

HONORABLE MARSHA J. PECHMAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL INC, et al.,

Defendants.

Case No.: 2:10-cv-01385-MJP

DEFENDANT AOL INC.'S JOINDER
IN GOOGLE'S MOTION TO DISMISS

**Note on Motion Calendar:
Nov. 19, 2010**

I. INTRODUCTION AND RELIEF REQUESTED

Defendant AOL Inc. ("AOL") respectfully joins in Defendants Google Inc. and YouTube, LLC's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6) ("Google's Motion to Dismiss"). As discussed in Google's Motion to Dismiss, Plaintiff Interval Licensing LLC's ("Interval") claims against all defendants—including AOL—fail to meet the pleading requirements of Fed. R. Civ. P. 8(a)(2) as defined by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). Accordingly, AOL joins Google's motion for dismissal.

II. INTERVAL'S CLAIMS FAIL TO SATISFY THE PLEADING STANDARD

Under the *Iqbal* and *Twombly* standards, a plaintiff may not simply state that the law has been violated, but must also plead sufficient facts to show a plausible claim for relief. To be facially plausible, a claim must plead "*factual content* that allows the court to draw the

1 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at
2 1949 (emphasis added). “A pleading that offers ‘labels and conclusions,’ or ‘a formulaic
3 recitation of the elements of a cause of action will not do.” *Id.* (quoting *Twombly*, 550 U.S. at
4 555). Finally, while a court must accept all allegations in a complaint as true, that is not the case
5 with legal conclusions: “[t]hreadbare recitals of the elements of a cause of action, supported by
6 mere conclusory statements, do not suffice.” *Id.*

7 Interval’s infringement claims against AOL offer no more than the “threadbare recitals”
8 and “conclusory statements” that the Supreme Court has repeatedly warned are insufficient. As
9 with its allegations against Google, Interval has failed to plead specific facts in support of its
10 claims that AOL infringes the patents-in-suit:

11 Defendant AOL has infringed and continues to infringe one or more claims of the
12 ’507 patent. AOL is liable for infringing the ’507 patent under 35 U.S.C. § 271
13 by making and using websites, hardware, and software to categorize, compare,
and display segments of a body of information as claimed in the patent.

14 ***

15 Defendant AOL has infringed and continues to infringe one or more claims of the
16 ’652 patent. AOL is liable for infringing the ’652 patent under 35 U.S.C. § 271
17 by making, using, offering, providing, and encouraging customers to use products
18 that display information in a way that occupies the peripheral attention of the user
as claimed in the patent.

18 ***

19 Defendant AOL has infringed and continues to infringe one or more claims of the
20 ’314 patent. AOL is liable for infringing the ’314 patent under 35 U.S.C. § 271
21 by making, using, offering, providing, and encouraging customers to use products
22 that display information in a way that occupies the peripheral attention of the user
as claimed in the patent.

23 ***

24 Defendant AOL has infringed and continues to infringe one or more claims of the
25 ’682 patent. AOL is liable for infringing the ’682 patent under 35 U.S.C. § 271
26 by making and using websites and associated hardware and software to provide
27 alerts that information is of current interest to a user as claimed in the patent.

Dkt. 1, Complaint, ¶¶ 21, 33, 39, 45.

1 These generic and conclusory paragraphs are devoid of the “factual content” required by
 2 *Twombly* and *Iqbal*. The claims fail to identify basic information like (1) the products or
 3 services offered by AOL that are alleged to infringe Interval’s patents; (2) how AOL’s products
 4 or services have allegedly infringed the patents-in-suit; or (3) the underlying technology or
 5 mechanism of the alleged infringement.

6 Additionally, for the reasons discussed in Google’s Motion to Dismiss, Interval’s
 7 Complaint also fails to state a claim for indirect infringement against any Defendant, including
 8 AOL.¹ First, to the extent Interval asserts that AOL induces or contributes to direct infringement
 9 by another, it fails to plead any specific facts regarding the alleged direct infringement. Because
 10 direct infringement is a predicate to indirect infringement, Interval’s claims against AOL are
 11 deficient to the extent they allege indirect infringement. *See BMC Resources, Inc. v.*
 12 *Paymentech, L.P.*, 498 F.3d 1373, 1379 (Fed. Cir. 2007). Moreover, to the extent Interval
 13 attempts to allege that AOL induces or contributes to another’s infringement by way of an
 14 unspecified encouragement to customers, Interval also fails to state a claim upon which relief
 15 may be granted. A claim for indirect infringement requires, at a minimum, knowledge of the
 16 asserted patent at the time of the allegedly infringing activities. *See Mallinckrodt Inc. v. E-Z-Em*
 17 *Inc.*, 670 F. Supp. 2d 349, 354-55 (D. Del. 2009). Further, “knowledge after filing of the present
 18 action is not sufficient for pleading the requisite knowledge for indirect infringement.” *Xpoint*
 19 *Techs., Inc. v. Microsoft Corp.*, 09-cv-628, 2010 WL 3187025, at *6 (D. Del. Aug. 12, 2010)
 20 (citing *Mallinckrodt*, 670 F. Supp. 2d at 354 n.1). The Complaint contains no such allegations of
 21 knowledge; therefore, it cannot support a claim for indirect infringement.

