 9, at 175–76 (“Interpretation of the scope of patent claims is a notoriously indeterminate process. Accordingly, whether or not a defendant’s products actually infringe a patent cannot be known with certainty until litigation is underway.”).

<sup>107</sup> E.g., Magliocca, *supra* note 57, at 1829–30.

<sup>108</sup> See, e.g., Gretchen Ann Bender, *Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for A Consistent Claim Construction Methodology*, 8 J. INTELL. PROP. L. 175, 207 (2001) (finding a reversal rate of 40% for claim construction); Christian A. Chu, *Empirical Analysis of the Federal Circuit’s Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075, 1142 (2001) (“[A] litigant whose case only involved an infringement issue had a 34% chance that the Federal Circuit would reverse the case on the basis of erroneous claim constructions.”); Kimberly A. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable?*, 8 LEWIS & CLARK L. REV. 231, 236–39 (2005) (finding a reversal rate of 40.8% when summary affirmances were

creates incentives for patentees to file nuisance-value infringement suits and for alleged infringers to quickly settle them.

### III. Pleading Patent Infringement

#### A. Pleading Practice Generally

Every civil action begins with the filing of a complaint.<sup>109</sup> Over time, scholars have debated the level of detail that all pleadings,<sup>110</sup> including a complaint, should include.<sup>111</sup> These pleading requirements vary based on the court system in which the action is taking place.

Before the adoption of the Federal Rules of Civil Procedure, federal courts were required to follow the civil procedure of the state in which they were located.<sup>112</sup> At that time, most states followed a system of pleading modeled after the code pleading statute of New York.<sup>113</sup> New York adopted this statute, known as

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excluded and 34.5% if summary affirmances are included); *see also* *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1476 (Fed. Cir. 1998) (en banc) (Rader, J., dissenting) (“[O]ne study shows that the plenary standard of review has produced reversal, in whole or in part, of almost 40% of all claim constructions since *Markman I.* . . . In fact, this reversal rate, hovering near 50%, is the worst possible. Even a rate that was much higher would provide greater certainty.”).

<sup>109</sup> FED. R. CIV. P. 3 (“A civil action is commenced by filing a complaint with the court.”).

<sup>110</sup> *See* BLACK’S LAW DICTIONARY 1191 (8th ed. 2004) (defining “pleading” as “[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. In federal civil procedure, the main pleadings are the plaintiff’s complaint and the defendant’s answer”); *see also* FED. R. CIV. P. 7 (listing the pleadings available in a civil action).

<sup>111</sup> For a discussion of the historical debates over pleading practice, *see generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

<sup>112</sup> Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (stating that “the practice, pleadings, and forms and modes of proceeding . . . in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held”); *see also* *Amy v. City of Watertown*, 130 U.S. 301, 304 (1889) (discussing how this statute requires that “whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where Congress itself has legislated upon a particular subject”); *Nudd v. Burrows*, 91 U.S. 426, 441 (1875) (stating that the purpose of this Act was “to bring about uniformity in the law of procedure in the Federal and State courts of the same locality” and that the Act “had its origin in the code-enactments of many of the States”).

<sup>113</sup> *See, e.g.*, CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* § 84 (1897) (“If the legislation thus begun had gone no further, the result would

the Field Code, in 1848,<sup>114</sup> which acted as “a kind of catalytic agent for procedural reform elsewhere in the United States.”<sup>115</sup> Under this code, a complaint needed to include “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”<sup>116</sup> As a result, the code prevented parties from pleading legal conclusions or evidence in a complaint.<sup>117</sup> Instead, a plaintiff was required to plead the “ultimate facts” that demonstrated that a cause of action existed.<sup>118</sup>

One example of how this pleading system operated is *Gillispie v. Goodyear Service Stores*.<sup>119</sup> In *Gillispie*, the plaintiff alleged that the defendants, “‘without cause or just excuse and maliciously,’ trespassed upon premises occupied by her as

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still have been among the great events in the history of modern law. But the really significant thing here is that the enactment of this New York code opened, as it were, the floodgates of reformatory legislation, and determined the course of its progress.”); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 533 (1925) (stating that the Field Code “served as the model of all succeeding codes in this country”).

<sup>114</sup> See Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497. For a discussion of the history leading up to the adoption of the Field Code, see generally Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

<sup>115</sup> Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 293 (3d ed. 2005).

<sup>116</sup> Act of Apr. 12, 1848, § 120, 1848 N.Y. Laws 497, 521.

<sup>117</sup> See, e.g., 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1218 (3d ed. 2008) (“In the parlance fashionable during that era, the facts that were to be pleaded were the ‘ultimate facts’; the inclusion of ‘evidence’ and ‘conclusions of law’ was improper.” (internal footnote omitted)); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1753 (1998) [hereinafter Marcus, *Puzzling Persistence*] (noting that, under code pleading, “the pleading was insufficient if limited to conclusions and improper if packed with evidence”).

<sup>118</sup> See, e.g., 5 WRIGHT & MILLER, *supra* note 117, § 1218 (“The codes required the pleader to set forth the facts underlying and demonstrating the existence of his cause of action.”); David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395 (1980) (“Only ultimate facts satisfied the pleading standard; evidentiary facts and conclusions within a pleading could not state a claim.”).

<sup>119</sup> *Gillispie v. Goodyear Serv. Stores*, 128 S.E.2d 762 (N.C. 1963). Although this case was decided after the federal rules were adopted, North Carolina still used a code pleading system, and this case has been cited as the classic example of code pleading. See, e.g., JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 513–14 (rev. 9th ed. 2005); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1025 & n.22 (1989).

a residence, assaulted her[,] and caused her to be seized and confined as a prisoner.”<sup>120</sup> According to the court, these statements were mere “legal conclusions” and not adequately supported by facts.<sup>121</sup> Specifically, the court stated that these allegations “do not disclose what occurred, when it occurred, where it occurred, who did what, the relationships between defendants and plaintiff or of defendants inter se, or any other factual data that might identify the occasion or describe the circumstances of the alleged wrongful conduct of defendants.”<sup>122</sup> Accordingly, the court affirmed the trial court’s dismissal of the complaint for failing to state sufficient facts to establish a cause of action.<sup>123</sup>

As this example illustrates, code pleading was problematic. Enforcing the distinction between facts and legal conclusions opened the door for unresolvable disputes.<sup>124</sup> Judicial decisions were inconsistent—what one judge viewed as pleading facts constituted pleading legal conclusions to others.<sup>125</sup> As a result, cases were increasingly resolved based on pleading decisions rather than the merits of a case.<sup>126</sup>

The Federal Rules of Civil Procedure were adopted in 1938 as a response to the pitfalls of code pleading.<sup>127</sup> The drafters intended to abolish code pleading in

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<sup>120</sup> *Gillispie*, 128 S.E.2d at 765–66.

<sup>121</sup> *Id.* at 766.

<sup>122</sup> *Id.* (emphasis omitted).

<sup>123</sup> *Id.*

<sup>124</sup> Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) [hereinafter Marcus, *Revival of Fact Pleading*]; see Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 555 (2002).

<sup>125</sup> See Fairman, *supra* note 124, at 555; Roberts, *supra* note 118, at 395–96 (“This [code pleading] scheme placed considerable emphasis on hypertechnical artifices of pleading and produced inconsistent interpretations of the adequacy of a complaint’s allegations.”). One scholar of the period attempted to explain this distinction by stating that “to give the facts a legal coloring and aspect, to present them in their legal bearing upon the issues, rather than in their actual naked simplicity, is so far forth an averment of law instead of fact.” JOHN NORTON POMEROY, *CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION* § 423, at 640 (Walter Carrington ed., rev. 5th ed. 1929).

<sup>126</sup> See, e.g., 5 WRIGHT & MILLER, *supra* note 117, § 1218 (stating that the codes resulted in a “multitude of pleading decisions”); Marcus, *Puzzling Persistence*, *supra* note 117, at 1753 (noting that, under code pleading, “pleading decisions continued to multiply”).

<sup>127</sup> E.g., Roberts, *supra* note 118, at 396. For a complete discussion of the historical background of the Federal Rules of Civil Procedure, see generally Subrin, *supra* note 111.

the federal system and provide a new standard for the level of detail needed in a complaint.<sup>128</sup> The “keystone” of this new pleading system was Rule 8.<sup>129</sup> Specifically, Rule 8(a)(2) states that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>130</sup> Additionally, the rules contain an appendix of forms that illustrate sufficient pleadings under the rules.<sup>131</sup> As Charles Clark, one of the drafters of the Federal Rules stated, these forms were “probably the most important part of the rules,” because “when you can’t define you can at least draw pictures to show your meaning.”<sup>132</sup>

Overall, the federal rules adopted a “notice pleading” standard.<sup>133</sup> The goal of the framers was that pleadings would merely put a party on notice and that facts, as well as the specifics of claims, would be fleshed out through the discovery process.<sup>134</sup> Instead of parties fighting over procedural technicalities, once discovery occurred, meritless claims could be disposed of through summary judgment.<sup>135</sup>

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<sup>128</sup> See, e.g., Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 918–19 (1961); Roberts, *supra* note 118, at 396.

<sup>129</sup> 5 WRIGHT & MILLER, *supra* note 117, § 1202 (“Rule 8 is the keystone of the system of pleading embodied in the Federal Rules of Civil Procedure.”); see Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (describing Rule 8 as “the jewel in the crown of the Federal Rules”).

<sup>130</sup> FED. R. CIV. P. 8(a)(2).

<sup>131</sup> FED. R. CIV. P. 84.

<sup>132</sup> Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

<sup>133</sup> E.g., 5 WRIGHT & MILLER, *supra* note 117, § 1202.

<sup>134</sup> See, e.g., Conley v. Gibson, 355 U.S. 41, 47–48 (1957) (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Hickman v. Taylor, 329 U.S. 495, 501 (1947) (“The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts . . . relative to those issues.”); see also O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1365 (Fed. Cir. 2006).

<sup>135</sup> E.g., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (“This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993) (“[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”).

The classic example of notice pleading in action is *Dioguardi v. Durning*.<sup>136</sup> The plaintiff brought suit against the Collector of Customs at the Port of New York because he held the plaintiff's "tonics" from Italy for a year and then sold them at a public auction because of unpaid fees.<sup>137</sup> The plaintiff filed an "obviously home drawn" complaint alleging "that his 'medical extracts' were given to the Springdale Distilling Company 'with my betting (bidding?) price of \$110: and not their price of \$120,'" and "that three weeks before the sale, two cases, of [nineteen] bottles each case, disappeared."<sup>138</sup> The trial court dismissed the plaintiff's complaint for failing "to state facts sufficient to constitute a cause of action."<sup>139</sup>

The Second Circuit, in an opinion by Judge Charles Clark, reversed.<sup>140</sup> The court concluded that "however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced."<sup>141</sup> As a result, the court concluded that the plaintiff should not be deprived of his day in court and that dismissal of the complaint was inappropriate.<sup>142</sup>

Notice pleading has several potential benefits. First, unlike the code pleading regime, it allows courts to resolve cases on the merits rather than relying upon procedural technicalities.<sup>143</sup> In theory, notice pleading also minimizes complexity.<sup>144</sup>

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<sup>136</sup> *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (Clark, J.).

<sup>137</sup> *Id.* at 774.

<sup>138</sup> *Id.* at 774–75. The court also noted the "plaintiff's limited ability to write and speak English." *Id.* at 775.

<sup>139</sup> *Id.* at 774.

<sup>140</sup> *Id.* at 776.

