

FIGHTING PATENT TROLLS EARLY: LEARNING FROM THE UNITED KINGDOM IN OUR SCRAMBLE TO DETERMINE THE CORRECT PLEADING STANDARDS FOR DIRECT PATENT INFRINGEMENT

INTRODUCTION

Congress, since the time of the country’s founding, has sought to “promote the [p]rogress of [s]cience and useful [a]rts” through the patent system.¹ Yet the progress of science and useful arts has been hampered recently, ironically through the patent system that was designed for their promotion. This is because patent holders who produce no goods (also known as non-practicing entities—or, pejoratively, “patent trolls”) have taken to leveraging vague patents against true innovators through expensive litigation in hopes of spurring these innovators to settle the case. This leaves one to wonder: how did these frivolous claims become so lucrative?

To answer this, one must delve into the historical development of pleading standards in the United States. Plaintiffs formerly enjoyed a lax pleading standard that only required minimally coherent facts. However, by the beginning of the twenty-first century, these “notice pleading” standards evolved to become far less pro-plaintiff.² Litigants pleading direct patent infringement initially enjoyed insulation from these newly heightened standards through Federal Rule of Civil Procedure 84, which permitted them to initiate a claim with a brief, boilerplate, non-fact-intensive form.³ However, this Rule was abrogated in 2015, leaving district courts to wonder how one was to plead direct patent infringement in light of the new heightened pleading standard. A more pro-plaintiff standard would make it easier for patent trolls to file frivolous lawsuits; a less pro-plaintiff standard would make it harder for patent owners to fully enforce their rights.

This note considers whether the United States might benefit from a strict pleading standard for direct infringement by comparing its pleading standard to that of the United Kingdom. While the data available on patent trolls in the United Kingdom is unfortunately sparse, the discrepancy in the prevalence of patent trolls between the two countries might indicate that a stricter pleading standard like that in the United Kingdom might help the United States in its fight against patent trolls.

The tools the United Kingdom uses to help safeguard its patent system and inventors from patent trolls—e.g., high administrative costs to obtain a

1 U.S. CONST. art. I, § 8, cl. 8.

2 See *infra* Part I.A.

3 See *infra* Parts I.A, I.B.

patent and the “loser pays” rule—indicate that patent trolls are cost-conscious; when litigation presents financially high risks, they will abandon the plan to bring suit.⁴ Therefore, it is reasonable to deduce that the United Kingdom’s higher pleading standard for patent infringement performs the same function, and thus the United States could benefit from a similar standard.

I. DEVELOPMENT OF PLEADING STANDARDS GENERALLY

A. *The Originally Lax Requirements of Rule 8(a)*

Though plaintiffs’ attorneys today are wont to stress over whether they have successfully pleaded a claim, this stress has not always been felt so keenly. Congress adopted Federal Rule of Civil Procedure 8 in 1937.⁵ It provides, in pertinent part, that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶ Charles E. Clark, principal draftsman of this Rule,⁷ expounded upon its meaning seven years after its adoption while sitting as a judge for the Second Circuit Court of Appeals in *Dioguardi v. Durning*.⁸ In that case, Dioguardi, an Italian immigrant representing himself *pro se*,⁹ filed an “obviously home drawn” complaint against the Collector of Customs.¹⁰ Though the complaint was barely coherent—the court had to guess at what his claim “appear[ed] to be”¹¹—the court held that Dioguardi had successfully pleaded a claim.¹² According to one judge, Judge Clark wanted his opinion to send a message that, under Rule 8(a), “the complaint was merely to get the ball rolling.”¹³ Whether the plaintiff’s case had specific

⁴ See *infra* Part III.D.

⁵ *Rule 8: General Rules of Pleading*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/frcp/rule_8 (last visited Jan. 17, 2022).

⁶ FED. R. CIV. P. 8(a)(2).

⁷ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 6 (2010).

⁸ 139 F.2d 774, 775 (2d Cir. 1944).

⁹ Miller, *supra* note 7.

¹⁰ *Dioguardi*, 139 F.2d at 774. The complaint itself contained allegations like, “Why was the medicinaly [*sic*] given to the Springdale Distilling Co. with my betting price of \$110; and not their price of \$120;” “It isn’t so easy to do away with two cases with 37 bottles of one quart. Being protected, they can take this chance;” and, “No one can stop my rights upon my merchandise, because of both the duly and the entry.” rotito24, *Dioguardi’s Amended Complaint from Dioguardi v. Durning*, H2O (Oct. 9, 2014), <https://h2o.law.harvard.edu/collages/14782>.

¹¹ Judge Peter Flynn, *Twombly and “Fact Pleading:” State and Federal Pleading Standards Merge*, AMERICAN LAW INSTITUTE CONTINUING LEGAL EDUCATION, STAGES OF LITIGATION: A TO Z (Aug. 8, 2012) (quoting *Dioguardi*, 139 F.2d at 775).

¹² *Dioguardi*, 139 F.2d at 775.

¹³ Flynn, *supra* note 11.

facts to constitute a proper cause of action was to be determined through discovery and summary judgment.¹⁴

The *Dioguardi* decision is thought to have been the origin of the “notice pleading era.”¹⁵ Notice pleading is a system in which a plaintiff’s “short and plain statement of the claim” need only “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests,”¹⁶ and in which “a complaint [w]ould not be dismissed for failure to state a claim unless it appear[ed] beyond doubt that the plaintiff [could] prove *no set of facts* in support of his claim which would entitle him to relief.”¹⁷ Such was the Supreme Court’s holding in *Conley v. Gibson*.¹⁸ Significantly, by 2007, this holding had been cited in a dozen subsequent Supreme Court opinions and four additional non-majority Supreme Court opinions; in none of them was the language “questioned, criticized, or explained away.”¹⁹

Yet the liberal, pro-plaintiff notice pleading standards articulated in *Dioguardi* and *Conley* were significantly narrowed by the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*²⁰ and *Ashcroft v. Iqbal*.²¹ Doing away with the “no set of facts” standard of *Conley*, these cases held that, while “detailed factual allegations” are not necessary, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible* on its face.”²² The factual content must “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²³ Though it is disputed whether there has been a substantial increase in dismissals for failure to state a claim,²⁴ it is certain that *Twombly* and *Iqbal* have heightened the pleading requirements for

14 *Id.*

15 Robin J. Effron, *Putting the “Notice” Back into Pleading*, 41 CARDOZO L. REV. 981, 994 (2020).

16 *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also id.* at n.5 (citing *Dioguardi*).

17 *Id.* at 45-46 (emphasis added).

18 *Id.* at 47-48.

19 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577-78 (2007) (Stevens, J., dissenting) (quotations omitted).

20 550 U.S. 544 (2007)

21 556 U.S. 662 (2009).

22 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570) (emphasis added; quotation marks omitted).

23 *Id.* (citing *Twombly*, 550 U.S. at 556).