22 By failing to specify these essential facts about AOL and its accused products or services,
 23 Interval has made it impossible for AOL to prepare a defense. Moreover, these facts are required
 24 in order for a complaint to perform its central function—to set forth “factual content that allows
 25 the court to draw the reasonable inference that the defendant is liable for the misconduct

26 _____
 27 ¹ It is not clear whether the Complaint pleads indirect infringement, but the Prayer for Relief
 requests “[p]ermanently enjoining Defendants ... from further infringement, including
 contributory infringement and/or inducing infringement.” (Dkt. 1 at 14.)

1 alleged.” *Iqbal*, 129 S. Ct. at 1949. The pleading requirements of Fed. R. Civ. P. 8—and the
2 recent Supreme Court authority interpreting these requirements—demand more. Dismissal is
3 proper.

4 **III. CONCLUSION**

5 For the foregoing reasons, and for the reasons discussed in Google’s Motion to Dismiss,
6 AOL respectfully joins Google’s Motion to Dismiss and requests that the Court dismiss
7 Interval’s Complaint for failure to state a claim upon which relief can be granted, including all
8 claims alleged against AOL.

9 DATED this 22nd day of October, 2010.

10 STOKES LAWRENCE, P.S.

11
12 By: /s/ Aneelah Afzali
13 Shannon M. Jost (WSBA #32511)
14 Scott A.W. Johnson (WSBA #15543)
15 Aneelah Afzali (WSBA #34552)
16 Attorneys for Defendants Google, Inc.,
17 YouTube, LLC and AOL Inc.

18 and

19 *To Be Admitted Pro Hac Vice*
20 Gerald F. Ivey
21 Finnegan, Henderson, Farabow, Garrett &
22 Dunner, LLP
23 901 New York Ave., NW
24 Washington DC, 20001

25 *To Be Admitted Pro Hac Vice*
26 Robert L. Burns
27 Elliot C. Cook
Finnegan, Henderson, Farabow, Garrett &
Dunner, LLP
Two Freedom Square
11955 Freedom Drive, Suite 800
Reston, VA 20190

To Be Admitted Pro Hac Vice
Cortney S. Alexander
Finnegan, Henderson, Farabow, Garrett &
Dunner, LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

3500 SunTrust Plaza
303 Peachtree Street NE
Atlanta, GA 30308

Attorneys for Defendant AOL Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, I caused the foregoing DEFENDANT AOL INC.'S JOINDER IN GOOGLE'S MOTION TO DISMISS to be:

electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Attorneys for Plaintiff Interval Licensing LLC

Justin A. Nelson (jnelson@susmangodfrey.com)
Eric J. Enger (eenger@hpcllp.com)
Matthew R. Berry (mberry@susmangodfrey.com)
Max L. Tribble (mtribble@susmangodfrey.com)
Michael F. Heim (mheim@hpcllp.com)
Nathan J. Davis (ndavis@hpcllp.com)

Defendant Apple Inc.

David S. Almeling (dalmeling@omm.com)
Brian M. Berliner (bberliner@omm.com)
George A. Riley (griley@omm.com)
Jeremy E. Roller (jroller@yarmuth.com)
Scott T. Wilsdon (wilsdon@yarmuth.com)
Neil L. Yang (nyang@omm.com)

Attorneys for Office Depot, Inc.

Edward J. Bennett (ebennett@wc.com)
J. Christopher Carraway (chris.carraway@klarquist.com)
John D. Vandenberg (john.vandenberg@klarquist.com)
Michael D. Hunsinger (mike_hunsingerlawyers@yahoo.com)

Attorneys for OfficeMax, Inc.

Kevin C. Baumgardner (kbaumgardner@corrchronin.com)
Steven W. Fogg (sfogg@corrchronin.com)
Jeffrey D. Neumeyer (JeffNeumeyer@officemax.com)

Attorneys for Defendants eBay, Inc., Netflix, Inc., & Staples, Inc.

J. Christopher Carraway (chris.carraway@klarquist.com)
John D. Vandenberg (john.vandenberg@klarquist.com)

Attorneys for Defendants Google, Inc. and YouTube LLC

Aaron Chase (aaron.chase@whitecase.com)
Dimitrios T. Drivas (ddrivas@whitecase.com)
John Handy (jhandy@whitecase.com)
Kevin X. McGann (kmcgann@whitecase.com)
Aneelah Afzali (aneelah.afzali@stokeslaw.com)
Scott A. W. Johnson (sawj@stokeslaw.com)
Shannon M. Jost (shannon.jost@stokeslaw.com)
Warren S. Heit (wheit@whitecase.com)

1 **Attorneys for Defendant Yahoo! Inc.**

2 Dario A. Machleidt (dmachleidt@flhlaw.com)

3 Eric W. Ow (eow@mofo.com)

4 Francis Ho (fho@mofo.com)

5 Matthew I. Kreeger (mkreeger@mofo.com)

6 Michael Jacobs (mjacobs@mofo.com)

7 Richard S. J. Hung (rhung@mofo.com)

8 Mark P. Walters (mwalters@flhlaw.comwheit@whitecase.com)

9 s/ Aneelah Afzali

10 Aneelah Afzali (WSBA #34552)

11 Stokes Lawrence, P.S.

12 800 Fifth Avenue, Suite 4000

13 Seattle, WA 98104

14 (206) 626-6000

15 Fax: (206) 464-1496

16 aa@stokeslaw.com

17 Attorney for Defendants Google, Inc., YouTube
18 LLC, and AOL Inc.