<sup>141</sup> *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 319 (1938) ("[I]n the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such substitute is in very truth to make technical forms the mistress and not the handmaid of justice."); Hon. H. Church Ford, *Federal Rules of Civil Procedure: Pleadings, Motions, Parties, and Pre-trial Procedure*, 1 F.R.D. 315, 318 (1940) ("The philosophy which the rules seek to inculcate seems to be that the ends of justice may be attained more surely and more expeditiously by directing principal attention to the realities and by giving less consideration to mere formalities."); see also *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the mer-



This rationale focuses on an individual's access to justice and the court system as a method of obtaining relief for wrongs.<sup>145</sup>

If a party fails to satisfy these pleading requirements, it can result in the dismissal of the cause of action for "failure to state a claim."<sup>146</sup> Alternatively, a party has the ability to move the court for "a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response."<sup>147</sup> In line with the goals of notice pleading, however, the Supreme Court historically interpreted Rule 8 as imposing only a minimal burden on plaintiffs.<sup>148</sup> For example, in *Conley v. Gibson*, the Court stated the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>149</sup> The Court later explicitly rejected heightened pleading in any area other than those specifically enumerated in the rules.<sup>150</sup>

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its."), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); Marcus, *Puzzling Persistence*, *supra* note 117, at 1749 (noting that under the federal rules, "[p]leading decisions, so prominent at common law and under the codes, were to wither and die except in extraordinary circumstances").

<sup>144</sup> See, e.g., Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 462 (1943) ("There is little doubt that the great success of the rules has been due to this combination of simplicity of general requirements, requiring little time and attention in their application, with the special devices for speedy disposition of those cases which are easily adjudicated."). As one commentary notes, "it has been said that 'a sixteen year old boy could plead' under these rules." 5 WRIGHT & MILLER, *supra* note 117, § 1202, at 94.

<sup>145</sup> See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."); *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) ("The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court."); Fairman, *supra* note 124, at 557.

<sup>146</sup> FED. R. CIV. P. 12(b)(6).

<sup>147</sup> FED. R. CIV. P. 12(e).

<sup>148</sup> See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 437–39 (2008).

<sup>149</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>150</sup> *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Federal Rule of Civil Procedure 9 requires a plaintiff to plead claims of fraud or mistake "with particularity." FED. R. CIV. P. 9(b).

In 2007, this jurisprudence took a distinct turn with the Court's decision in *Bell Atlantic Corp. v. Twombly*.<sup>151</sup> In *Twombly*, an antitrust case, the court concluded that the "no set of facts" language from *Conley* had "after puzzling the profession for [fifty] years . . . earned its retirement."<sup>152</sup> In its place, the Court adopted a standard requiring a plaintiff to plead "a claim to relief that is plausible on its face."<sup>153</sup>

The *Twombly* decision created uncertainty among circuit courts, which split over how broadly to read the decision.<sup>154</sup> One source of this confusion was that shortly after *Twombly* was decided, another Supreme Court decision reversed the dismissal of a civil rights complaint for failure to state a claim, without mentioning "plausibility pleading."<sup>155</sup> As a result, some courts read *Twombly* narrowly, confining the new "plausibility" standard solely to the antitrust context.<sup>156</sup> The majority of courts, however, viewed *Twombly* more broadly and applied the new pleading standard to other contexts.<sup>157</sup>

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<sup>151</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>152</sup> *Id.* at 563; *see also* *Boroff v. Alza Corp.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 395211, at \*2 (N.D. Ohio Jan. 27, 2010) (noting that "the Supreme Court has consigned the *Conley* standard to the dustbin of history").

<sup>153</sup> *Twombly*, 550 U.S. at 570. Thus, plaintiffs must "nudge[] their claims across the line from conceivable to plausible." *Id.*

<sup>154</sup> *See* *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (noting that the new standard announced in *Twombly* is "less than pellucid"); *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (noting that the *Twombly* opinion is "confusing" and concluding that "[t]he issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come"); *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n.7 (4th Cir. 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach."); *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) ("Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in [*Twombly*].").

<sup>155</sup> *See* *Erickson v. Pardus*, 551 U.S. 89, 93–95 (2007) (per curiam).

<sup>156</sup> *See, e.g.*, *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact."); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007) (stating that the Court's opinion "does not suggest that *Bell Atlantic* changed the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*").

<sup>157</sup> *See, e.g.*, *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 n.43 (11th Cir. 2008) ("We understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of all claims brought pursuant to Rule 8(a)."); *Phillips*, 515 F.3d at 234 ("[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.");

The Supreme Court clarified the scope of *Twombly* two years later in *Ashcroft v. Iqbal*.<sup>158</sup> In *Iqbal*, a Pakistani national filed suit against several federal officials for allegedly subjecting him to unconstitutionally harsh conditions of confinement because of his race, religion, or national origin following the terrorist attacks of September 11, 2001.<sup>159</sup>

The Court began its analysis by noting that Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”<sup>160</sup> Accordingly, “[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.”<sup>161</sup> This determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>162</sup> Further, the Court rejected the plaintiff’s argument that *Twombly* applied only in the limited context of antitrust disputes, stating that “*Twombly* expounded the pleading standard for ‘all civil actions.’”<sup>163</sup> Thus, following *Iqbal*, civil litigation shifted to a plausibility pleading paradigm.

#### B. Pleading in Patent Infringement Actions

A patent infringement suit is merely a specific type of civil action.<sup>164</sup> Accordingly, courts have traditionally applied the general notice pleading standard to

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*see also* Smith v. Duffey, 576 F.3d 336, 339–40 (7th Cir. 2009) (describing *Twombly* as “fast becoming the citation du jour in Rule 12(b)(6) cases”); Mary J. Hackett & Patricia E. Antezana, *All But Two Circuits Interpret Twombly Broadly*, NAT’L L.J., Oct. 27, 2008, at S3.

<sup>158</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

<sup>159</sup> *Id.* at 1942.

<sup>160</sup> *Id.* at 1949; *see also id.* at 1950 (“Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

<sup>161</sup> *Id.* at 1949.

<sup>162</sup> *Id.* at 1950.

<sup>163</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1).

<sup>164</sup> *E.g.*, 6 R. CARL MOY, MOY’S WALKER ON PATENTS, § 17:4 (4th ed. 2007) (“Viewed at a basic level, a suit for patent infringement is simply a specific example of a general civil action.”); *see also* FED. R. CIV. P. 2 (“There is one form of action—the civil action.”).

patent infringement cases the same way that it applies in other cases.<sup>165</sup> As a result, “[i]nfringement complaints are usually sparse and conclusory.”<sup>166</sup>

One of the key contributing factors to the sparse nature of complaints in patent infringement actions is Form 18 of the Federal Rules of Civil Procedure.<sup>167</sup> This form provides a sample complaint for patent infringement.<sup>168</sup> Its content is significant because the forms, by rule, are deemed to be sufficient pleadings.<sup>169</sup> Specifically, the sample patent infringement complaint includes only five brief elements: a statement of jurisdiction, a cursory statement about the ownership of the patent, the allegedly infringing product, that the patentee provided notice to the alleged infringer, and the relief demanded by the plaintiff.<sup>170</sup>

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<sup>165</sup> See, e.g., *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000) (noting that “a patentee need only plead facts sufficient to place the alleged infringer on notice”); 5 WRIGHT & MILLER, *supra* note 117, § 1251 (“The principles of pleading simplicity and brevity applicable to complaints in other actions also apply in infringement suits.”); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.”).

<sup>166</sup> MENELL ET AL., *supra* note 44, at 2-20; see also *id.* at 2-12 (noting that “[d]etails of the defendants’ allegedly infringing activities are rarely offered” in infringement complaints).

<sup>167</sup> See FED. R. CIV. P. Form 18. When the federal rules were initially enacted, this was Form 16, rather than Form 18. See FED. R. CIV. P. Form 16 (1938), reprinted at 303 U.S. 775–76.

<sup>168</sup> FED. R. CIV. P. Form 18.

<sup>169</sup> FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”); see also *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that the forms contained in the federal rules “plainly demonstrate” the pleading requirement under the rules), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356–57 (Fed. Cir. 2007) (citing and applying Form 18 as sufficient to state a claim for patent infringement). The *Twombly* Court also approved of the forms as sufficient pleadings. See *Twombly*, 550 U.S. at 565 n.10.

<sup>170</sup> FED. R. CIV. P. Form 18. The complete form is as follows:

1. (Statement of Jurisdiction—See Form 7)
2. On *date*, United States Letters Patent No. \_\_\_\_\_ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant’s infringing acts and still owns the patent.
3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

The Federal Circuit has required a complaint for patent infringement to satisfy a similarly minimal threshold.<sup>171</sup> For example, in *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*, a pre-*Twombly* decision, the court applied “the liberal pleading standards” to a patent infringement complaint.<sup>172</sup> Specifically, the court concluded that “[t]he Rule 12(b)(6) pleading requirements for a complaint of infringement cannot be extended to require a plaintiff to specifically include each element of the claims of the asserted patent.”<sup>173</sup> According to the court, “[t]o impose such requirements would contravene the notice pleading standard, and would add needless steps to the already complex process of patent litigation.”<sup>174</sup> Thus, a patent holder only needs to allege “facts sufficient to put the alleged infringer on notice.”<sup>175</sup>

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4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

- (a) a preliminary and final injunction against the continuing infringement;
- (b) an accounting for damages; and
- (c) interest and costs.

*Id.* Additionally, a caption is required, and the complaint must be dated and signed. *See id.*

<sup>171</sup> Notably, the review of a district court’s dismissal pursuant to Rule 12(b)(6) is a procedural question to which the Federal Circuit applies the law of the regional circuit. *See, e.g., C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) (“The question of whether a Rule 12(b)(6) motion was properly granted is a purely procedural question not pertaining to patent law, to which this court applies the rule of the regional . . . circuit.”). However, an interesting dilemma arises, as a regional circuit will never hear a patent case, so it can never provide guidance as to the pleading standard to use for infringement claims. *See* 28 U.S.C. § 1295(a) (2006) (providing that the Federal Circuit has exclusive jurisdiction over appeals in patent cases). *See generally* CBT Flint Partners, L.L.C. v. Goodmail Sys., Inc., 529 F. Supp. 2d 1376, 1379 (N.D. Ga. 2007) (pointing out this discrepancy). Indeed, the Federal Circuit has applied its own law, not the law of the regional circuit, when evaluating whether an inequitable conduct claim has been pleaded with the particularity required by Rule 9(b). *See Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326 (Fed. Cir. 2009).

<sup>172</sup> *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

The Federal Circuit maintained this liberal approach to pleading following *Twombly* in *McZeal v. Sprint Nextel Corp.*<sup>176</sup> After reaffirming the *Phonometrics* court's statement that a plaintiff did not need to allege each element of the claims of the asserted patent, the court noted its belief that *Twombly* did not alter the pleading requirements of Rule 8.<sup>177</sup> Accordingly, any details regarding how the defendant's product infringed the patent were unnecessary, as these details were "something to be determined through discovery."<sup>178</sup> Notably, *McZeal* has been criticized and distinguished after the *Iqbal* decision.<sup>179</sup>

However, district courts are still divided over what the rules require a patentee to plead, especially post-*Twombly*.<sup>180</sup> Initially, similar to the pre-*Iqbal* circuit split, the *Twombly* decision itself generated confusion.<sup>181</sup> Some courts concluded that the Supreme Court's decision had no effect on patent cases.<sup>182</sup> The majority of courts, however, recognized that *Twombly* applied to patent infringement ac-

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<sup>176</sup> *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

<sup>177</sup> *Id.* at 1357 & n.4.

<sup>178</sup> *Id.* at 1358. Notably, because the plaintiff was proceeding pro se, the court applied "the low bar for pro se litigants to avoid dismissal on the basis of [Federal Rule of Civil Procedure] 12(b)(6)." *Id.*

<sup>179</sup> See, e.g., *Koninklijke Philips Elecs. N.V. v. ADS Group*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 938216, at \*4 n.8 (S.D.N.Y. Mar. 12, 2010) ("The decision in *McZeal*, however, was motivated by a (perhaps) misplaced indulgence of the pleadings of a pro se plaintiff. Of greater relevance, *McZeal* was decided before the *Iqbal* decision made clear that *Twombly*'s heightened pleading standard applied to all cases, not merely those like *Twombly* that assert antitrust violations." (internal citation omitted)); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF, 2010 WL 889541, at \*3 (N.D. Cal. Mar. 11, 2010) (noting that *McZeal* was "unhelpful" because it "was decided after *Twombly* but before *Iqbal*" and because the plaintiff was proceeding pro se); *Bender v. Motorola, Inc.*, No. C 09-1245 SBA, 2010 WL 726739, at \*3 (N.D. Cal. Feb. 26, 2010) (describing a plaintiff's reliance on *McZeal* as "misplaced").