24 Compare William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 474 (2017) (finding “only limited evidence” that *Twombly* and *Iqbal* “have had a major effect on the behavior of lawyers and judges across all cases”) with Miller, *supra* note 7 at 20 n.67 (citing “a few studies suggesting a greater frequency of dismissal under *Twombly* and *Iqbal* than under *Conley*”).

plaintiffs. These cases necessarily make it more difficult for plaintiffs to state a claim.²⁵

B. Pleading Requirements for Patent Infringement

Though the generic pleading standards changed markedly under *Twombly* and *Iqbal*, certain causes of action—including direct patent infringement²⁶—enjoyed unchanged pleading requirements under Federal Rule of Civil Procedure 84.²⁷ Rule 84 provided that, if a plaintiff used Form 18 (provided in the Rules' Appendix of Forms) to plead one of the given causes of action, then she had successfully pleaded her claim.²⁸ Under Form 18, a plaintiff “only needed to identify the infringing party, the infringed patent, the infringing device, and provide statements of jurisdiction and patent notice.”²⁹

²⁵ See Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN ST. L. REV. 1191, 1194 (2010) (“Both *Conley* and *Iqbal* create flawed systems. Under *Conley*, blameless defendants are dragged through a lengthy and expensive discovery process. Under *Iqbal*, culpable defendants will be released at the pleading stage because of the inability of plaintiffs to get access to necessary information.”).

²⁶ 35 U.S.C. § 271(a) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”).

²⁷ FED. R. CIV. P. 84 (abrogated).

²⁸ FED. R. CIV. P. 84 (2021) (abrogated 2015). Before it was abrogated, Rule 84 stated that, “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” FED. R. CIV. P. 84 (2014).

²⁹ Kathryn Hull, *For Whom the Bell Tolls: The End of Rule 84 (and Form 18 Patent Pleading Standards)*, IP BLITZ (Jan. 8, 2016), <https://www.ip-blitz.com/2016/01/for-whom-the-bell-tolls-the-end-of-rule-84-and-form-18-patent-pleading-standards/>. The full text of Form 18 is as follows:

Form 18. Complaint for Patent Infringement

(Caption – See Form 1.)

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.

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.

(Date and sign – See Form 2.)

FED. R. CIV. P. app. Form 18 (2014) (abrogated 2015).

District courts struggled to reconcile the plausibility standard of *Twombly* and *Iqbal* with the looser standards of Form 18.³⁰ Yet the Federal Circuit³¹ in *R+L Carriers, Inc. v. DriverTech LLC*³² held that, for direct infringement claims, Form 18 controls, even to the extent that it conflicts with *Twombly* and *Iqbal*.³³ However, since Form 18 only addresses direct infringement, the Federal Circuit instructed that lower courts “look to Supreme Court precedent for guidance regarding the pleading standards for claims of indirect infringement.”³⁴ Consequently, district courts applied different standards for pleading indirect infringement versus direct infringement,³⁵ with some courts even classifying Form 18 as a circumvention of the plausibility standard of *Twombly* and *Iqbal*.³⁶

A significant change came in 2015 when Congress abrogated Rule 84 from the Federal Rules of Civil Procedure.³⁷ A direct patent infringement pleading is no longer statutorily valid under the minimum

30 Andrew C. Michaels, *An Infamous Illustration of Patent Infringement Pleading: Form 18 and Context-Specificity*, 19 B.U. J. SCI. & TECH. L. 286, 294 (2013). See *id.* at n. 52 for a collection of cases.

31 The United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over district court decisions in cases arising under the federal patent laws. 28 U.S.C. § 1295(a)(1). Accordingly, Federal Circuit decisions on issues of patent law are binding on federal district courts, and no other appellate courts review patent disputes.

32 681 F.3d 1323 (Fed. Cir. 2012).

33 *Id.* at 1334.

34 *Id.* at 1337. Whereas direct infringement is geared towards preventing defendants from directly making, using, or selling that which is covered by the patentee’s patent, indirect infringement “exists to protect patent rights from subversion by those who, without directly infringing the patent themselves, engage in acts designed to facilitate infringement by others.” *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 188 (1980); see also ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY* 756-59 (7th ed. 2017) (summarizing the purpose and history of indirect infringement). There are two types of indirect infringement: inducement, 35 U.S.C. § 271(b) (penalizing those who “actively induce[] infringement of a patent”), and contributory infringement, 35 U.S.C. § 271(c) (penalizing those who sell or import parts of a patented product that are “not a staple article or commodity of commerce suitable for substantial noninfringing use”).

35 Michaels, *supra* note 30, at 288 (citing *Superior Indus., LLC, v. Thor Global Enters., Ltd.*, 700 F.3d 1287, 1295-96 (Fed. Cir. 2012)).

36 *Id.* (citing *CreAgri, Inc. v. Pinnaclife Inc.*, No. 5:11-CV-06635-LHK, 2013 WL 11569, at *2 (N.D. Cal. Jan. 1, 2013); *Loftex USA LLC v. Trident Ltd.*, No. 11 Civ. 9349(PAE), 2012 WL 5877427, at *3 (S.D.N.Y. Nov. 20, 2012)).

37 See FED. R. CIV. P. 84 (2014) (abrogated 2015).

Rule 84 was adopted when the Civil Rules were established in 1938 “to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.”

The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many alternative sources for forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.

FED. R. CIV. P. 84 (2014) (abrogated 2015) advisory committee’s note to 2015 amendment.

Form 18 requirements,³⁸ and thus must, like indirect infringement pleadings, satisfy the higher *Twombly* and *Iqbal* plausibility standard.³⁹ To the delight of confused scholars and litigants, the Federal Circuit has been relatively clear as to how one sufficiently pleads a claim for indirect infringement.⁴⁰ However, how to satisfy the plausibility standard with respect to direct infringement remains unclear.⁴¹

C. Different Pleading Standards in the District Courts

District courts' approaches to the conundrum of how to plead direct patent infringement exist on a spectrum from *Dioguardi*-esque plaintiff friendliness to rigid adherence to the heightened standard of *Twombly* and *Iqbal*. The strictest courts require the complainant to "allege facts sufficient to show infringement of each element of each asserted claim."⁴² Less strict courts require only that "all elements of at least one patent claim in the complaint" are infringed.⁴³ Still others merely require a plaintiff to "plead that the allegedly infringing product and the patented product share a unique feature."⁴⁴ The most lenient courts hold that the now-repealed Form 18 is

38 *Incom Corp. v. Walt Disney Co.*, No. CV15-3011 PSG (MRWX), 2016 WL 4942032, at *3 (C.D. Cal. Feb. 4, 2016) ("Form 18 no longer provides a safe harbor for pleading direct infringement."). The district court further declined to allow the plaintiff to plead using Form 18, relying in part on "the Supreme Court's admonition to apply the new rules where practicable . . ." *Id.*

39 Hull, *supra* note 29.

40 "To state a claim for contributory infringement, . . . a plaintiff must, among other things, plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses." *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1337 (Fed. Cir. 2012). "To prevail on inducement, the patentee must show, first that there has been direct infringement [by a third party], and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage [the third party's] infringement." *Kyocera Wireless Corp. v. Int'l Trade Comm'n.*, 545 F.3d 1340, 1353-54 (Fed. Cir. 2008) (citation and internal quotation omitted).

41 Hull, *supra* note 29 (noting "the amount and type of factual matter needed to allow the court to draw the 'reasonable inference' or 'plausibility' for liability remains unclear"). See Jun Zheng, *A New Era for Patent Infringement Pleading: Twombly, Iqbal, and the Demise of Form 18*, 24 TEX. INTELL. PROP. L.J. 15, 16-17 (2016).

