

CAFC Balances the Patent Infringement Pleading Burden

Bot M8 LLC v. Sony Corp. of Am., 4 F.4th 1342 (Fed. Cir. 2021)

By: Michael Bregenzer and Andy Himebaugh | November 29, 2021

Recently, the Court of Appeals for the Federal Circuit (“CAFC”) took the rare [opportunity](#) to describe the pleading requirement as it relates to direct patent infringement. Plaintiff Bot M8 LLC (“Bot M8”) sued Sony Corp. of America (“Sony”) alleging that Sony’s products, including its Playstation 4 videogame console (the “PS4”), infringed six of its patents directed towards technology for authentication and copyright protection. The district court granted Sony’s motion to dismiss for four of the asserted patents, U.S. Patent Nos. 8,078,540 (“the ’540 patent”), 8,095,990 (“the ’990 patent”), 7,664,988 (“the ’988 patent”), and 8,112,670 (“the ’670 patent”) for failing to adequately plead infringement. This dismissal was challenged on appeal.

The CAFC first stated “a plaintiff cannot assert a plausible claim for infringement under the *Iqbal/Twombly* standard by reciting the claim elements and merely concluding that the accused product has those elements.”¹ The ’540 patent required that game and authentication programs be stored on the same board, separate from the motherboard. Bot M8 argued that the PS4’s hard drive stored both programs separate from the motherboard. Sony pointed to statements in the complaint that the authentication program was loaded and stored onto the PS4’s motherboard for execution. Bot M8 countered that this was an “overview statement” and that the limitation was still met if the authentication program was stored on the hard drive with the game program and simultaneously loaded onto the motherboard during execution. But the CAFC found that BotM8 had “essentially pleaded itself out of court” since it was impossible for the authentication program to be separate from the motherboard as plead. The ’990 patent required storing game information together with a mutual authentication program on a removable storage medium. The CAFC noted that “while Bot M8 points to different storage components in the allegedly infringing devices, it never says which one or ones satisfy mutual authentication limitation.” The CAFC therefore found these allegations to be “conclusory and merely track the claim language” and that “merely possible” infringement allegations are not sufficiently plausible for pleading.

The ’988 and ’670 patents required executing a “fault inspection program” before a game is started. The CAFC rejected Sony’s argument that these contentions also just tracked the claim language. The CAFC felt that Bot M8’s allegations that the PS4 generated error messages upon booting up supported a reasonable inference that the PS4 infringed this limitation. To hold otherwise, the CAFC held, would be “demanding too much at this phase” as a plaintiff “need not ‘prove its case at the pleading stage.’”²

This case emphasizes that the *Iqbal/Twombly* standard applies to direct infringement allegations. Patent owners must allege facts from which it is plausible to conclude that the accused device meets the claimed limitations and not merely provide a list of allegedly infringed limitations accompanied by the conclusion that the accused device or one of its components satisfies it.

¹ See, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

² *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1350 (Fed. Cir. 2018)