<sup>180</sup> See, e.g., *LG Elecs. U.S.A., Inc.*, 2010 WL 889541, at \*5 (noting the "lack of complete uniformity in recent district court authority" on the pleading requirements in patent infringement actions following *Twombly* and *Iqbal*). See generally Yekaterina Korostash, *Pleading Standards in Patent Litigation After Bell Atlantic v. Twombly*, INTELL. PROP. STRATEGIST, Jan. 2008, at 1.

<sup>181</sup> See Donoghue, *supra* note 94, at 2 ("The courts are split, however, on the precise impact that *Twombly* has on pleadings in patent cases.").

<sup>182</sup> See, e.g., *CBT Flint Partners, L.L.C. v. Goodmail Sys., Inc.*, 529 F. Supp. 2d 1376, 1379–80 (N.D. Ga. 2007) (concluding that "*Twombly* did not alter pleading standards—especially in the patent context").

tions.<sup>183</sup> This split was resolved by the Supreme Court's conclusive statement in *Iqbal* that the *Twombly* standard applied to all civil actions.<sup>184</sup>

*Iqbal* did not, however, address the substantive pleading requirements for patent infringement actions. Over time, courts have split over two issues—and *Twombly* only reignited this debate. First, courts often divide over the question of whether the plaintiff must specify the claims in the patent that it believes the defendant is infringing.<sup>185</sup> Prior to *Twombly*, most courts did not require a plaintiff to specify the infringed claims.<sup>186</sup> These courts relied upon the notice function of pleadings and stressed that this notice function was satisfied without specifying the patent claims that were being infringed.<sup>187</sup> Historically, however, a plaintiff was required to plead with such specificity.<sup>188</sup>

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<sup>183</sup> See, e.g., *Anticancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 282 (S.D. Cal. 2007) (“The Court finds that the new *Bell Atlantic* pleading standard applies to pleadings in patent infringement actions . . .”); see also *In re Papst Licensing GMBH & Co. KG Litig.*, 585 F. Supp. 2d 32, 34–36 (D.D.C. 2008) (applying *Twombly* to a patent infringement action).

<sup>184</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1); see also *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (noting that *Iqbal* “clarified that *Twombly*’s plausibility requirement applies across the board, not just to antitrust cases”).

<sup>185</sup> See, e.g., Franklin D. Kang, *Pleading Patent Infringement Claims: Does Form 16 Suffice for All Purposes?*, INTELL. PROP. L. NEWSL., Winter 2006, at 25, 29 (“There is . . . a split of authority on whether a complaint for patent infringement must specify the claims of the patent-in-suit alleged to have been infringed.”).

<sup>186</sup> See, e.g., *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000); *Beery v. Hitachi Home Elecs. (Am.), Inc.*, 157 F.R.D. 477, 480–81 (C.D. Cal. 1993); *Tippmann Pneumatics, L.L.C. v. Brass Eagle, L.L.C.*, No. 1:04-CV-449-TLS, 2005 WL 2456908, at \*2 (N.D. Ind. Oct. 4, 2005).

<sup>187</sup> See, e.g., *Tippmann Pneumatics, L.L.C.*, 2005 WL 2456908, at \*2 (“A claim for patent infringement is sufficient to put the defendant on notice even if it does not state which patent claims were infringed.” (citing *Phonometrics*, 203 F.3d at 794)).

<sup>188</sup> See, e.g., *J.D. Ferry Co. v. Macbeth Eng’g Corp.*, 11 F.R.D. 75, 76 (M.D. Pa. 1951) (“The general practice in patent infringement suits has been to require the plaintiff to state what claims of a patent he alleges to have been infringed.”); *Coyne & Delany Co. v. G.W. Onthank Co.*, 10 F.R.D. 435, 436 (S.D. Iowa 1950); *Marvel Slide Fastener Corp. v. Klozo Fastener Corp.*, 80 F. Supp. 366, 367 (S.D.N.Y. 1948); *Nat’l Nut Co. of Cal. v. Kelling Nut Co.*, 61 F. Supp. 76, 78–79 (N.D. Ill. 1945); *Bonney Supply Co. v. Heltzel*, 243 F. 399, 404 (N.D. Ohio 1917) (“The complainant knows, or should know, which of these separate claims are infringed; and it is therefore proper, in the interest of greater certainty and definiteness, that it be required to specify which of the ten claims it intends to rely on—in other words, give further and better particulars of the matter of infringement contained in its pleading.”).

This trend has persisted following *Twombly* and *Iqbal*. Most courts continue to hold that a plaintiff does not need to identify which claims it believes are being infringed.<sup>189</sup> Notably, however, one court has concluded that the plaintiff must specifically plead the allegedly infringed claims.<sup>190</sup> As this court noted, “a plaintiff’s failure to specify which claims it believes are infringed by a defendant’s products places an undue burden on the defendant, who must wade through all the claims in a patent and determine which claims might apply to its products to give a complete response.”<sup>191</sup>

The second area that has generated dispute is whether a plaintiff must specifically plead how the defendant is infringing the patent.<sup>192</sup> On this issue, the division among courts is considerably more pronounced. Numerous courts, both before and after *Twombly*, have concluded that some identification of the method of infringement is required.<sup>193</sup> Similar to the rationale behind requiring a plaintiff to allege

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<sup>189</sup> See, e.g., *Ardente, Inc. v. Shanley*, No. C 07-4479 MHP, 2010 WL 546485, at \*5 n.6 (N.D. Cal. Feb. 10, 2010) (“The court is unaware of any case holding that the Supreme Court’s decisions in *Twombly* and *Iqbal* have now resulted in a strict requirement that a patent infringement plaintiff plead the specific claims believed to have been infringed.”); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008); *Rambus, Inc. v. Nvidia Corp.*, No. C 08-3343 SI, 2008 WL 4911165, at \*2 (N.D. Cal. Nov. 13, 2008); *Taltwell, L.L.C. v. Zonet USA Corp.*, No. Civ. A. 3:07cv543, 2007 WL 4562874, at \*14 (E.D. Va. Dec. 20, 2007).

<sup>190</sup> *Taurus IP, L.L.C. v. Ford Motor Co.*, 539 F. Supp. 2d 1122, 1127 (W.D. Wis. 2008).

<sup>191</sup> *Id.*; see also *Ardente, Inc.*, 2010 WL 546485, at \*5 n.6 (“[S]pecifying the patent claims allegedly infringed enhances the plausibility of a patent infringement plaintiff’s complaint.”).

<sup>192</sup> See *Kang*, *supra* note 185, at 26 (“There currently exists a split of authority on whether a complaint for patent infringement must specify the defendant’s products or services alleged to have infringed the patent-in-suit and, if so, the degree of specificity required.”).

<sup>193</sup> See, e.g., *Eidos Commc’ns, L.L.C. v. Skype Techs. SA*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 638337, at \*2–3 (D. Del. Feb. 24, 2010); *Taurus IP, L.L.C.*, 539 F. Supp. 2d at 1126–27 (W.D. Wis. 2008); *Windy City Innovations, L.L.C., v. Am. Online, Inc.*, 227 F.R.D. 278, 283 (N.D. Ill. 2005) (granting a defendant’s motion to dismiss on an infringement claim because “a vague reference to ‘other’ unnamed products or services fails to provide the operative facts in relation to the alleged infringement by those ‘other’ unnamed products or services”); *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996); *Paraffine Cos. v. Wieland*, 17 F.2d 992, 993 (N.D. Cal. 1927); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF, 2010 WL 889541, at \*6 (N.D. Cal. Mar. 11, 2010) (“Sufficient allegations would include, at a minimum, a brief description of what the patent at issue does, and an allegation that certain named and specifically identified products or product components also do what the patent does, thereby raising a plausible claim that the named products are infringing.”); *Ware v. Circuit City Stores, Inc.*, No. Civ. A. 4:05-CV-0156-RLV, 2010 WL 767094, at \*2 (N.D. Ga. Jan. 5, 2010); *Fifth Market, Inc. v. CME Group, Inc.*, No. Civ. A. 08-520 GMS, 2009 WL 5966836, at \*1 (D. Del. May 14, 2009) (“None of Fifth Market’s claims, however, contain any reference to a single infringing product or method . . .



specific claims, these courts stress how failing to identify the specific infringing product or service imposes an undue burden on the defendant.<sup>194</sup>

For example, in one recent case, the plaintiff alleged that the defendant was infringing its patent by “making, using, offering to sell and/or selling infringing software and hardware products.”<sup>195</sup> However, the defendant produced at least 150 different types of products that had over 4000 possible end-user applications.<sup>196</sup> As the court noted, “Form [18] simply does not address a factual scenario of this sort.”<sup>197</sup> Accordingly, the court held that the plaintiff’s allegations did not provide fair notice to the defendant and therefore failed to satisfy Rule 8(a).<sup>198</sup>

Another line of cases has reached the opposite conclusion and held that no such identification is necessary, even post-*Twombly*.<sup>199</sup> Again, these courts stress

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Therefore, Fifth Market’s complaint fails to provide the CME defendants with fair notice of the claims and grounds for their entitlement to relief, and the court will grant [their] motion to dismiss.”); Halo Elecs., Inc. v. Bel Fuse Inc., No. 2:07-CV-00331-PMP-PAL, 2007 WL 2156332, at \*2 (D. Nev. July 26, 2007); eSoft, Inc. v. Astaro Corp., Civ. No. 06-cv-00441-REB-MEH, 2006 WL 2164454, at \*2 (D. Colo. July 31, 2006); Hewlett-Packard Co. v. Intergraph Corp., No. C 03-2517-MJJ, 2003 WL 23884794, at \*1 (N.D. Cal. Sept. 6, 2003); *see also* Agilent Techs., Inc. v. Micromuse, Inc., No. 04 Civ. 3090(RWS), 2004 WL 2346152, at \*4-6 (S.D.N.Y. Oct. 19, 2004) (holding that specifying the method of infringement was required, but that a Rule 12(e) motion was the appropriate remedy).

<sup>194</sup> *See, e.g., Taurus IP, L.L.C.*, 539 F. Supp. 2d at 1127; *Static Control Components, Inc. v. Future Graphics, L.L.C.*, No. 07CV00007, 2008 WL 160827, at \*2 (M.D.N.C. Jan. 15, 2008); *Hewlett-Packard Co.*, 2003 WL 23884794, at \*1.

<sup>195</sup> *Hewlett-Packard Co.*, 2003 WL 23884794, at \*1 (emphasis omitted).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See, e.g., Mesh Comm, L.L.C. v. EKA Sys., Inc.*, No. 8:09-cv-1064-T-33TGW, 2010 WL 750337, at \*2 (M.D. Fla. Mar. 4, 2010) (concluding that vague infringement allegations lacking a reference to a specific product were sufficient under *Twombly*); *Teirstein v. AGA Med. Corp.*, Civ. Action No. 6:08cv14, 2009 WL 704138, at \*3 (E.D. Tex. Mar. 16, 2009); *Digital Tech. Licensing L.L.C. v. Sprint Nextel Corp.*, Civ. Action No. 07-5432 (SRC)(MAS), 2008 WL 4068930, at \*4 (D.N.J. Aug. 27, 2008) (concluding that a pleading that did not specify an infringing product was sufficient and noting that “there is no binding precedent that requires a complaint to provide notice of which of defendant’s products infringe claims under the applicable patents”); *Taltwell, L.L.C. v. Zonet USA Corp.*, Civ. Action No. 3:07cv543, 2007 WL 4562874, at \*13-14 (E.D. Va. Dec. 20, 2007); *Tippmann Pneumatics, L.L.C. v. Brass Eagle, L.L.C.*, No. 1:04-CV-449-TLS, 2005 WL 2456908, at \*1-2 (N.D. Ind. Oct. 4, 2005); *One World Techs., Ltd. v. Robert Bosch Tool Corp.*, No. 04 C 0833, 2004 WL 1576696, at \*2 (N.D. Ill. July 13, 2004); *see also Actus L.L.C. v. Bank of Am. Corp.*, Civ. Action No. 2-09-cv-102-TJW, 2010 WL 547183, at \*2 (E.D. Tex. Feb.

the low bar posed by the notice function of pleadings and state that discovery will allow a defendant to clarify the manner of infringement.<sup>200</sup> For example, one court approved a complaint where the plaintiff alleged that its patent was infringed by the defendant “‘making, importing, offering for sale, selling, and/or using devices that embody the patented methods, including [four] megabit and higher density DRAMs.’”<sup>201</sup> The court concluded that even though this allegation referred to “‘nearly all of [d]efendants’ product line,” it was sufficient because it followed Form 18 and the defendant would receive more specific notice as discovery progressed.<sup>202</sup> Thus, in patent infringement actions, courts continue to dispute the contours of *Twombly*, *Iqbal*, and notice pleading generally.