42 Nick Baniel, *Amended Rules, Amended Pleadings: How the Abrogation of Form 18 Politicized Direct Infringement Patent Pleading*, 21 VAND. J. ENT. & TECH. L. 737, 745 (2019) (citing *Oil-Dri Corp. of America v. Nestle Purina Petcare Co.*, No. 15-cv-1067, 2017 WL 1197096, at *5 (N.D. Ill. Mar. 31, 2017) (finding that allowing a plaintiff to "plead infringement as to one patent claim and then proceed in the litigation with respect to every other materially different claim in the patent" would "sidestep[] *Twombly* and *Iqbal*'s plausibility requirements"); *Thermolife Int'l, LLC v. Vitamin Shoppe, Inc.*, No. 0:16-CV-60693, 2016 WL 6678525, at *2 (S.D. Fla. June 8, 2016)).

43 *Id.* at 746 (citing *Sunrise Techs., Inc. v. Cimcon Lighting, Inc.*, 219 F. Supp. 3d 260, 263 (D. Mass. 2016)).

44 *Id.* at 747 (citing *Iron Gate Sec., Inc. v. Lowe's Cos.*, No. 15-cv-8814(SAS), 2016 U.S. Dist. LEXIS 34061, at *8 (S.D.N.Y. Mar. 16, 2016) ("Allegations that plead that 'a specific product[]

still a viable means of pleading direct infringement.⁴⁵ Floating somewhere along this spectrum are courts who simply apply *Twombly* and *Iqbal* to direct infringement pleadings on a case-by-case basis.⁴⁶

II. WHY IS THIS SPLIT IMPORTANT?

As it is uncertain how one might satisfy the *Twombly* and *Iqbal* pleading standard for direct patent infringement, district judges are left to make a choice with inevitable policy consequences: choose a strict pleading standard that errs on the side of protecting innocent defendants at the potential expense of victimized plaintiffs, or choose a laxer pleading standard that errs on the side of protecting victimized plaintiffs at the potential expense of innocent defendants.⁴⁷ While this dilemma presumably exists in every civil suit, its effect on patent law is notable for one significant reason: non-practicing entities.

Non-practicing entities (“NPEs”) acquire patents without actually producing or selling the goods or processes the patents protect.⁴⁸ Instead, they acquire the patents for the sole purpose of either bringing infringement suits or negotiating a licensing agreement.⁴⁹ While some argue that NPEs provide a societal benefit because of their ability to facilitate markets for new technologies,⁵⁰ many others are far more cynical.⁵¹

allegedly infringes [the] patent by virtue of certain specific characteristics' meet the *Iqbal* plausibility standard. A plaintiff is not required to list which of the claims in the patent have been infringed in its pleading[] . . .” (third alteration added)).

45 *Id.* at 748 (citing *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-0772-GMN-NJK, 2016 WL 199417, at *2 n.1 (D. Nev. Jan. 15, 2016) (quoting the Advisory Committee note associated with Rule 84’s abrogation that “[t]he abrogation of Rule 84 does not alter existing pleading standards” to argue that Form 18 is still a viable means of pleading direct patent infringement)).

46 *Id.* at 749 (citing *PanOptis Patent Mgmt., LLC v. Blackberry Corp.*, No. 2:16-CV-00059-JRG-RSP, 2017 WL 780885, at *3 (E.D. Tex. Feb. 10, 2017)).

47 See Campbell, *supra* note 25.

48 *Non-Practicing Entity (NPE)*, THOMPSON REUTERS PRACTICAL LAW, [https://uk.practicallaw.thomsonreuters.com/4-513-0928?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-513-0928?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited Nov. 22, 2021).

49 *Id.*

50 See James Bessen et al., *The Private and Social Costs of Patent Trolls*, 34 REGULATION 26, 26-27 (2011-2012), available at <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2012/5/v34n4-1.pdf> (noting that “[s]ome inventors lack the resources and expertise necessary to successfully license their technologies or, if necessary, enforce their patents,” and NPEs provide these inventors with these resources and expertise). In fact, some argue that NPEs function to give individual inventors returns on their inventions similar to that which these inventors enjoyed in the 19th century prior to “the rise of the large research and development laboratories,” allowing for an increased incentive to innovate. *Id.*

51 *Id.*; see also David L. Schwarz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 427 (2014) (“Some claim that NPEs are antithetical to the

Critics, including many technology firms, compare these NPEs to the mythical trolls who hide under bridges built by other people, unexpectedly popping up to demand payment of tolls. The critics call NPEs “patent trolls,” claiming that they buy up vaguely worded patents that can be construed to cover established technologies and use them opportunistically to extract licensing fees from the real innovators.⁵²

NPEs have had a notable effect on patent litigation in the past decade. Between 2000 and 2008, NPEs initiated less than 20% of “high tech” patent lawsuits.⁵³ By 2012, some estimate that NPEs had initiated over 60% of *all* new patent lawsuits.⁵⁴

But the presence of NPEs has not only affected the quantity of patent litigation; it has also affected the quality of the patent system in general. Since they produce no goods, NPEs are not subject to countersuits, nor can opposing parties negotiate a cross-licensing agreement.⁵⁵ Moreover, NPEs can exploit contingency agreements and timing tactics to assert infringement claims against hundreds of defendants at low cost when these potential defendants are most vulnerable.⁵⁶ These practices accumulate to

Constitution's mandate that the patent laws encourage innovation. They argue that NPEs hinder rather than encourage innovation, especially in the software field. Others claim that NPEs provide small inventors and companies an opportunity otherwise missing to receive rewards for their inventions.”)

⁵² Bessen, et. al., *supra* note 50, at 26.

⁵³ See Schwarz, *supra* note 51, at 426 n.1 (citing Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1603 (2009))

⁵⁴ *Id.* at 426 n.3 (citing others). Interestingly, even before NPEs had come to dominate the majority of “high tech” patent litigation, *id.*, they were already known as “willing, if not eager litigants, having built a business around patent enforcement.” Chien, *supra* note 53.

⁵⁵ Grace Heinecke, *Pay the Troll Toll: The Patent Troll Model Is Fundamentally at Odds with the Patent System's Goals of Innovation and Competition*, 84 FORDHAM L. REV. 1153, 1173-74 (2015). Of course, the fact that practicing entities are susceptible to countersuits and can negotiate a cross-licensing agreement with opposing practicing entities means that they are significantly more likely to pursue these paths as opposed to litigation. See *id.* at 1174 note 199 (citing EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION (2013) [https://obamawhitehouse.archives.gov/sites/default/files/docs/patent_report.pdf] (“Rival makers of complex products are likely to be infringing each other's patents, so they have an incentive to settle competing infringement cases by cross-licensing, rather than engaging in expensive legal battles that do not add to society's stock of scientific knowledge.”)).

⁵⁶ *Id.* at 1174. In addition to taking advantage of individual innovators, patent trolls are also known to “exploit weaknesses in the patent system” generally. *Id.* at 1156. For example, the United States Patent and Trademark Office (PTO) has been receiving more and more patent applications each year. See generally U.S. PATENT AND TRADEMARK OFFICE, U.S. PATENT STATISTICS CHART CALENDAR YEARS 1963-2019 (2020). Some believe that this is indicative that that PTO is more inclined to grant “far more overly broad or weak patents,” perhaps motivated in no small part by the fees the PTO receives when it grants a patent. Heinecke, *supra* note 55, at 1175.

deter innovation by hurting those who actually produce products.⁵⁷ In light of the consequences of the NPEs' infiltration of the patent system, the repercussions of instituting a plaintiff-friendly pleading standard for patent infringement become frighteningly clear.

