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Business & Practice

How Patent Holders Can Avoid Early Dismissal at Pleadings Stage

By Mark Lezama

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Knobbe Martens partner Mark Lezama examines a recent Federal Circuit decision that may provide guidance for patent holders to avoid dismissal at the pleadings stage. He explains the pros and cons of following the plaintiff's strategy in that case.

A court can invalidate a patent claim under Section 101 of the Patent Act at the pleadings stage if it determines the claim is directed to an abstract idea and there are no plausible factual allegations that the claim contains an inventive concept.

The US Court of Appeals for the Federal Circuit in two separate cases—*Berkheimer v. HP Inc.* and *Aatrix Software Inc. v. Green Shades Software Inc.*—explained that the second prong of a two-part patentability test confirmed in 2014 by the US Supreme Court involves questions of fact that can preclude pretrial dismissal. That prong, from *Alice Corp. v. CLS Bank*, explores whether a patent claim contains an inventive concept beyond implementing an abstract idea using well-understood, routine, conventional activities.

While many expected the Federal Circuit precedent to make Section 101 dismissals at the pleading stage rare, that has not been the case. Despite the factual nature of *Alice* step two, over the past four years many patent owners have been unable to plausibly plead factual allegations showing their patent has an inventive concept, and have lost their patents shortly after filing suit.

A recent decision by the Federal Circuit offers guidance on how to avoid dismissal at the pleading stage under Section 101.

In *Cooperative Entertainment Inc. v. Collective Technology Inc.*, the court said dismissal was inappropriate because the patent holder had alleged an inventive concept sufficiently plausibly to preclude dismissal at the pleading stage. The district court had ruled that Cooperative's claims over its video sharing technology were invalid under Section 101.

So how can patent holders replicate Cooperative's success?

Provide Specific Support

Patent holders can first make sure their patents explain how the invention constitutes an advancement over the prior art, and then repeat that explanation in their pleadings.

For example, the Federal Circuit noted Cooperative's specification explained how its peer-to-peer network structure was different from and improved on prior art. This included the assertion that the prior art did not provide video streaming over P2P networks outside of a content distribution network.

According to Cooperative's patent, the invention bypassed any static CDN, yielding more efficient and cost-effective content delivery. Cooperative then reiterated these assertions in its amended complaint.

Although Cooperative's invention story was consistent, the Federal Circuit did not hold that it was necessary for the patent to expressly support the complaint's inventive-concept allegations. In its 2019 *Cellspin Soft* decision, the court rejected such a strict requirement for support.

Nonetheless, the *Cooperative* court repeatedly mentioned how closely Cooperative's pleadings corresponded to the specification. Support in the specification or prosecution history may therefore be more important than *Cellspin* suggests.

If the intrinsic evidence does not affirmatively support allegations in the pleadings that the claimed technology differs from the prior art, solves a problem, improves functionality, or is unconventional, a court might be more inclined to find a way to distinguish *Cellspin* and disregard those allegations as conclusory—and therefore not entitled to the assumption of truth on a motion to dismiss.

Attorneys drafting patent applications often prefer to characterize the prior art as little as possible, and there are sound reasons for that approach. Patent drafters also sometimes prefer not to characterize the advantages of the invention, lest those advantages be deemed requirements of the claims or otherwise become a focal point in litigation.

Cooperative illustrates the potential advantages of drafting the specification to explain how the invention advances the art.

Specificity of Claim

Patent holders should also focus the complaint on claims with a textual hook to the inventive concepts described in the specification and the complaint's factual allegations. The Federal Circuit noted one of Cooperative's claims tracked the inventive concepts asserted in the specification and pleadings by expressly reciting a P2P network where the peer nodes consume the same content within a predetermined time and are distributed outside CDNs.

When the claim language is broad or does not match the specification verbatim, plaintiffs should consider whether alleging the inventive concept appears in the claim language would effectively concede the claims are narrower than their plain language would suggest and carefully weigh the consequences.

It remains to be seen whether Cooperative's strategy will pay off in the long run. In crafting its inventive-concept narrative at the patent-drafting stage and adhering to the same narrative in its litigation pleadings and on appeal, Cooperative may have survived a motion to dismiss only to find that it has made concessions that weaken its case in other respects.

Other patent holders can consider the same tradeoffs in deciding whether to similarly build inventive-concept assertions into their next patent application. At a minimum, patent holders now have another Federal Circuit decision they can use as a road map to successfully navigate Section 101 challenges at the pleading stage.

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Author Information

Mark Lezama is a partner at Knobbe Martens where he represents patent owners and accused infringers in jurisdictions across the country. He takes a holistic approach to litigation, complementing courtroom successes with out-of-court strategies for his clients, including pursuing inter partes review by the Patent Trial and Appeal Board.

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