Another issue is the inconsistency between Form 18, which, by rule, is a model of a sufficient pleading, and the modern plausibility pleading standard.<sup>203</sup> Indeed, post-*Iqbal*, some courts have reaffirmed that a complaint modeled after Form 18 sufficiently states a claim.<sup>204</sup> In a recent unpublished decision, the Federal Circuit also implied the continued vitality of Form 18 following *Iqbal*.<sup>205</sup> The

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10, 2010) (“The Court does not require that plaintiffs in a patent infringement lawsuit attach fully-developed infringement contentions to its complaint.”).

<sup>200</sup> See, e.g., *S.O.I.Tec Silicon Insulator Techs., S.A. v. Memc Elec. Materials, Inc.*, Civ. No. 08-292-SLR, 2009 WL 423989, at \*2 (D. Del. Feb. 20, 2009); *One World Techs., Ltd.*, 2004 WL 1576696, at \*2. Another court noted that imposing this requirement on a plaintiff would require an overly burdensome “Herculean investigation.” *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, No. 1:05-CV-64 TS, 2008 WL 200340, at \*1 (D. Utah Jan. 22, 2008). Interestingly, the court made no mention of the potential burdens that this minimal pleading might impose on the defendant. See *id.*

<sup>201</sup> *OKI Elec. Indus. Co. v. LG Semicon Co.*, No. CIV. 97-20310 SW, 1998 WL 101737, at \*3 (N.D. Cal. Feb. 25, 1998).

<sup>202</sup> *Id.*

<sup>203</sup> See *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF, 2010 WL 889541, at \*5 (N.D. Cal. Mar. 11, 2010) (“As several courts have noted, it is difficult to reconcile the guidelines set forth in *Twombly* and *Iqbal* with Form 18.”); *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 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.”); see also *FED. R. CIV. P.* 84 (stating that the appendix of forms are examples of sufficient pleadings).

<sup>204</sup> See, e.g., *Advanced Analogic Techs., Inc. v. Kinetic Techs., Inc.*, No. C-09-1360 MMC, 2009 WL 1974602, at \*1 & n.2 (N.D. Cal. July 8, 2009); *Iguana L.L.C. v. Lanham*, No. 7:08-CV-09(CDL), 2009 WL 1620586, at \*1–2 (M.D. Ga. June 9, 2009).

<sup>205</sup> See *Colida v. Nokia, Inc.*, No. 2009-1326, 2009 WL 3172724, at \*2 & n.2 (Fed. Cir. Oct. 6, 2009) (concluding that the plaintiff’s infringement claims were “facially implausible,” but noting that he

sparse allegations in this form appear to be the prototypical “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” that the Supreme Court in *Iqbal* rejected as insufficient.<sup>206</sup> The difficulties inherent in this disparity are an issue that courts will be faced with in the post-*Twombly* era.

### C. How Notice Pleading Enables Patent Litigation Abuse

As previously outlined, the patent litigation landscape is marred by an overabundance of nuisance-value suits.<sup>207</sup> Notice pleading facilitates the proliferation of these suits in several ways.

#### 1. *Lowers Costs for Plaintiffs*

First, notice pleading drastically lowers costs for plaintiffs.<sup>208</sup> A patent infringement complaint, as discussed earlier, is simple and typically only a few pages in length.<sup>209</sup> Thus, a plaintiff does not incur substantial costs to prepare and file it.<sup>210</sup> These factors incentivize the filing of nuisance-value infringement suits because a plaintiff does not stand to lose a significant amount of money by filing a complaint.<sup>211</sup> Instead, the plaintiff stands to profit from a likely quick settlement.<sup>212</sup>

In theory, a plaintiff in a patent infringement action, like all plaintiffs, would still incur costs based on the presuit investigation requirement contained in Rule

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had not argued that the complaint was sufficient under Form 18 and Rule 84 of the Federal Rules of Civil Procedure).

<sup>206</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

<sup>207</sup> See *supra* Part I.C.

<sup>208</sup> See, e.g., Marcus, *Revival of Fact Pleading*, *supra* note 124, at 477 (discussing notice pleading and noting that “[t]he Federal Rules were designed, in part, to open the federal courts to those of lesser means”).

<sup>209</sup> See *supra* Part II.B; see also Tyler, *supra* note 100 (noting that patent infringement complaints are usually only four or five pages long).

<sup>210</sup> See, e.g., JAFFE & LERNER, *supra* note 35, at 152. Indeed, if a patentee is represented on a contingency fee basis, no costs are incurred.

<sup>211</sup> See Tyler, *supra* note 100 (“A patent complaint requires remarkably little information. . . . Yet this simple, non-specific complaint has a nuisance value of a few hundred thousand dollars the minute it is filed and served.”).

<sup>212</sup> See *supra* Part I.C.

11.<sup>213</sup> Specifically, as outlined by the Federal Circuit, “Rule 11 requires an attorney who files a patent infringement action to compare the accused device with the construed patent claims.”<sup>214</sup> This necessarily requires that the “attorney interpret the pertinent claims of the patent in issue before filing a complaint alleging patent infringement.”<sup>215</sup> In other words, an attorney must, “at a bare minimum, apply the claims of each and every patent that is being brought into the lawsuit to an accused device and conclude that there is a reasonable basis for a finding of infringement of at least one claim of each patent so asserted.”<sup>216</sup> Thus, theoretically, an attorney will conduct a pre-filing investigation that will include construing the patent’s claims and applying that construction to a specific product manufactured by the defendant.<sup>217</sup>

Under the current notice pleading regime, however, this presuit investigation requirement imposes few real costs on a plaintiff in an infringement case. Despite the Federal Circuit’s broad statements, often the actual presuit investigation required by courts is minimal.<sup>218</sup> The safe harbor provision in Rule 11 also allows unscrupulous parties to easily get away with failing to conduct an investigation prior to filing suit.<sup>219</sup> A plaintiff does not need to disclose this Rule 11 determina-

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<sup>213</sup> See FED. R. CIV. P. 11(b); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (“Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and ‘not interposed for any improper purpose.’”); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (“The attorney has a duty prior to filing a complaint not only to conduct a reasonable factual investigation, but also to perform adequate legal research . . .”).

<sup>214</sup> *Antonious v. Spalding & Evenflo Cos.*, 275 F.3d 1066, 1073 (Fed. Cir. 2002); see also *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1300–01 (Fed. Cir. 2004); *View Eng’g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000).

<sup>215</sup> *Antonious*, 275 F.3d at 1072.

<sup>216</sup> *View Eng’g, Inc.*, 208 F.3d at 986.

<sup>217</sup> See *id.*

<sup>218</sup> See, e.g., *Apple Computer, Inc. v. Articulate Sys., Inc.*, 234 F.3d 14, 27 (Fed. Cir. 2000) (concluding that a pretrial investigation was sufficient when the only proof was a single entry in the plaintiff’s privilege log that was never produced to the opposing party); Thomas I. Ross, *Making Patent Plaintiffs Pay*, INTELL. PROP. & TECH. L.J., June 2006, at 1, 2 (noting that “Rule 11 is ineffective as a sword against patent plaintiffs”).

<sup>219</sup> See FED. R. CIV. P. 11(c)(2) (stating that a motion for sanctions under Rule 11 cannot be filed until a party is given the opportunity to withdraw the challenged filing, claim, or other argument within twenty-one days). See generally Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555 (2001) (describing how Rule 11 is easily circumvented by ill-intentioned attorneys).

tion, either, making it difficult for a defendant to value the suit for settlement purposes.<sup>220</sup> Further, the scope of a patent's claim is typically ambiguous and it is difficult to know with any certainty how a court will construe it.<sup>221</sup> This fact benefits nuisance-value plaintiffs, as it allows them to bring actions that lack merit but satisfy the minimal requirements of Rule 11.<sup>222</sup> Thus, notice pleading undermines the Rule 11 deterrent and further lowers the costs a plaintiff must incur prior to filing an infringement complaint.

For example, in a recent case, the Federal Circuit considered whether a plaintiff's counsel had sufficiently investigated whether the defendant's website infringed a patent for an interface between electronic and hard copies of documents.<sup>223</sup> The plaintiff was a patent holding company that asserted numerous identical infringement actions against a variety of companies.<sup>224</sup> The court concluded that the investigation was adequate because the plaintiff's counsel "examine[d] portions of [the defendant's] website and, based on his experience, concluded that it worked in a manner that infringed the [plaintiff's] patent."<sup>225</sup> As this case illustrates, a cursory pre-filing inquiry can suffice in infringement cases—demonstrating that this mechanism is not suitable for deterring the filing of nuisance-value suits.

## 2. *Increases Costs for Defendants*

Notice pleading also facilitates the filing of patent infringement suits, and therefore nuisance-value settlements, by increasing an alleged infringer's costs, particularly the costs of responding to a complaint. As a general matter, notice pleading is problematic when applied to technologically complex areas of the law be-

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<sup>220</sup> See FED. R. CIV. P. 11(b) (stating that presenting a pleading to the court certifies, *inter alia*, that it has been presented following a reasonable investigation); see also FED. R. CIV. P. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."). Indeed, this information is also potentially subject to the attorney-client privilege or work-product protection. See MENELL ET AL., *supra* note 44, at 4-8.

<sup>221</sup> See *supra* notes 106-08 and accompanying text.

<sup>222</sup> Sudarshan, *supra* note 9, at 176-77.

<sup>223</sup> Eon-Net L.P. v. Flagstar Bancorp, 249 F. App'x 189, 189-90 (Fed. Cir. 2007).

<sup>224</sup> *Id.* at 197.

<sup>225</sup> *Id.* at 196.

cause it increases a defendant's response costs.<sup>226</sup> More specifically, the cases previously mentioned, both before and after *Twombly*, typically do not require a plaintiff to specify the claim being infringed, nor the allegedly infringing product or process.<sup>227</sup> Thus, an infringement complaint does not inform a defendant of what the case is truly about, requiring a defendant to expend substantial resources in order to effectively respond.<sup>228</sup>

These expenses generally result from the lack of two details in a complaint. First, most patent infringement suits allege infringement of patents with numerous claims, or assert infringement of several patents.<sup>229</sup> As a result, a defendant must expend time and effort interpreting each potentially applicable claim, performing prior art searches for potential invalidity defenses, and preparing non-infringement defenses, which typically require hiring experts.<sup>230</sup> This process often occurs during the period before an answer is filed so that a defendant can assert any applicable affirmative defenses.<sup>231</sup> This period is limited: twenty days after a complaint is served, or sixty days if a defendant waives service of process.<sup>232</sup> Responding in this short period of time, therefore, entails significant costs and may preclude a defendant from mounting an effective defense.<sup>233</sup> Further, unlike nuisance-value plaintiffs, courts typically require defendants to plead additional detail for affirmative defenses such as invalidity and inequitable conduct.<sup>234</sup> Accordingly, even

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<sup>226</sup> See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 65 (2007) (noting how notice pleading does not work well in complex litigation).