III. COMPARING PLEADING STANDARDS BETWEEN THE UNITED STATES AND THE UNITED KINGDOM

A. *Why the United Kingdom?*

In determining the appropriate countries to compare to the United States, it is first important to consider those countries whose level of innovation is comparable to that of the United States.⁵⁸ To do this, I relied on the 2020 Global Innovation Index⁵⁹ and found a list of countries with similar scores to the United States.⁶⁰ Of those with comparable scores, I

⁵⁷ *Id.* at 1176; see also James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 397 (2014) (arguing that an estimated \$29 billion cost of NPE patent assertions in 2011 implies reduced innovation incentives). But see Samuel F. Ernst, *Introduction to the 2015 Chapman Law Review Symposium: Trolls or Toll-Takers: Do Intellectual Property Non-Practicing Entities Add Value to Society?*, 18 CHAPMAN L. REV. 611, 613 (2015) (arguing that "patent trolls help to effectuate the goal of the Patent and Copyright Clause of the U.S. Constitution" in that they "provid[e] liquidity, market clearing, and increased efficiency to the market for patents").

Moreover, there are particular districts known to be hotbeds for patent trolls. See Alexander S. Krois, *The Evolution of Patent Venue in the Aftermath of TC Heartland*, 34 BERKELEY TECH. L.J. 1023, 1029 (2019) (noting that "high-volume litigants" [i.e., patent litigants who bring numerous cases per year] favor the Eastern District of Texas, and that the Eastern District of Texas "captur[ed] 75% of all patent cases that high-volume plaintiffs brought in Q2 2015").

Although the number of suits by NPEs and the total number of patent suits is likely to fall [in the wake of *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S.Ct. 1514 (2017)], NPEs may begin to bring cases in districts where cases are more likely to go trial, where damages awards are higher on average, and where local rules provide similar advantages to those enjoyed in the Eastern District of Texas.

Jacob M. Berman, *The Limited [Economic] Impact of TC Heartland, Inc. v. Kraft Foods LLC*, 25 B.U. J. SCI. & TECH. L. 647, 653 (2019).

⁵⁸ After all, comparing the United States to a country with similar direct patent infringement elements would be fruitless if the comparator country did not have many patents that could be infringed in the first place.

⁵⁹ CORNELL ET. AL, GLOBAL INNOVATION INDEX 2020 (Soumitra Dutta, Bruno Lanvin, & Sacha Wunsch-Vincent eds., 2020), <https://www.globalinnovationindex.org/gii-2020-report#>.

The GII is computed by taking a simple average of the scores in two sub-indices, the Innovation Input Index and Innovation Output Index, which are composed of five and two pillars respectively. Each of these pillars describe an attribute of innovation, and comprise up to five indicators, and their score is calculated by the weighted average method.

Global Innovation Index, WIKIPEDIA, https://en.wikipedia.org/wiki/Global_Innovation_Index (last visited Feb. 28, 2021, 4:10 UTC).

⁶⁰ The United States received an innovation score of 60.56, the third highest in the Global Innovation Index. CORNELL, *supra* note 59, at xxxii. The countries that ranked near it are (1)

chose to focus on the European nations given their relative economic and political similarity to the United States.⁶¹

From there, I isolated the countries that had statutory patent infringement elements like those of the United States.⁶² Among the European countries with comparable innovation indexes to that of the United States, it appeared that the patent infringement elements of the United Kingdom were most similar.⁶³ Moreover, and perhaps most importantly, the United Kingdom has, like the United States, a common law judicial system.

B. Patent Trolls in the United Kingdom

No other pleading standard in the world is quite as relaxed as that in the United States.⁶⁴ In contrast, the United Kingdom, America's common-law father, has pleading standards that bear similarities to dominant civil law⁶⁵ countries in that it requires a statement of the material facts; "a

Switzerland (score: 66.08), (2) Sweden (score: 62.47), (4) United Kingdom (score: 59.78), (5) Netherlands (score: 58.76), (6) Denmark (score: 57.53), (7) Finland (score: 57.02), (8) Singapore (score: 56.61), (9) Germany (score: 56.55), and (10) Republic of Korea (score: 56.11). *Id.*

61 See Stefania Fusco, *Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe*, 20 MICH. TELECOMM. & TECH. L. REV. 439, 442 (2014) (noting that both Europe and the United States have "western economies with similar patent policies and interests," there is a significant number of "multinational companies that operate both in the United States and in Europe," and "the relevant U.S. and European markets have similar levels of sophistication").

62 Otherwise, the risk exists that differences in the prevalence of patent trolls in each country could be the result of the necessity to prove entirely different things.

63 See Christian Helmers, Brian Love, & Luke McDonagh, *Is There a Patent Troll Problem in the U.K.?*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 509, 541-42 (2014); see also *id.* at n.100 (citing THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* 165 (2013) (noting "affinities among the U.K., Canadian, and Australian [patent] regimes . . . , as well as with the U.S. [patent] system"); Donna M. Gitter, *Should the United States Designate Specialist Patent Trial Judges? An Empirical Analysis of H.R. 628 in Light of the English Experience and the Work of Professor Moore*, 10 COLUM. SCI. & TECH. L. REV. 169, 183-85 (2009) (noting that "US patent law is ultimately grown from a British seed," and that both countries share the "the basic requirements of patentability—novelty, utility, and nonobviousness"). It is important to note as well the lack of data and scholarship on other countries, which has likely limited other possibilities.

64 Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 452 (2010). In fact, the International Institute for the Unification of Private Law joined with the American Law Institute in 2004 with the goal of "reconciling the differences among various national rules of civil procedure" *ALI / UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT (2019), **Error! Hyperlink reference not valid.** <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/overview/>. Pursuant to that goal, they adopted Principles of Transnational Civil Procedure. *Id.* These principles "reject notice pleading, instead requiring a statement of facts that 'must, so far as reasonably practicable, set forth detail as to time, place, participants, and events.'" Dodson, *supra* at 455.

65 Civil law countries require plaintiffs to provide significantly more than America does. Dodson, *supra* note 64 at 452. Germany, for example, "requires a party to designate the means of proof (for

statement of the ‘necessary particulars,’ designed to give notice; and a summary of the evidence the claimant has against the defendant.”⁶⁶

Specific to patent infringement, in the United Kingdom a complaint must “show which of the claims in the specification of the patent are alleged to be infringed[,] and . . . must give at least one example of each type of infringement alleged . . .”⁶⁷ Even the strictest United States district courts do not require actual examples of infringement.⁶⁸

Though patent trolls have generally been seen as a uniquely American phenomenon, this is a bit of an exaggeration. There is plenty of evidence to suggest patent troll activity in other nations, including the United Kingdom.⁶⁹ Unfortunately, there is no hard data on the presence of patent trolls in the United Kingdom in the past decade, and thus we are forced to rely on the decade prior. Between 2000 and 2010, one empirical study shows that patent trolls were “responsible for 11% of all patent suits filed in the U.K.,”⁷⁰ whereas patent trolls in the United States during roughly the same period accounted for 19% of patent suits.⁷¹

While the astute reader likely finds herself justifiably concerned about lurking variables getting in the way of coming to any conclusions from this information, it is remarkable how many variables one can dispense with. Stereotypical American litigiousness⁷² is likely not a factor in the disparity, since the United Kingdom ranks highly among European countries in terms of the size of damages awards, costs of defense, and burdensomeness of the discovery process.⁷³ Nor is a different cultural

example, by identifying documents and witnesses) for each factual assertion in the pleadings.” *Id.* at 452-53. “Asian procedural systems, such as Japan’s, also require fact pleading (and submission of evidence at the pleading stage).” *Id.* at 453.; *see also* Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301 (2002) (noting that, in comparing American civil procedure to other countries, it is typical to look at England, France, Germany, Italy, and Japan).

66 Dodson, *supra* note 64 at 454.

67 Civ. P. Prac. Direction 63, ¶ 4.1 (U.K.), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part63/pd_part63.

68 *See supra* note 42.

69 *See Fusco, supra* note 61 at 451. Interestingly, “European countries appeared immune to the activities of NPEs” until around 2014. *Id.* at 441. Some have attempted to compile reasons why patent trolls have preferred the United States to Europe. *See* Anna Mayergoyz, *Lessons from Europe on How to Tame U.S. Patent Trolls*, 42 CORNELL INT’L L.J. 241, 244 (2009) (offering potential reasons, including “the relatively narrow scope of subject matter for patents, the capability of post-grant opposition proceedings, . . . administrative costs, . . . [and] attorney’s fees . . .”).

70 Helmers, *supra* note 63 at 509.

71 Chien, *supra* note 53 at 1603.

72 *See generally* Tonja Jacobi, *Explaining American Litigiousness: A Product of Politics, Not Just Law*, AM. L. & ECON. ASS’N. ANN. MEETINGS 1, 5 (2005); *see also* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1395-96 (1994) (arguing that the media’s portrayal of America as full of “outrageous and ridiculous litigation” is the source behind America’s perceived litigiousness).

73 Helmers, *supra* note 63 at 541-42.

framework a likely factor, considering that the United Kingdom, like the United States, has plenty of high-tech patents for NPEs to assert.⁷⁴ Lastly, the rate of success in court for patent trolls in the United Kingdom is, in fact, roughly the same as that in the United States.⁷⁵

C. *The United Kingdom's Legal Framework and Patent Regime*

The reduced presence of NPE litigation in the United Kingdom has prompted several scholars to prescribe for the United States a patent law system like that of the United Kingdom.⁷⁶

The European Patent Convention, ratified in 1973, “provides a procedure for securing a single, European patent, which has the effect of a national patent in the signatory nations designated in the application.”⁷⁷ Significantly, it provides a much narrower spectrum of patentable subject matter than does the United States patent regime, making it less likely that a troll could obtain a broad and/or trivial method patent to leverage against a small inventor.⁷⁸ Moreover, the European Patent Office (“EPO”)⁷⁹ provides for an opposition proceeding in which any person can challenge the issuance of a patent based on any validity grounds, with few limitations

⁷⁴ *Id.* at 543-44. The authors of this study further found that “U.K. NPEs can and do obscure patent ownership before filing suit,” sharing a tactical advantage that U.S. NPEs also possess. *Id.* at 543.

⁷⁵ *Id.* at 544. The authors claim that “sophisticated NPEs actually lose slightly *more* often in the U.S.,” based on concededly limited data comparing U.S. and U.K. litigation involving patent trolls. *Id.*

⁷⁶ One scholar in particular has identified the major doctrinal and procedural aspects of Europe’s patent regime that appear to contribute to a relatively troll-free Europe. See Mayergoz, *supra* note 69 at 257.

⁷⁷ Thomas Miner, *The European Patent Convention*, 3 MD. J. INT’L L. 408 (1978) (citing Convention on the Grant of European Patents, art. 58, Oct. 5, 1973, 1065 U.N.T.S. 199). “The convention is in force for Belgium, Federal Republic of Germany, France, Luxembourg, Netherlands, Switzerland and United Kingdom. Austria, Denmark, Greece, Ireland, Italy, Lichtenstein, Monaco, Norway, and Sweden have also signed but had not ratified by October 7, 1977, the date the EPC entered into force.” *Id.* at n.1.

⁷⁸ Mayergoz, *supra* note 69, at 258. Most significantly, Europe, unlike the United States, excludes business methods from patentability. *Id.* at 258-59 (citing *State St. Bank & Tr. Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368, 1374-75 (Fed. Cir. 1998)). Business method patents, in particular, are criticized as providing patents which are overbroad and in fact stifle innovation. See Ognjen Zivojnovic, *Patentable Subject Matter After Alice—Distinguishing Narrow Software Patents from Overly Broad Business Method Patents*, 30 BERKELEY TECH. L.J. 807, 808-09 (2015); Jeffrey R. Kuester & Lawrence E. Thompson, *Risks Associated with Restricting Business Method and E-Commerce Patents*, 17 GA. ST. U. L. REV. 657, 672 (2001). Trolls who own these kinds of patents are then able to leverage patents on broad methods such as “swinging on a swing” against inventors. Mayergoz, *supra* note 69, at 260.

⁷⁹ The EPO is an office established in 1977 pursuant to the EPC, which, like the PTO, determines whether to grant a patent. Mayergoz, *supra* note 69, at 257-58.

on the evidence that may be presented.⁸⁰ The United States, in contrast, provides for out-of-court reexaminations only when the USPTO determines that the challenger's request presents "a substantial new question of patentability"—a question limited to only two of the five validity doctrines.⁸¹ Finally, those seeking to obtain patents from the EPO not only must pay three times what one would pay to the USPTO, but they must also pay to substantiate their patent rights in eight other contracting countries, culminating in costs up to twelve times that of obtaining a United States patent.⁸² Simply put, the EPO has placed obstacles in the way of a successful NPE lawsuit that are difficult to surmount.

The United Kingdom also benefits from several non-patent-specific aspects of its legal system that thwart the prospects of successful NPE litigation. Most notably, the United Kingdom's "loser pays" rule requires the losing litigant to pay its opponents' legal expenses and attorney fees.⁸³ The authors of one empirical comparison of the success of NPE lawsuits in the United Kingdom and the United States suggest that these awards play a significant role in maintaining the scarcity of European NPE activity.⁸⁴ The

80 *Id.* at 260-62 (citing EPC, *supra* note 77, arts. 99-105). These opposition proceedings are relatively cheap for patent litigation, amounting to an average of \$20,000 per side, *id.* at 261 (citing Bronwyn H. Hall & Dietmar Harhoff, *Post-Grant Reviews in the U.S. Patent System—Design Choices and Expected Impact*, 19 BERKELEY TECH. L.J. 989, 1005 & n.74 (2004)). "Commentators predict that the effectiveness of this low-cost alternative to litigation ultimately decreases the number of patents and prevents invalid patents from being litigated." *Id.* at 261-62 (citing Hall & Harhoff, *supra*, at 1006-07).

81 *Id.* at 262-63. The reason these limitations exist is because the only prior art the examiner is permitted to reference are printed publications and previously submitted patents. *Id.* at 262. Ironically, the *inter partes* reexamination provision in the America Invents Act was designed to "bring[] U.S. reexaminations closer to those in Europe," but they are in fact rarely used and subject to the restraints outlined in the body of this note. *Id.*

82 *Id.* at 263-64. Applicants to the EPO "must pay fees for mandatory translations of the complete patent specification into the official language of each of the designated contracting states and official validation fees to the national patent offices of each of those states." *Id.* at 264 (citing GERALD PATERSON, *THE EUROPEAN PATENT SYSTEM: THE LAW AND PRACTICE OF THE EUROPEAN PATENT CONVENTION* 88 (2d ed. 2001)). Mayergoz argues that the United States could adopt similar cost measures to those of the EPO. While the United States obviously does not have the same need to translate patents as do applicants before the EPO, Mayergoz advocates for increased fees before the PTO in a way that targets troll activity. *Id.*

83 *Id.* at 266.