<sup>227</sup> See *supra* Part II.B.

<sup>228</sup> See Donoghue, *supra* note 94, at 6.

<sup>229</sup> E.g., Sudarshan, *supra* note 9, at 164–65.

<sup>230</sup> *Id.* at 165; see also Donoghue, *supra* note 94, at 12–13 (describing this burden as “Herculean”).

<sup>231</sup> See FED. R. CIV. P. 8(c)(1).

<sup>232</sup> FED. R. CIV. P. 12(a)(1)(A); see also FED. R. CIV. P. 4(d) (outlining the process for waiver which results in an extension of the time to answer).

<sup>233</sup> See Donoghue, *supra* note 94, at 3–4.

<sup>234</sup> See MENELL ET AL., *supra* note 44, at 2-23 to 2-24 (discussing the heightened pleading requirements for inequitable conduct and noting that “[c]ourts can require defendants to identify specific prior art references they intend to assert as invalidating and to disclose invalidity claims based on written description, indefiniteness, or enablement”); N.D. CAL. LOCAL PATENT R. 3-3; see also *infra* Part III.B (discussing the application of Federal Rule of Civil Procedure 9(b) to inequitable conduct).

without an effective Rule 11 limitation, defendants need to conduct additional investigation and incur unique costs in responding to an infringement complaint.<sup>235</sup>

Additionally, large companies are the most common target of nuisance-value suits.<sup>236</sup> Since a plaintiff does not need to plead the specific method of infringement by a defendant, a large company will need to investigate which of its products may be infringing—an expensive undertaking.<sup>237</sup> Thus, overall, notice pleading imposes significant costs on alleged infringers, which only further encourages nuisance-value settlements and, therefore, the filing of nuisance-value claims.

### 3. Prevents Early Dismissal

As previously discussed, the overall paradigm of the Federal Rules is that discovery will expose meritless claims and that such claims can then be disposed of through motions for summary judgment.<sup>238</sup> Accordingly, the minimal pleading requirements of Rule 8(a) were intended to prevent the dismissal of cases until after discovery occurs.<sup>239</sup>

In the patent context, however, this minimal pleading threshold prevents dismissal until after costly, and typically lengthy, discovery has occurred.<sup>240</sup> As a result, accused infringers are forced to decide between settlement and incurring the substantial expenses associated with discovery.<sup>241</sup> Further, these costs are dispropor-

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<sup>235</sup> For example, a patent is presumed to be valid, 35 U.S.C. § 282 (2006), so a plaintiff does not need to investigate the validity of a patent as part of its Rule 11 pre-filing investigation, whereas a defendant would need to do so in order to assert an invalidity defense. See *MENELL ET AL.*, *supra* note 44, at 2-28 to 2-29; see also *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1303 (Fed. Cir. 2004).

<sup>236</sup> See Douglas L. Price, *Assessing the Patentability of Financial Services and Products*, 3 J. HIGH TECH. L. 141, 157 (2004) (“[T]here has been a substantial increase in nuisance cases by smaller companies who seek wealth by bringing patent infringement suits against larger companies.”); see also Bessen & Meurer, *Lessons*, *supra* note 26, at 14 (noting that “small firms and independent inventors might engage in more opportunistic litigation”).

<sup>237</sup> See Donoghue, *supra* note 94, at 12–13.

<sup>238</sup> See *supra* notes 134–35 and accompanying text.

<sup>239</sup> See, e.g., Epstein, *supra* note 226, at 69–70 (noting the link between pleading standards and discovery); see also *supra* note 137 and accompanying text.

<sup>240</sup> See, e.g., Donoghue, *supra* note 94, at 6; Heller & Gollin, *supra* note 97, § 70.01 (discussing the costs of discovery in patent infringement actions); see also *supra* notes 48–52 and accompanying text.

<sup>241</sup> Donoghue, *supra* note 94, at 6; Harkins, *supra* note 59, at 443–44.

portionately allocated to defendants.<sup>242</sup> It should come as no surprise, therefore, that a large percentage of infringement cases settle before discovery fully begins.<sup>243</sup> For these reasons, notice pleading facilitates the proliferation of nuisance-value patent infringement claims.

#### IV. The Use of Heightened Pleading for Patent Infringement Actions

As the above analysis demonstrates, notice pleading is problematic in patent infringement actions. But are there any alternatives? This section explores the use of heightened, or particularized, pleading. Essentially, this alternative requires a plaintiff to plead more detail in support of a claim. Implementing this approach in patent cases presents an opportunity to remedy the ills caused by notice pleading and to begin addressing the current patent litigation predicament.

##### A. Heightened Pleading and Its Use in Other Areas

Other areas of the law use heightened pleading as a mechanism to reduce the amount of costly, time-consuming, and often frivolous litigation.<sup>244</sup> Examining some of these areas, along with the rationales for why heightened pleading was implemented, provides a useful background for why adopting a similar approach is appropriate for patent infringement actions.

##### 1. Federal Rule of Civil Procedure 9(b)

The Federal Rules of Civil Procedure contain one prominent example of heightened pleading requirements. Rule 9 states that “a party must state with particularity the circumstances constituting fraud or mistake.”<sup>245</sup> Generally, courts have interpreted this language to require a plaintiff to plead facts regarding who made a false statement, when and where it was made, as well as the content of the statement.<sup>246</sup> Depending on the specific subject matter, some courts require even more detail.<sup>247</sup>

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<sup>242</sup> See *supra* notes 91–96 and accompanying text.

<sup>243</sup> See, e.g., *BESSEN & MEURER*, *supra* note 5, at 131–32.

<sup>244</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (“On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires.”).

<sup>245</sup> FED. R. CIV. P. 9(b).

<sup>246</sup> See, e.g., *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (“Put simply, Rule 9(b) requires ‘the who, what, when, where, and how’ to be laid out.” (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997))); *U.S. ex rel. Costner v. United*



The requirement of particularized facts has several rationales.<sup>248</sup> First, it discourages meritless claims of fraud or mistake, which are frequently advanced solely for their settlement value and which impose substantial costs on courts and parties.<sup>249</sup> Second, these claims cover such a wide variety of potential conduct that a defendant needs more information about the plaintiff's claim in order to prepare a responsive pleading.<sup>250</sup> Particularity is also premised on the fact that fraud and mistake claims involve alleged conduct that incorporates some degree of moral turpitude, so particularity is needed to protect defendants from lightly made claims.<sup>251</sup> These considerations resulted in the particularity requirement in cases of fraud and mistake.

## 2. Securities Fraud

Securities fraud is one area where heightened pleading has been adopted by statute. Pursuant to federal securities statutes and their accompanying implement-

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States, 317 F.3d 883, 888 (8th Cir. 2003) (noting that Rule 9(b) requires a claim to "identify who, what, where, when, and how"); *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 19 (1st Cir. 2002) (stating that Rule 9(b) requires a plaintiff to specify "the time, place, and content of the alleged false or fraudulent representations" (quoting *Powers v. Boston Cooper Corp.*, 926 F.2d 109, 111 (1st Cir. 1991))); *Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 678 (6th Cir. 2001); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999); 5A WRIGHT & MILLER, *supra* note 117, § 1297.

<sup>247</sup> 5A WRIGHT & MILLER, *supra* note 117, § 1297.

<sup>248</sup> For a complete discussion of the rationales for Rule 9(b), see 5A WRIGHT & MILLER, *supra* note 117, § 1296.

<sup>249</sup> See, e.g., *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *U.S. ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004); *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002); 5A WRIGHT & MILLER, *supra* note 117, § 1296; see also *Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985) (noting that Rule 9(b) serves to "eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed").

<sup>250</sup> See, e.g., *Williams*, 389 F.3d at 1256; *Clausen*, 290 F.3d at 1310; *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236–37 (10th Cir. 2000); 5A WRIGHT & MILLER, *supra* note 117, § 1296.

<sup>251</sup> See *Kearns*, 567 F.3d at 1125 (noting that a purpose of Rule 9(b) is "to protect those whose reputation would be harmed as a result of being subject to fraud charges"); *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999); *Harsco Corp. v. Segui*, 91 F.3d 337, 347 (2d Cir. 1996); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992) ("This higher standard stems from the obvious concerns that general, unsubstantiated charges of fraud can do damage to a defendant's reputation."); 5A WRIGHT & MILLER, *supra* note 117, § 1296.

ing regulations, private individuals can bring a civil action for securities fraud.<sup>252</sup> The federal securities statutes forbid publicly traded companies from using “any manipulative or deceptive device” in connection with the purchase or sale of securities.<sup>253</sup> Further, Securities and Exchange Commission Rule 10b-5 prohibits, in part, making “any untrue statement of a material fact,” or failing “to state a material fact necessary in order to make the statements made . . . not misleading.”<sup>254</sup> Courts have implied the right to a private damages action from these sources.<sup>255</sup>

In 1995, Congress passed the Private Securities Litigation Reform Act, over the President’s veto, to address alleged abuses in securities litigation.<sup>256</sup> A key section of this legislation involved heightening the pleading requirements for private securities fraud actions.<sup>257</sup> Specifically, the Act required a complaint for securities fraud, for each alleged violation, to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>258</sup>

These heightened pleading standards were designed to “curb perceived abuses of the [section] 10(b) private action.”<sup>259</sup> Specifically, Congress noted the practice of routinely filing costly and burdensome lawsuits for the purpose of extracting “exorbitant ‘settlements.’”<sup>260</sup> The high costs of these suits created incentives for

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<sup>252</sup> *E.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (“Private federal securities fraud actions are based upon federal securities statutes and their implementing regulations.”).

<sup>253</sup> 15 U.S.C. § 78j (2006); *see also id.* § 78u-4(b).

<sup>254</sup> 17 C.F.R. § 240.10b-5 (2009).

<sup>255</sup> *E.g.*, *Dura Pharms., Inc.*, 544 U.S. at 341 (“The courts have implied from these statutes and Rule a private damages action, which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation.”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (“The existence of this implied remedy is simply beyond peradventure.”).

<sup>256</sup> *See* Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.) [hereinafter PSLRA]; Marcus, *Puzzling Persistence*, *supra* note 117, at 1765.

<sup>257</sup> *See* PSLRA § 1, 109 Stat. at 746–47.

<sup>258</sup> 15 U.S.C. § 78u-4(b)(2) (2006). Several courts have concluded that this statutory pleading standard is essentially the same standard as Federal Rule of Civil Procedure 9(b). *See, e.g.*, *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 253 (3d Cir. 2009); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1165 (9th Cir. 2009); *Miss. Pub. Employees’ Ret. Sys. v. Boston Scientific Corp.*, 523 F.3d 75, 85 n.5 (1st Cir. 2008).

<sup>259</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007).

<sup>260</sup> H.R. REP. NO. 104-369, at 31–32 (1995) (Conf. Rep.).

parties to quickly settle, which only further encouraged the filing of additional claims.<sup>261</sup> In other words, heightened pleading addressed the problems of “nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers.”<sup>262</sup> Thus, a more robust pleading requirement was implemented in securities fraud cases to limit such nuisance-value suits.

### B. Applying a Heightened Pleading Standard to Patent Infringement Actions

Similar to these other types of cases, patent infringement litigation, as previously outlined, is expensive, time-intensive, and increasingly brought by nuisance-value plaintiffs.<sup>263</sup> As a result, like these other substantive areas, the pleading requirements for patent cases should be raised to curb litigation abuse.<sup>264</sup>

Initially, it is important to note that the pleading with particularity required by Rule 9(b) currently has limited application in patent cases. The sole area where courts apply the rule is to the affirmative defense of inequitable conduct.<sup>265</sup> This defense alleges that the patentee, when applying for the patent, intended to mislead or deceive the patent examiner and “fail[ed] to disclose material information or

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<sup>261</sup> See *id.* at 31.

<sup>262</sup> *Tellabs, Inc.*, 551 U.S. at 320 (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)).

<sup>263</sup> See *supra* Part I.