84 Christian Helmers, Brian Love, & Luke McDonagh, *Is There a Patent Troll Problem in the U.K.?*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 509, 516 (2014). The authors' findings "tend to suggest that fee-shifting deters NPEs from litigating in the U.K., and thus, fee-shifting may successfully reduce the number of NPE suits in the U.S. as well." *Id.*

Unlike those litigating in the U.S., NPEs deciding whether to file suit in the U.K. must consider the very real possibility that they will not only fail to win damages and recoup their own legal fees, but also that they will have to pay the accused infringer an amount approximating two-thirds of the cost of defense. As discussed above, it is unlikely that an unsuccessful NPE could walk away from a case paying less than about £250,000, the equivalent of about \$375,000. *Id.* at 544.

United States, on the other hand, only requires “losers” to pay attorney fees in “exceptional cases.”⁸⁵

D. *The Relevance and Power of Pleading Standards*

After appreciating these significant differences between the United States’ and the United Kingdom’s patent regimes, one may wonder whether the differences in the pleading standards between the United States and the United Kingdom are relevant at all. But this author argues not that these factors are inaccurate or overblown, but instead that the analysis is incomplete; that, in fact, it is unreasonable to assume that the differences in pleading standards between the United States and the United Kingdom are of no consequence.

Heightening pleading standards to weed out frivolous claims has been done before.⁸⁶ For example, Federal Rule of Civil Procedure 9(b) creates a heightened pleading standard for allegations of fraud, providing that those making such allegations “must state *with particularity* the circumstances constituting fraud or mistake.”⁸⁷ Federal courts have noticed that fraud allegations are frequently made solely for their value in creating a nuisance or extracting a settlement.⁸⁸ As such, courts have noted that this

85 Mayergoyz, *supra* note 69, at 266 (citing 35 U.S.C. § 285 (2006)). The bar for what qualified as an “exceptional case” was, up until 2014, high and strictly applied. The Federal Circuit held that a case is only “exceptional” for purposes of § 285 if “there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions;” or if the litigation is both “brought in subjective bad faith” and “is objectively baseless.” *Brooks Furniture Mfg., Inc. v. Dutailier Intern., Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005). The Supreme Court overruled this standard, ruling that “[d]istrict courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014).

86 Indeed, the Supreme Court heavily implied in *Twombly* that this was its rationale behind raising the pleading requirements to the plausibility standard. *See* 550 U.S. at 558 (noting the importance of filtering out “largely groundless claim[s]” at the pleading stage). One author critiques the Supreme Court for this approach, questioning the Court’s competency in making such determinations on the merits so early in the litigation process. Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483, 1544 (2013). The author cites psychological research indicating that “we form opinions about the facts alleged by one plaintiff based on views we already had, in general, about similar people,” and uses it to argue that “judges are unlikely to be good at making correct evaluations at the pleading stage of which cases deserve to proceed forward and which do not.” *Id.* at 1544 (citing Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126-27 (2012)).

87 FED. R. CIV. P. 9(b) (emphasis added).

88 5A Wright & Miller, Fed. Prac. & Proc. Civ. § 1296 (4th ed. 2020); *see also* *In re Party City Secs. Litig.*, 147 F. Supp. 2d 282, 298 (D.N.J. 2001) (“The purpose of the heightened pleading requirement is to give defendants ‘notice of the claims against them, [to] provide an increased measure of protection for their reputations, and [to] reduce the number of frivolous suits brought solely to extract settlements.’”) (quoting *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997)).

Rule's heightened pleading standard serves to both protect the defendant from spurious claims of immoral conduct⁸⁹ and prevent plaintiffs from using such allegations to extract a settlement.⁹⁰ A heightened pleading standard theoretically serves to filter out these meritless claims.⁹¹ Even so, critics are skeptical that handling meritless claims at the pleading stage is effective. They claim that there is minimal support for the notion that increasing pleading standards filters out the meritless claims from the meritorious ones.⁹² But this view simply fails to give the pleading phase enough credit. For evidence that a heightened pleading standard helps filter out frivolous lawsuits, one need look no further than the realm of private securities litigation. Concerned that "the potentially enormous damages in securities fraud class actions were encouraging frivolous 'strike' suits," Congress enacted the Private Securities Litigation Reform Act ("PSLRA") in 1995.⁹³ A "pervasive barrier to weak claims" in the PSLRA is its heightened pleading standard.⁹⁴ "Plaintiffs must specify in their complaint each statement alleged to have been misleading and the reasons the statement is misleading. In addition, plaintiffs must state with particularity facts giving rise to a 'strong inference' that the defendant acted with 'the required state of mind,' that is, with fraudulent intent."⁹⁵ Evidence suggests that this elevated pleading requirement has kept frivolous claims of fraud from

89 See Wright & Miller, *supra* note 88 (citing Haynes v. JPMorgan Chase Bank, N.A., 466 Fed. App'x 763, 765 (11th Cir. 2012)).

90 See *id.* (citing *In re GlenFed, Inc. Secs. Litig.*, 11 F.3d 843, 847 (9th Cir. 1993), opinion vacated on other grounds on reh'g, 42 F.3d 1541 (9th Cir. 1994)).

91 See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 125 ("Even a few critics of the *Iqbal/Twombly* heightened pleading standard tend to assume that there is a rational motivation for raising pleading standards, in order to better filter out meritless suits, even if they disagree with it for other reasons.")

92 Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 994 n.102 (2011); see also Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1209 n.98 (2014) (citing authorities that question the propriety of determining whether a claim is frivolous at the pleading stage).

93 Stephen J. Choi, Karen K. Nelson & Adam C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 38 (2009).

94 *Id.*

95 *Id.*

surviving a motion to dismiss,⁹⁶ significantly decreasing the risk that plaintiffs will use such claims to force a settlement.⁹⁷

Critics also claim that there are other, more appropriate judicial avenues for filtering out meritless claims in the litigation process. The pleading stage, so the argument goes, was not intended to weed out frivolous claims; this function is served later in the litigation process.⁹⁸ Summary judgment, for example, allows a judge to make merit-based determinations *after* being presented with adequate evidence and arguments from both parties.⁹⁹ Further, Rule 11 requires parties to only assert claims with a sound legal or factual basis,¹⁰⁰ Rule 16 allows a court to “eliminate frivolous claims,”¹⁰¹ and Rule 26 permits courts to control discovery in a way that prevents it from becoming unduly burdensome.¹⁰²

It is certainly accurate to contend that these tools from the Federal Rules of Civil Procedure perform the same filtering function that would be accomplished by a heightened pleading standard. However, the question of whether courts *should* use the pleading phase as a means of filtering out groundless lawsuits is moot; the Supreme Court in *Twombly* repeatedly endorsed using the pleadings for such a function.¹⁰³ Further, that the Supreme Court read “plausibility” into Rule 8 necessarily gives judges

96 Dough Winnard, *Know When to Hold 'Em, Know When to Fold 'Em: The Collapse of the Auction Rate Securities Market and the Problem of Standing for Securities Holders Under Rule 10B-5*, 104 NW. U. L. REV. 671, 694 n.190 (2010) (citing Elaine Buckberg et al., *Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?* NAT'L ECON. RESEARCH ASSOCS. (July. 18, 2005), <http://https://www.nera.com/publications/archive/2005/recent-trends-in-shareholder-class-action-litigation--are-world.html>).

97 *Id.* at 694 (citing Choi et al., *supra* note 93 at 59). Note, however, that, while the Choi study finds nine percent decrease in nuisance suits after the enactment of the PSLRA, the authors determine that this difference is not significant. Choi et. al, *supra* note 93 at 59. The authors nevertheless conclude, though, that “the PSLRA is screening out claims with some indicia of merit, not just claims that would have been deemed frivolous nuisance suits under the prior rules.” *Id.*

98 A. Benjamin Spencer, *Plausibility Pleading*, 49 B. C. L. REV. 431, 483 (2008). The author relies on Charles Clark himself to substantiate this point:

[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of proof, and do not need to force the pleadings to their less appropriate function There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.

Id. (citing Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937)).

99 *See id.* at 484-85.

100 *Id.* at 485-86 (citing FED. R. CIV. P. 11).

101 *Id.* at 486 (citing FED. R. CIV. P. 16(c)(1)).

102 *Id.* (citing FED. R. CIV. P. 26 advisory committee's note to the 2000 amendments).

103 *See Twombly*, *supra* note 19 at 546, 557-58, 559.

discretion in this area.¹⁰⁴ Different calculations are required to determine which stage of litigation best filters out frivolous claims. Regarding patent trolls in particular, it is crucial to note that the harm to small inventors happens immediately after the motion to dismiss for failure to state a claim is denied. At this point, the trolls can use the lurking attorney fees and discovery costs to leverage a settlement. However, this risk does not exist at the pleading stage.¹⁰⁵ A judge waiting until discovery has begun has already allowed the imposition of costs—and the risk of having to settle—on the small inventor.¹⁰⁶

The risk of overcorrection—that meritorious claims will be thrown out with the meritless ones—presents a difficult calculation regarding an important policy matter. However, overcorrection still secures more dismissals of patent troll suits than could be accomplished in the absence of a heightened pleading standard.¹⁰⁷ Moreover, judges retain discretion to prevent the dismissal of legitimate claims. For example, in applying the heightened standards of the PSLRA, judges have exercised “‘sensitiv[ity]’ to the fact that application of the Rule prior to discovery ‘may permit sophisticated defrauders to successfully conceal the details of their fraud.’”¹⁰⁸

104 See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its *judicial experience* and *common sense*”) (emphasis added). One scholar critiques this direction for judges as “deeply problematic.” Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1311 (2010). He argues, for one, that this approach will lead to a number of meritorious claims being dismissed at the pleading stage merely because the information that the plaintiff needs to make its claim “plausible” is held by the defendant. *Id.* at 1311-12. Moreover, the approach “embraces a dangerous amount of subjectivity.” *Id.* at 1312-13.

105 Arjun Rangarajan, *Pleading Patents: Predicting the Outcome of Statutorily Heightening Pleading Standards*, 13 DUKE L. & TECH. REV. 195, 212 (2015). Indeed, at the pleading stage, “[p]arties have not yet invested in significant attorney fees, the incentive to settle an extremely weak case is low, and the discovery costs are absent.” *Id.*

106 What’s more, in the field of private securities litigation, Rule 11 was deemed by Congress to be insufficient to curb the prevalence of strike suits. According to the committee report of the PSLRA, “Existing Rule 11 has not deterred abusive securities litigation. Courts often fail to impose Rule 11 sanctions even where such sanctions are warranted. When sanctions are awarded, they are generally insufficient to make whole the victim of a Rule 11 violation.” H.R. Rep. No. 104-369, at 39.

107 See Kevin S. Shmelzer, *The Door Slammed Shut Needs to Be Reopened: Examining the Pleading Requirements Under the Private Securities Litigation Reform Act*, 78 TEMP. L. REV. 405, 425 (2005) (finding, in the wake of the PSLRA, that “the heightened pleading standards and the corresponding increase in the number of dismissals has created an atmosphere where corporate actors feel immune from liability”).

108 *Burlington Coat Factory*, 114 F.3d at 1418 (quoting *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 284 (3d Cir. 1992)). The Court went on to note that “the normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant’s knowledge or control.” *Id.*

One final critique of adopting a heightened pleading standard like the United Kingdom's is that the United Kingdom has several other procedures to curb the prevalence of patent trolls.¹⁰⁹ Why not simply adopt those other procedural measures? Indeed, a patent system more like the United Kingdom's would be a welcome change in the fight against patent trolls. But instituting such dramatic change in the American legal system would be a challenge. Given the infrequency of attorney fees awards in American litigation, such an award would likely be seldom invoked, even with a laxer standard. In addition, while there is good reason to believe that judges could wisely administer a higher pleading standard in a way that filters out the meritorious claims from the groundless ones, raising the fees to obtain a patent from the USPTO to approximate or match the fees at the EPO necessarily affects *all* patent applicants—both the ill-willed *and* the well-meaning.¹¹⁰ It seems more palatable to pose the risk of dispensing with meritorious claims with a heightened pleading standard—a risk that is ideally eliminated by judicial discretion—than it is to impose a guaranteed substantial cost on *all* patent applicants.

What is more, patent-troll-specific legislation has not enjoyed the success one might hope for. True, Congress succeeded in abandoning the lax pleading requirement of Form 18.¹¹¹ However, this only brought the pleading requirement up to the normal standard; it did not implement an exceptionally rigid pleading requirement. Moreover, while some have expressed optimism about the impact that the Leahy-Smith America Invents Act will have on patent trolls,¹¹² federal legislation proposed specifically to

109 *See supra* Part III.C.

110 It is important to recall that trolls usually purchase patents from others who actually did the work of applying for the patent. Todd Klein, *Ebay v. Mercexchange and KSR Int'l Co. v. Teleflex, Inc.: The Supreme Court Wages War Against Patent Trolls*, 112 PENN ST. L. REV. 295, 300 (2007) (“Typically, patent trolls are not inventors themselves, but rather they are companies that purchase patents from inventors with the sole purpose of suing for infringement any company that is using the patented technology.”) In this sense, it may seem like imposing more and/or greater fees at the PTO would not hurt patent trolls in the long run because they do not actually perform any work before the PTO. However, this increase in fees would still raise the cost of being a patent troll, albeit indirectly. Those who did the leg work of prosecuting a patent before the PTO would simply take the extra costs imposed on them by the PTO and pass those costs on to the patent troll second-hand.

111 *See supra* I.B.