<sup>264</sup> Notably, other countries have imposed particularity requirements for pleading patent infringement actions. See, e.g., CPR 63.9 (U.K.), available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/parts/part63.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/parts/part63.pdf) (requiring “particulars” in pleading patent infringement claim); see also CPR 63.9, PD ¶ 11.1 (U.K.), available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/practice\\_directions/pd\\_part63.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/practice_directions/pd_part63.pdf) (“In a claim for infringement of a patent—(1) the statement of case must—(a) show which of the claims in the specification of the patent are alleged to be infringed; and (b) give at least one example of each type of infringement alleged . . .”). For a broader discussion of pre-trial patent procedure internationally, see generally Brian Daley et al., *Pre-trial Proceedings in Patent Infringement Actions: A Comparison Among Canada, the United Kingdom, and the United States of America*, 35 AIPLA Q.J. 113 (2007).

<sup>265</sup> See, e.g., *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326–27 (Fed. Cir. 2009); *Cent. Admixture Pharmacy Servs., Inc. v. Advanced Cardiac Solutions, P.C.*, 482 F.3d 1347, 1356–57 (Fed. Cir. 2007); *Ferguson Beauregard/Logic Controls v. Mega Sys., L.L.C.*, 350 F.3d 1327, 1344 (Fed. Cir. 2003); see also *Bartronics, Inc. v. Power-One, Inc.*, 245 F.R.D. 532, 535 (S.D. Ala. 2007) (listing cases); David Hricik, *Wrong About Everything: The Application By the District Courts of Rule 9(b) to Inequitable Conduct*, 86 MARQ. L. REV. 895, 905 (2003) (“A long line of district courts have held that Rule 9(b) applies to inequitable conduct claims.”).

submit[ted] materially false information to the PTO during prosecution.”<sup>266</sup> If proven, it renders the patent unenforceable.<sup>267</sup> Because this defense is essentially a “fraud on the Patent Office,” courts apply Rule 9(b) and require that it be pled with particularity.<sup>268</sup> However, courts have resisted expanding the particularity requirement to other areas of patent law.<sup>269</sup>

### *I. Heightened Patent Pleading Generally*

In light of the Supreme Court’s decisions in *Twombly* and *Iqbal*, and given the current patent litigation predicament, it is time to revisit the application of heightened pleading requirements to infringement actions. But what would a particularized patent pleading regime look like?

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<sup>266</sup> *Digital Control, Inc. v. Charles Mach. Works*, 437 F.3d 1309, 1313 (Fed. Cir. 2006); *see Exergen Corp.*, 575 F.3d at 1327 n.3 (“The substantive elements of inequitable conduct are: (1) an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) the individual did so with a specific intent to deceive the PTO.”); *Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs., Ltd.*, 394 F.3d 1348, 1351 (Fed. Cir. 2005); *see also* 37 C.F.R. § 1.56(a) (2009) (“Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section.”).

<sup>267</sup> *E.g.*, *Digital Control, Inc.*, 437 F.3d at 1313; *Life Techs., Inc. v. Clontech Labs., Inc.*, 224 F.3d 1320, 1324 (Fed. Cir. 2000) (“A determination of inequitable conduct during the prosecution of a patent application renders the subsequently issued patent unenforceable.”).

<sup>268</sup> *E.g.*, *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988) (“The charge was formerly known as ‘fraud on the Patent Office,’ a more pejorative term, but the change of name does not make the thing itself smell any sweeter.”); *see also Venetec Int’l, Inc. v. Nexus Med., L.L.C.*, 541 F. Supp. 2d 612, 618 (D. Del. 2008) (“Because inequitable conduct is a claim sounding in fraud, Rule 9(b) applies which requires the elements of inequitable conduct to be pled with particularity.”). Specifically, the Federal Circuit has held that “in pleading inequitable conduct in patent cases, Rule 9(b) requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO.” *Exergen Corp.*, 575 F.3d at 1327.

<sup>269</sup> *See, e.g.*, *Cent. Admixture Pharmacy Servs., Inc. v. Advanced Cardiac Solutions, P.C.*, 482 F.3d 1347, 1356 (Fed. Cir. 2007) (declining to apply Rule 9 to a claim for willful infringement); *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys., L.L.C.*, 350 F.3d 1327, 1343 (Fed. Cir. 2003) (“Willfulness does not equate to fraud, and thus, the pleading requirement for willful infringement does not rise to the stringent standard required by Rule 9(b).”).

Generally, heightened pleading would require the pleading of additional detail to support an infringement claim.<sup>270</sup> More specifically, adopting a heightened pleading standard would require a plaintiff, similar to the approach currently adopted by some courts, to specifically identify the claims of the patent that a defendant is allegedly infringing.<sup>271</sup> It would also require a plaintiff to specifically allege how the defendant is infringing.<sup>272</sup> Thus, a plaintiff would need to identify how the defendant's products, processes, or acts infringe specific patent claims.

This modification could also have implications for the pleading of patent claim construction. As previously outlined, ambiguity in the current claim construction jurisprudence allows nuisance-value patentees to undermine the efficacy of the Rule 11 pre-suit investigation requirement.<sup>273</sup> A particularity requirement, however, could incorporate requiring a patentee to include in the complaint how it is construing the patent's claims to come to the conclusion that the defendant is infringing. After all, the plaintiff, in theory, should be conducting a claim construction analysis prior to filing suit anyway.<sup>274</sup> Although plaintiffs could amend their complaint as discovery progressed, they would still be required to make an initial showing of sufficient facts before discovery could begin.<sup>275</sup> By requiring plaintiffs to initially plead this claim construction, defendants would receive additional notice and the purposes of Rule 11 would be more effectively vindicated.<sup>276</sup>

A heightened pleading standard in infringement suits would also address the perverse incentives created by the current use of notice pleading.<sup>277</sup> First, it would increase a nuisance-value plaintiff's costs of filing an infringement suit because the

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<sup>270</sup> See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (noting that heightened pleading requires "greater factual detail").

<sup>271</sup> Donoghue, *supra* note 94, at 3; see also *supra* notes 190–91 and accompanying text.

<sup>272</sup> Donoghue, *supra* note 94, at 10.

<sup>273</sup> See *supra* notes 221–22 and accompanying text.

<sup>274</sup> See *supra* notes 215–17 and accompanying text.

<sup>275</sup> This is because a motion to dismiss for failure to state a claim is made before discovery begins. FED. R. CIV. P. 12(b). A patentee would always be able to move the court to amend the complaint if necessary, which the rules state that a court should "freely give . . . when justice so requires." FED. R. CIV. P. 15(a)(2).

<sup>276</sup> Cf. William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 969–71 (1987) (arguing that Rule 9(b) and Rule 8(a) should be harmonized and greater particularity required as needed for notice).

<sup>277</sup> See *supra* Part II.C.

complaint would take more time and effort to prepare, and plaintiffs would be forced to incur presuit investigatory costs.<sup>278</sup> These additional costs would make obtaining a nuisance-value settlement more difficult, thereby reducing the incentive to file a nuisance-value action.<sup>279</sup>

Second, a heightened pleading standard would provide an opportunity for defendants to avoid some of the costs associated with responding to nuisance-value suits. Insufficient pleading is addressed through a motion to dismiss for failure to state a claim.<sup>280</sup> A defendant makes this motion prior to filing an answer.<sup>281</sup> Because affirmative defenses, such as patent invalidity, are not raised until an answer is filed,<sup>282</sup> this means that a defendant would not have to incur the significant costs of preparing an invalidity defense until the court rules on the motion.<sup>283</sup> Thus, heightened pleading allows a defendant to put off many of the costs associated with responding to an infringement claim and reduces the incentive to immediately agree to nuisance-value settlements.

Additionally, heightened pleading would theoretically limit the costs a defendant would need to incur in order to prepare an answer in response to a nuisance-value infringement claim. A defendant would no longer be forced to determine which patent claims were at issue or how those claims were being infringed when preparing its answer.<sup>284</sup> Although a plaintiff could seek to amend these claims, a defendant could then move to amend its answer in response or argue that permitting the plaintiff's amendment would not be in the interests of justice.<sup>285</sup> By shifting

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<sup>278</sup> See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 75 (2002) (noting that a heightened pleading regime will require a plaintiff to conduct a "thorough investigation and well-conceived pleading from the beginning of a case").

<sup>279</sup> See JAFFE & LERNER, *supra* note 35, at 176–77 (noting how doctrinal shifts by courts affect patentees' willingness to bring infringement suits).

<sup>280</sup> See FED. R. CIV. P. 12(b)(6).

<sup>281</sup> FED. R. CIV. P. 12(b).

<sup>282</sup> FED. R. CIV. P. 8(c).

<sup>283</sup> See *supra* notes 97–98 and accompanying text.

<sup>284</sup> See *supra* Part II.B.

<sup>285</sup> See FED. R. CIV. P. 15(a). Several courts have denied plaintiff-patentees' motions to amend pursuant to this provision. See, e.g., *Hutchins v. Zoll Med. Corp.*, 430 F. Supp. 2d 24, 36–37 (D. Mass. 2006) (denying a patentee's motion to amend the complaint where it would be prejudicial and overly burdensome to the defendant); *Ameritek, Inc. v. Carolina Lasercut Corp.*, 891 F. Supp. 254, 255–56 (M.D.N.C. 1994) (same).

this burden to the plaintiff, it would also provide another disincentive for plaintiffs contemplating filing a nuisance-value suit.<sup>286</sup>

Similarly, more stringent pleading requirements would also facilitate the early dismissal of dubious infringement claims.<sup>287</sup> Heightened pleading would allow for early dismissal of these claims before the discovery process begins.<sup>288</sup> This is obviously related to lowering a defendant's costs, because the earlier a patent case is resolved, the fewer costs a defendant must incur.<sup>289</sup> Thus, overall, particularized pleading in patent infringement cases would impose additional costs on plaintiffs and lower the burden on defendants, reducing the incentives that currently foster the filing of nuisance-value infringement claims.

Moreover, adopting more stringent pleading requirements would effectuate the Supreme Court's decisions in *Twombly* and *Iqbal*. In *Twombly*, the Court sent a clear signal that the particularity required in pleading a substantive cause of action should be linked to the practical realities associated with that cause of action, and recognized how pleading standards can serve as a critical tool in streamlining litigation and its costs.<sup>290</sup> Essentially, the Court recognized that in certain types of cases,

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<sup>286</sup> See Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1856 (2004) (stating that a factor in the success of a nuisance-value litigation strategy is the cost to the initiating party versus the cost of an opposing party responding).

<sup>287</sup> See Marcus, *Revival of Fact Pleading*, *supra* note 124, at 454 (arguing that pleadings practice should be used to resolve cases on the merits); see also *Giarratano v. Johnson*, 521 F.3d 298, 304 n.3 (4th Cir. 2008) (noting that “the *Twombly* standard is even more favorable to dismissal of a complaint”).

<sup>288</sup> See *supra* note 275 and accompanying text; see also U.S. *ex rel.* *Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009) (stating that *Twombly* “raises a hurdle in front of what courts had previously seen as a plaintiff’s nigh immediate access to discovery” and noting that “[i]n cases of fraud, Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery”).

<sup>289</sup> See BESSEN & MEURER, *supra* note 5, at 131.

<sup>290</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–60 (2007); see also *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (noting that *Iqbal* and *Twombly* sought to address “the recognized problems created by ‘strike suits’ . . . and the high costs of frivolous litigation”); *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (“The [*Twombly*] Court held that in complex litigation . . . the defendant is not to be put to the cost of pretrial discovery—a cost that in complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak—unless the complaint says enough about the case to permit an inference that it may well have real merit.”). This position has previously appeared in the Court’s jurisprudence. *E.g.*, *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (“Certainly, in a case of this magnitude, a district court must retain the power to insist

practical realities interfere with the notice function of complaints.<sup>291</sup> Similar concerns were raised in *Iqbal*.<sup>292</sup> The potential benefits of heightening these requirements indicate that courts should seize this opportunity to address the current patent litigation predicament.<sup>293</sup>

## 2. Interaction with Form 18 and the Need for Revision

A significant related issue is how a heightened pleading requirement would interact with Form 18, which requires only a few cursory statements in order for a complaint to survive a motion to dismiss.<sup>294</sup> These minimal requirements conflict with *Twombly* and *Iqbal*, which require a plaintiff to provide a more “plausible” pleading.<sup>295</sup>

This inconsistency dictates the revision of Form 18.<sup>296</sup> These revisions could incorporate a heightened pleading standard.<sup>297</sup> The form was originally drafted when the rules were first promulgated in 1938.<sup>298</sup> Since that time, it has not undergone any substantive revisions.<sup>299</sup>

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upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

<sup>291</sup> See *Twombly*, 550 U.S. at 557–59.

<sup>292</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); see also *Hecker v. Deere & Co.*, 569 F.3d 708, 710 (7th Cir. 2009) (noting that “*Iqbal* reinforces *Twombly*’s message”).

<sup>293</sup> See *Donoghue*, *supra* note 94, at 13; see also Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009) (“As the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases.”).

<sup>294</sup> See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 12–13 (2009) (noting the tension between the forms and the pleading standard outlined in *Twombly*); see also *supra* notes 167–70.

<sup>295</sup> See *supra* notes 202, 206 and accompanying text.

<sup>296</sup> See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., concurring in part, dissenting in part) (“One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.”).

<sup>297</sup> See *id.*

<sup>298</sup> See FED. R. CIV. P. Form 16 (1938), reprinted at 303 U.S. 775–76.

<sup>299</sup> Compare *id.*, with FED. R. CIV. P. Form 18; see *McZeal*, 501 F.3d at 1360 (Dyk, J., concurring in part, dissenting in part). In 1963, the prayer for relief section of the form was amended to conform to the language of 35 U.S.C. § 284.



Patent law, however, has undergone significant changes since 1938, which have not been accounted for in the form.<sup>300</sup> During the early twentieth century, through a series of decisions, the Supreme Court established a clear anti-patent framework, which one commentator described as its “most virulent anti-patent era.”<sup>301</sup> Thus, the federal rules were drafted in an era of limited patent rights.

However, since that time, two significant changes occurred. First, the passage of the 1952 Patent Act represented a doctrinal shift in patent law.<sup>302</sup> Generally, the Act overturned the Supreme Court’s prior anti-patent jurisprudence.<sup>303</sup> For example, changes in the joint inventorship doctrine made patent invalidation less likely.<sup>304</sup> The Act also clarified what rights a patent conferred and approved of the corporate patent strategy of acquiring “blocking patents.”<sup>305</sup>

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<sup>300</sup> See generally Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187 (2000).

<sup>301</sup> *Id.* at 2223; see David Silverstein, *Patents, Science, and Innovation: Historical Linkages and Implications for Global Technological Competitiveness*, 17 RUTGERS COMPUTER & TECH. L.J. 261, 304 (1991) (describing this period as the “Dark Ages” in the history of the U.S. patent system); see also *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 152 (1950) (“The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans.”); *id.* at 158 (Douglas, J., concurring) (“The patent involved in the present case belongs to this list of incredible patents which the Patent Office has spawned. The fact that a patent as flimsy and as spurious as this one has to be brought all the way to this Court to be declared invalid dramatically illustrates how far our patent system frequently departs from the constitutional standards which are supposed to govern.”); *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 566–68 (1949) (invalidating a patent for “want of invention”); *id.* at 572 (Jackson, J., dissenting) (stating that “the only patent that is valid is one which this Court has not been able to get its hands on”); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665–69 (1944) (stating that “the limits of the patent are narrowly and strictly confined to the terms of the grant” and deciding to “limit substantially the doctrine of contributory infringement”); *Cuno Eng’g Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91–92 (1941) (adopting a heightened test for patentability, which was to be strictly applied, that required a “flash of creative genius”).

<sup>302</sup> See Bryson Act, Pub. L. No. 82-593, 66 Stat. 792 (1952); Merges, *supra* note 300, at 2221–24.

<sup>303</sup> Merges, *supra* note 300, at 2223.

<sup>304</sup> Merges, *supra* note 300, at 2222.

<sup>305</sup> Merges, *supra* note 300, at 2222; see also *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1379 n.2 (Fed. Cir. 2000) (“A ‘blocking patent’ is an earlier patent that must be licensed in order to practice a later patent. This often occurs, for instance, between a pioneer patent and an improvement patent.”).

Second, the Federal Circuit's creation in 1982 effected significant changes in patent law.<sup>306</sup> In addition to making it easier to obtain a patent, the Federal Circuit has made patents easier to enforce.<sup>307</sup> The court also made a substantial impact on the remedies available for infringement.<sup>308</sup> In short, the creation of the Federal Circuit served to expand patent rights well beyond their scope when the federal rules, and thus Form 18, were drafted. Overall, these changes in patent law since the 1930s are in stark contrast to the relative stability of other substantive legal theories, such as negligence, which are also illustrated in the official forms.<sup>309</sup>

Additionally, patents themselves are significantly more complex today than they were when Form 18 was originally drafted. As the twentieth century progressed, there was a drastic increase in the number of claims per patent.<sup>310</sup> The underlying technology also became significantly more complicated during this period.<sup>311</sup> Further, as previously mentioned, patents play a much larger role in modern society.<sup>312</sup> For example, in 1938, 43,130 patents were issued, out of 75,006 applications.<sup>313</sup> In contrast, in 2008, over four times as many patents were issued

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<sup>306</sup> See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 37 (codified as amended at 28 U.S.C. § 1295 (2006)); Merges, *supra* note 300, at 2224; Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 310 (2004) (“The United States’ establishment of the Court of Appeals for the Federal Circuit . . . in 1982 also institutionalized a more pro-patent approach.”).

<sup>307</sup> See, e.g., BESSEN & MEURER, *supra* note 5, at 18; JAFFE & LERNER, *supra* note 35, at 115–23 (outlining how the Federal Circuit expanded patentable subject matter and made invalidity challenges more difficult).

<sup>308</sup> See JAFFE & LERNER, *supra* note 35, at 110–16 (discussing how the Federal Circuit has strengthened the remedies available to a patentee for infringement).

<sup>309</sup> See Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779, 780 (2007) (noting the “relative stability in tort law throughout much of the twentieth century”). The Federal Rules contain an illustrative form for negligence. FED. R. CIV. P. Form 11. This form also has not changed significantly over time. Compare *id.*, with FED. R. CIV. P. Form 9 (1938), reprinted at 308 U.S. 771.

<sup>310</sup> See, e.g., John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77, 81 (2002) (“Patents issued in the 1990s contained approximately 50% more claims than patents issued in the 1970s.”).

<sup>311</sup> *E.g.*, *id.* at 79–80.

<sup>312</sup> See *supra* notes 31–34 and accompanying text.

<sup>313</sup> See U.S. PATENT & TRADEMARK OFFICE, U.S. PATENT ACTIVITY: CALENDAR YEARS 1790 TO THE PRESENT, at 2 (2009), available at [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h\\_counts.pdf](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.pdf).

out of almost seven times as many applications.<sup>314</sup> These changes only provide additional reasons to re-evaluate the content of Form 18 and the pleading requirements in patent infringement actions.<sup>315</sup>

Alternatively, courts should interpret Form 18 in light of *Twombly* and *Iqbal*. For example, the sample infringement allegation in Form 18 is that “[t]he defendant has infringed and is still infringing . . . by making, selling, and using electric motors.”<sup>316</sup> Several post-*Twombly* decisions have interpreted the use of the term “electric motors” as requiring a plaintiff to plead the specific product or method of infringement.<sup>317</sup> Another court narrowly interpreted the form as only applying when the plaintiff alleged solely direct infringement.<sup>318</sup> Accordingly, the claim that an alleged infringer “directly and/or indirectly” infringed the patents at issue precluded the patentee from relying on Form 18.<sup>319</sup>

These decisions, however, are not uniform and, indeed, may not go far enough in the amount of information they require a patentee to plead. As a result, revising the form to require more detailed allegations is a preferable mechanism for addressing the problems created by notice pleading in patent infringement actions, and best effectuates *Twombly* and *Iqbal*.

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<sup>314</sup> See *supra* notes 32–33 and accompanying text.

<sup>315</sup> See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360–61 (Fed. Cir. 2007) (Dyk, J., concurring in part, dissenting in part); cf. Vangelis Economu, *Sacking Super Sack: Using Existing Rules to Prevent Patentees from Fleeing an Improvident Patent Infringement Lawsuit*, 8 J. MARSHALL REV. INTELL. PROP. L. 90 (2008) (discussing how courts can interpret procedural mechanisms in the Federal Rules of Civil Procedure to limit patent litigation abuse).

<sup>316</sup> FED. R. CIV. P. Form 18.

<sup>317</sup> See, e.g., *Eidos Commc'ns, L.L.C. v. Skype Techs. SA*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 638337, at \*4 (D. Del. Feb. 24, 2010) (“The complaint at bar does not mimic Form 18, insofar as no category of product (or general identification of a process or method) is identified.”); *Bender v. Motorola, Inc.*, No. Civ. A. 09-1245 SBA, 2010 WL 726739, at \*3 (N.D. Cal. Feb. 26, 2010) (“The form contemplates that the pleader identify the accused device with some semblance of specificity to alert the alleged infringer which device is at issue. It does not contemplate that the accused device or devices be described in terms of a multiplicity of generically-described product lines . . . .”); *Ware v. Circuit City Stores, Inc.*, No. Civ. A. 4:05-CV-0156-RLV, 2010 WL 767094, at \*2 (N.D. Ga. Jan. 5, 2010); *Fifth Market, Inc. v. CME Group, Inc.*, No. Civ. A. 08-520 GMS, 2009 WL 5966836, at \*1 (D. Del. May 14, 2009) (“Form 18 of Federal Rule of Civil Procedure 84 makes clear that, at a minimum, Fifth Market must allege, in general terms, an infringing product.”).

<sup>318</sup> See *Elan Microelectronics Corp. v. Apple, Inc.*, No. Civ. A. 09-01531 RS, 2009 WL 2972374, at \*2 (N.D. Cal. Sept. 14, 2009).

<sup>319</sup> *Id.*

### C. Counter-Arguments to Heightened Pleading

*Twombly* and *Iqbal* are not without their critics.<sup>320</sup> Indeed, legislation has already been introduced in Congress to overrule them.<sup>321</sup> Many of these criticisms equally apply in the patent infringement context. In the end, however, the unique aspects of patent litigation indicate that the potential disadvantages of adopting heightened pleading for patent infringement are minimal.

#### 1. Increased Patent Enforcement Costs

Heightened pleading reduces the incentive to file a nuisance-value suit, in part, by imposing additional costs on a plaintiff.<sup>322</sup> These additional costs, however, would not fall solely on nuisance-value plaintiffs.<sup>323</sup> Instead, they would apply to all patent holders and potentially make enforcement of patent rights more difficult, particularly because it would lead to the dismissal of at least some meritorious claims.<sup>324</sup> Because the primary justification of patents is their ability to

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<sup>320</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting) (criticizing the majority as enacting a “fundamental—and unjustified—change in the character of pretrial practice”); Spencer, *supra* note 148, at 433 (concluding that *Twombly* is “an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court”); Editorial, *Throwing Out Mr. Iqbal’s Case*, N.Y. TIMES, May 20, 2009, at A28 (stating that *Iqbal* represents “[t]he [C]ourt’s conservative majority . . . increasingly using legal technicalities to keep people from getting a fair hearing”).

<sup>321</sup> See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (stating that “a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)”); Open Access to Courts Act, H.R. 4115, 111th Cong. (2009) (“A court shall not dismiss a complaint under subdivision (b)(6), (c), or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible . . .”).

<sup>322</sup> See *supra* notes 278–79 and accompanying text.

<sup>323</sup> See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 910–11 (2009) (discussing how heightened pleading, like any case-screening mechanism, affects both legitimate and meritless suits).