112 *See, e.g.,* Teo Firpo & Michael S. Mireles, *Monitoring Behavior: Universities, Nonprofits, Patents, and Litigation*, 71 SMU L. REV. 505, 526 (2018) (citing the *inter partes* review proceeding, the business method challenge, the post-grant review process separate from the *inter partes* review, and the restriction on “the number of defendants that can be joined in a single lawsuit” as ways the America Invents Act could potentially provide assistance in the fight against patent trolls).

combat patent trolls has largely been rejected.¹¹³ Specific to patent law doctrine, the case law behind patent-eligible subject matter remains unclear, convoluted, and inconsistent. And, despite Congress' attempts to intervene, general confusion about the doctrine remains.¹¹⁴

E. *The Need for a Judicial Remedy*

It is equally important to note that the judicial branch has found significant success in this battle—arguably much more so than the legislative branch.¹¹⁵ Further, not only has the Supreme Court endorsed the use of the pleading phase as a means of filtering out meritless lawsuits, but the Federal Circuit has also exercised this discretion in explicitly defining

¹¹³ See *Patent Progress's Guide to Federal Patent Reform Legislation*, PAT. PROGRESS, <https://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-patent-reform-legislation/> (last visited Jan. 10, 2021) (listing a host of federal legislation aimed at combatting patent trolls, almost none of which has been successful). The United Kingdom has itself enjoyed some legislative success in its fight against patent trolls. Andrew Orłowski, *UK Patent Troll Protections Tweaked – Lawyers Exempted*, THE REGISTER (May 2, 2017, 9:48 UTC), https://www.theregister.com/2017/05/02/uk_tweaks_patent_troll_remedies/.

¹¹⁴ See Kristen Osenga, *Institutional Design for Innovation: A Radical Proposal for Addressing § 101 Patent-Eligible Subject Matter*, 68 AM. U. L. REV. 1191, 1205 (2019) (quoting James Madison to describe the current state of the patentability doctrine: “It will be of little avail to the people if the laws are so incoherent that they cannot be understood”); Bryan Wisecup, *Mayo v. Prometheus: Reorganizing the Toolbox for Patent Eligible Subject Matter and Uses of Natural Laws*, 81 U. CIN. L. REV. 1651, 1657-58 (2013) (recognizing that, while Congress added some clarity to the doctrine in 2011 with the America Invents Act, Congress' failure to address “the patent eligible subject matter issue for medical methods or computer software applications” has allowed the Supreme Court to continue to struggle with the doctrine, as evidenced by the discourse on medical methods and computer software applications in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 80-82 (2012)).

¹¹⁵ See generally *Firpo & Mireles*, *supra* note 112, at 524-26. The Supreme Court in particular addressed patent trolls in the *eBay Inc. v. Mercexchange, L.L.C.* decision for the first time (albeit in a concurrence) as it laid out the test for whether to issue a permanent injunction as a remedy for patent infringement. 547 U.S. 388, 391 (2006). Justice Kennedy cautioned in his concurrence that, for patent trolls, “an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent,” and thus lower courts should consider being less quick to award permanent injunctions than they had been in the past. *Id.* at 395-97. Other Supreme Court decisions have arguably aided, albeit indirectly, in the fight against patent trolls. *Firpo & Mireles*, *supra* (citing *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 419-22 (2007); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545, 554-58 (2014); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 218-26 (2014); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S.Ct. 1514, 1517 (2017)). The Federal Circuit has also stepped into the fight against patent trolls. See *Mayergoyz*, *supra* note 69, at 256-57 n. 147 (citing *In re Seagate Tech. L.L.C.*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (requiring raising the standard for willful infringement to require the patentee to show “by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent”)).

how to meet the *Twombly* and *Iqbal* standards for indirect patent infringement.¹¹⁶

Lastly, and perhaps most crucially, those aspects of the United Kingdom's patent regime (and legal system in general) that are most effective at combating patent trolls are all focused on the cost-benefit analysis that a patent troll engages in while deciding whether to bring an infringement action. A patent troll in the United Kingdom, prior to even filing suit, must obtain the patent, which is substantially more expensive than in the United States; it must consider the risk that this money will have been wasted upon reexamination during an opposition proceeding; and, assuming the troll makes it this far, it must consider the risk that, if it should lose the infringement action it trial, it will be forced to pay the defendant's legal fees.¹¹⁷ In the United Kingdom, the probability and magnitude of cost are often greater than the probability and magnitude of benefit for the patent troll.

The same analysis applies to the patent troll facing a high pleading standard. Unlike Form 18 litigation, where the plaintiff needed to state little more in its complaint than the patent number and the invention in question, a patent troll would have to expend time and resources gathering information to provide specific—and, let us not forget, plausible—examples of infringement of precise claims in the patent's specification. This would, indeed, be an unwelcome cost to patent trolls, given their proclivity to rely on barebones assertions of infringement in which they may fail to provide even the exact claims of the patent alleged to have been infringed. And, though the risk exists that a patent troll will fabricate examples of infringement by the opposing party, it is likely that such

116 See *supra* Parts I.A, I.B. But not only are there a surplus of lurking variables to consider, one must also wonder whether a *judicial* change in pleading standards is the most appropriate avenue to pursue. The argument certainly exists that, should the United States implement a pleading standard for patent infringement similar to the United Kingdom, additional costs will be imposed on patent trolls to initiate lawsuits and therefore patent trolls will be disincentivized from initiating them in the first place. See Elizabeth Chang, *Effectuating the Benefits of the Twombly Plausibility Standard in Patent Infringement Cases: Application of Rule 9 Post-Abrogation of Rule 84*, 51 U.C. DAVIS L. REV. 273, 295 (2017) (arguing that, while Form 18 made it easier for patent trolls to file patent infringement suit, after the abrogation of Rule 84 they are “disincentivized to initiate frivolous litigation because they cannot quickly make a profit”). While there seems to be merit to this, one must recall the Federal Rules themselves; one need only plead “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a). And though *Twombly* and *Iqbal* heightened the pleading standard to have a plausibility requirement, these cases do not indicate that the judiciary must continue to veer further from *Dioguardi* to the stricter standards of the United Kingdom or the rest of the world. See *ALI / UNIDROIT supra* note 64. Therefore, if the standard is to change, the change should most appropriately come from Congress, not from the judiciary. See Chang, *supra* pp. 276-77.

117 See *supra* Part III.C.

attempts will be snuffed out by the time discovery begins, almost certainly warranting Rule 11 sanctions and attorney fees for the opposing party.

CONCLUSION

The United States has departed significantly from the original application, and perhaps even the actual language, of Rule 8(a)'s pleading requirement. This Rule, once seen as requiring merely that the defendant be put on reasonable notice of a suit pending against him, now requires the plaintiff to allege facts that would allow a judge to believe the claim against the defendant is plausible on its face. And, though Form 18 of the Federal Rules saved complaints for direct patent infringement from this high bar, the abrogation of Rule 84 has divided federal district courts on exactly how a plaintiff can meet the *Twombly* and *Iqbal* requirements for such a complaint.

One appreciates this problem's urgency once one realizes patent trolls are vexing modern innovation. Frivolous lawsuits are being brought against honest innovators with the aim of forcing them into out-of-court settlements, thus hampering innovation nationwide. Judges could curb this problem if they applied a strict pleading requirement to direct infringement claims. If one compares the pleading requirements and patent-troll prevalence in the United Kingdom to those of the United States, one finds that there is likely truth to this assertion.

A closer analysis of the differences between the legal systems of the United Kingdom and the United States seems to indicate why, at least to a significant degree, patent trolls are less active in the United Kingdom than in the United States. The costs associated with patent litigation in the United Kingdom are likely too great to justify a patent troll's risk of initiating an infringement action with a weak patent. To institute a high pleading standard would simply add costs to the patent troll's cost-benefit analysis in the United States. Moreover, there is good reason to believe that judicial intervention in this area would be effective, given the success that has been had in the realm of private securities litigation. Wide judicial discretion would also help to prevent meritorious infringement actions from being dismissed with the meritless ones. It would thus be prudent for the judiciary to adopt a high pleading standard for direct patent infringement to safeguard against patent trolls.

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