<sup>324</sup> See Spencer, *supra* note 148, at 481 (noting that “plausibility pleading rejects potentially valid, meritorious claims”).

incentivize innovation, making enforcement more difficult could have a detrimental impact on the incentive function of patents.<sup>325</sup>

In reality, however, this fear is unfounded. While some costs may be new, the particularized allegations that heightened pleading would entail are not imposing any costs that are not theoretically already required.<sup>326</sup> Indeed, according to Rule 11, plaintiffs should be performing a pre-suit investigation anyway, at least to the extent possible, but notice pleading currently allows some of them to effectively shirk this responsibility.<sup>327</sup> A heightened pleading requirement would therefore only impose additional costs on those unscrupulous plaintiffs that currently take advantage of this disparity.<sup>328</sup> Thus, instead of requiring plaintiffs to discover more facts, heightened pleading merely requires that they put them into the complaint.<sup>329</sup>

Certainly, the new pleading regime would have some effect at the margins on the ability to enforce some patents. Infringement of some types of patents may be impossible to discover without the benefit of the broad discovery rules included in the Federal Rules of Civil Procedure.<sup>330</sup> For example, process patents may become more difficult to enforce, especially if infringement occurs behind closed doors.<sup>331</sup>

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<sup>325</sup> See Daniel R. Cahoy, *An Incrementalist Approach to Patent Reform Policy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 587, 626 (2006) (noting that "a hobbled enforcement regime can greatly reduce [a patent system's] incentive value").

<sup>326</sup> See Donoghue, *supra* note 94, at 3 ("Holding plaintiffs to a heightened pleading standard will not substantially increase a patent plaintiff's pre-filing burden.").

<sup>327</sup> See *supra* Part II.C.1.

<sup>328</sup> Unfortunately, no empirical data is available that would permit an estimate as to what percentage of patent infringement suits currently fall into this category.

<sup>329</sup> Indeed, to the extent additional pre-filing requirements are imposed, as one commentator points out, requiring a greater investment in pre-filing investigation can "pay dividends later in the litigation if the results help guide a more efficient discovery process." Bone, *supra* note 323, at 926–27.

<sup>330</sup> See Jeffrey I. D. Lewis & Art C. Cody, *Unscrambling the Egg: Pre-Suit Infringement Investigations of Process and Method Patents*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 5, 19 (2002) (noting that it may be difficult for a plaintiff to establish infringement of a process patent prior to discovery); see also MENELL ET AL., *supra* note 44, at 2–29 (noting that "some infringement (for example, of software patents) is difficult to ascertain from publicly available information").

<sup>331</sup> See Lewis & Cody, *supra* note 330, at 7 ("When it comes to determining whether a process or business method infringes a patent, the inquiry is often illusive because critical information is not available to the patent holder."); see also Spencer, *supra* note 148, at 481 (noting that heightened pleading prevents discovery "in circumstances where the needed supporting facts lie within the exclusive possession of the defendants").

These cases, however, would likely be few and far between, and other methods exist to ensure the viability of enforcing these patents.<sup>332</sup> Thus, the overall benefits of adopting heightened pleading would justify any minimal costs that are created for this small subset of claims.

## 2. Alternate Mechanisms to Potentially Curb Abuse

Another potential counterargument is that other mechanisms currently in place can be used to more effectively deter frivolous claims. One such mechanism is the possibility of sanctions.<sup>333</sup> Sanctions, however, have proven to be ineffective at addressing the problem. As previously noted, the ambiguous nature of claim scope allows plaintiffs to file suits that will be unsuccessful at trial but are sufficient to comply with Rule 11.<sup>334</sup>

Antitrust claims based on the patentee's filing of infringement claims are another potential mechanism for curbing patent litigation abuse. Generally, a patent does not implicate antitrust laws, even though a patent grants its holder a monopoly over the patented invention.<sup>335</sup> However, if a patentee abuses this right and brings "sham" litigation, antitrust liability may arise.<sup>336</sup> This liability requires both that the litigation be baseless and that it be brought in bad faith.<sup>337</sup>

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<sup>332</sup> See 35 U.S.C. § 295 (2006) (creating a rebuttable presumption that a process patent has been infringed by a product as long as the patentee makes "a reasonable effort to determine the process actually used in the production of the product"); see also 3 MOY, *supra* note 164, § 12:42 (stating that few cases have used this section).

<sup>333</sup> These sanctions could stem from several sources. First, as previously discussed, Rule 11 provides such a mechanism. See FED. R. CIV. P. 11(b). The U.S. Code also has a patent-specific section allowing a court to award attorney's fees in "exceptional" cases. See 35 U.S.C. § 285 (2006). Finally, a court also has the inherent power to award fees. See 28 U.S.C. § 1927 (2006).

<sup>334</sup> See *supra* notes 221–22 and accompanying text.

<sup>335</sup> See, e.g., *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1304 (Fed. Cir. 2004) ("A patent owner who brings a suit for infringement, without more, is generally exempt from the antitrust laws for that action . . ."); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) ("[T]he antitrust laws do not negate the patentee's right to exclude others from patent property").

<sup>336</sup> See, e.g., *Q-Pharma, Inc.*, 360 F.3d at 1304–05; *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("When a patent owner uses his patent rights not only as a shield to protect his invention, but as a sword to eviscerate competition unfairly, that owner may be found to have abused the grant and may become liable for antitrust violations when sufficient power in the relevant market is present."); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 990 (9th Cir. 1979) ("The bringing of a series of ill-founded patent infringement actions, in bad faith, can constitute an antitrust violation in and of itself if such suits are initiated or pursued with an intent

Standing alone, these claims are ineffective at curbing infringement litigation abuse. Initially, alleged infringers typically raise antitrust violations as counterclaims.<sup>338</sup> Thus, they do not affect the initial costs a defendant must incur—in fact, adding an antitrust counterclaim significantly increases the overall cost of the litigation.<sup>339</sup> Second, these claims are difficult, if not impossible, to win.<sup>340</sup> This is because of legal doctrines that present difficult hurdles, such as the fact that courts presume that an infringement suit has been brought in good faith.<sup>341</sup> Thus, antitrust claims are ineffective at reining in nuisance-value infringement suits.

An additional alternate mechanism is the use of local patent rules. Currently, many district courts adopt local procedural rules specifically for patent cases.<sup>342</sup> These rules may require a patentee to disclose the specific patent claims at issue and the manner of infringement early in litigation.<sup>343</sup> Indeed, the Federal Circuit

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to monopolize a particular industry (and, of course, the other elements of a *Section 2* violation are present).”).

<sup>337</sup> See, e.g., *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1072 (Fed. Cir. 1998) (“[A] sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or validity that is objectively baseless.”); *Argus Chem. Corp. v. Fibre Glass-Evercoat Co.*, 812 F.2d 1381, 1386 (Fed. Cir. 1987).

<sup>338</sup> E.g., David R. Steinman & Danielle S. Fitzpatrick, *Antitrust Counterclaims in Patent Infringement Cases: A Guide to Walker Process and Sham-Litigation Claims*, 10 TEX. INTELL. PROP. L.J. 95, 95 (2001).

<sup>339</sup> Indeed, in *Twombly*, the Supreme Court quoted an opinion by Judge Posner discussing the significant costs of patent antitrust cases. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation)).

<sup>340</sup> See, e.g., *Meurer*, *supra* note 10, at 539 (“Antitrust law does not reach opportunistic litigation because the purpose of such litigation is to extract a settlement payment, not to exclude a rival.”); see also *Meurer*, *supra* note 10, at 540 (“[Antitrust] claims based on sham litigation are very common, but almost never successful.” (footnote omitted)).

<sup>341</sup> See, e.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998) (“The law recognizes a presumption that the assertion of a duly granted patent is made in good faith; this presumption is overcome only by affirmative evidence of bad faith.” (citation omitted)); *Carpet Seaming Tape Licensing Corp. v. Best Seam Inc.*, 616 F.2d 1133, 1143 (9th Cir. 1980) (“[I]nfringement suits are presumed to be in good faith, a presumption which can be rebutted only by clear and convincing evidence.”).

<sup>342</sup> See, e.g., N.D. CAL. LOCAL PATENT R., available at <http://www.cand.uscourts.gov/> (follow “Rules: Civil Rules” hyperlink); E.D. TEX. LOCAL PATENT R., available at <http://www.txed.uscourts.gov/Rules/LocalRules/Documents/Appendix%20M.pdf>.

<sup>343</sup> See, e.g., N.D. CAL. LOCAL PATENT R. 3-1; E.D. TEX. LOCAL PATENT R. 3-1; see also *Advanced Analogic Techs., Inc. v. Kinetic Techs., Inc.*, No. C-09-1360, 2009 WL 1974602, at \*1 (N.D. Cal.

has held that “local rules requiring the early disclosure of infringement and invalidity contentions and requiring amendments to contentions to be filed with diligence” are consistent with the notice pleading regime in the Federal Rules.<sup>344</sup>

Local rules facilitate the efficient resolution of patent cases. The problem, however, is that by definition, these rules are not uniform.<sup>345</sup> Further, these rules still do not provide needed specificity until after a defendant has incurred significant costs responding to the complaint.<sup>346</sup> In fact, many of these rules do not require specific disclosure until after the discovery process has begun.<sup>347</sup> Finally, even though the rules facilitate *efficient* resolution of cases, they do not necessarily facilitate *expedient* resolution.<sup>348</sup> Even with these rules, infringement cases can still take well over a year to resolve.<sup>349</sup> Thus, although the use of local rules, like other potential mechanisms, is beneficial, standing alone, it will not address many of the core issues that foster the growth of nuisance-value infringement claims.

## V. Conclusion

Pleading is just one of the problematic issues in a patent system that some commentators describe as a “drag on innovation.”<sup>350</sup> In fact, legislation is currently pending in Congress to enact widespread, comprehensive patent reform.<sup>351</sup> In any

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July 8, 2009) (denying a motion for a more definite statement because “Patent Local Rule 3-1 requires AATI to identify by name and model number and no later than ten days after the initial case management conference, each accused product, device, and apparatus”).

<sup>344</sup> O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1366 (Fed. Cir. 2006).

<sup>345</sup> See FED. R. CIV. P. 83.

<sup>346</sup> See McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1360 n.3 (Fed. Cir. 2007) (Dyk, J., concurring in part, dissenting in part).

<sup>347</sup> See *id.* (noting that local rules have ameliorated some of the problems with notice pleading but “do nothing to require an adequate statement of the claim before discovery commences”).

<sup>348</sup> Interestingly, the Eastern District of Virginia, which, according to one study, had the fastest median time-to-trial for patent cases from 1995 to 2008 (0.88 years), does not have any local patent rules. See PRICEWATERHOUSECOOPERS, *supra* note 53, at 17. See generally E.D. VA. LOCAL R., available at <http://www.vaed.uscourts.gov/localrules/EDVALRMAY2009.pdf>.

<sup>349</sup> See, e.g., Integrated Circuit Sys., Inc. v. Realtek Semiconductor Co., 308 F. Supp. 2d 1106, 1107 (N.D. Cal. 2004) (“The purpose of the Patent Local Rules is to place the parties on an orderly pretrial track which will produce a ruling on claim construction approximately a year after the complaint is filed.”).

<sup>350</sup> BESSEN & MEURER, *supra* note 5, at 146.

<sup>351</sup> See Patent Reform Act of 2009, S. 515, 111th Cong. (2009).



event, the dramatic increase in costly patent infringement litigation is only contributing to the problem. If anything, this litigation demonstrates that action must be taken to mitigate its drastic and perilous consequences on innovation and the patent system as a whole.

Altering pleading standards will not remedy all that ails the modern patent system, or even all that ails patent infringement litigation. It does, however, present a mechanism for curbing litigation abuse and reining in troll-like behavior. Unlike other potential mechanisms, particularized patent pleading provides a quick, economically efficient method for alleged infringers to contest nuisance-value claims and begin the process of putting the patent system back on track to truly promoting progress in science and the useful arts.