

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
28

HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

 Plaintiff,

 v.

AOL, INC., et al.,

 Defendants.

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

**DEFENDANT FACEBOOK, INC.’S JOINDER
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. R. 12(b)(6)**

**NOTED ON MOTION CALENDAR:
November 12, 2010**

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Facebook, Inc. (“Facebook”), through its undersigned counsel, respectfully joins in the Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6) filed by defendants Google Inc. and YouTube, LLC (“Google’s Motion to Dismiss”). (D.I. 62.) Interval’s complaint alleges that Facebook infringes U.S. Patent No. 6,757,682 (the “Fourth Cause of Action”), but does not indicate how the alleged infringement takes place, nor does it identify which products and/or services allegedly infringe. As such, Interval fails to meet the pleading requirements of the Federal Rules as interpreted by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (“*Iqbal*”), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544

1 (2007) (“*Twombly*”). Because of this failure, Interval’s Fourth Cause of Action should be
2 dismissed.

3 II. FACTUAL BACKGROUND

4 On August 27, 2010, Interval filed its complaint alleging that Facebook along with AOL,
5 Apple, eBay, Google, Netflix, Office Depot, OfficeMax, Staples, Yahoo, and YouTube infringe
6 U.S. Patent No. 6,757,682 (“the ’682 Patent”). (D.I. 1 at ¶¶ 45–55.) Interval’s allegations as to
7 the ’682 Patent are identical as to each defendant and merely assert that each infringes “by
8 making and using websites and associated hardware and software to provide alerts that
9 information is of current interest to a user as claimed in the patent.”¹ (*Id.*) Interval’s allegations
10 do not identify any Facebook products or services that are being accused of infringement, nor
11 provide a factual basis for the infringement claim.

12 III. ARGUMENT

13 The Supreme Court’s decision in *Twombly* makes clear that a complaint must include
14 “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.
15 The Court further specified in *Iqbal* that in order to be facially plausible, a claim must plead
16 “factual content that allows the court to draw the reasonable inference that the defendant is liable
17 for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. “A pleading that offers ‘labels and
18 conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’ Nor does
19 a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*
20 (quoting *Twombly*, 550 U.S. at 555, 557).

21 Interval’s allegations in its Fourth Cause of Action against Facebook fail to state a claim
22 for patent infringement under *Twombly* and *Iqbal* because they merely rephrase the title of the
23 ’682 Patent, add “websites and associated hardware and software,” and state that Facebook’s
24 allegedly infringing activity is performed “as claimed in the patent.” (D.I. 1 at ¶ 48.) Interval’s
25

26 ¹ The full text of the allegations against Facebook in the Interval complaint are as follows:
27 “Defendant Facebook has infringed and continues to infringe one or more claims of the ’682
28 patent. Facebook is liable for infringing the ’682 patent under 35 U.S.C. § 271 by making and
using websites and associated hardware and software to provide alerts that information is of
current interest to a user as claimed in the patent.” (*Id.* at ¶ 48.)

1 Fourth Cause of Action does not identify the products or services offered by Facebook that
2 allegedly infringe or how Facebook has allegedly infringed the patent-in-suit. The use of
3 identical allegations against all defendants, who provide widely varying products and services,
4 underscores the lack of specificity of Interval's claims. For these reasons, Interval's Fourth
5 Cause of Action does not satisfy the pleading requirements set forth in *Twombly* and *Iqbal*,
6 warranting dismissal under Rule 12(b)(6) for failure to state a claim.

7 **IV. CONCLUSION**

8 For the foregoing reasons, and for the reasons discussed in Google's Motion to Dismiss,
9 Facebook respectfully requests that the Court dismiss Interval's complaint as to the Fourth Cause
10 of Action against Facebook for failure to state a claim upon which relief can be granted.

11 DATED this 22nd day of October, 2010.

12 COOLEY LLP

13 /s/ Christopher B. Durbin

14 Christopher B. Durbin (WSBA #41159)

15 COOLEY LLP

16 719 Second Avenue, Suite 900

17 Seattle, WA 98104

18 Tel: (206) 452-8700

19 Fax: (206) 452-8800

20 Email: cdurbin@cooley.com

21 COOLEY LLP

22 Michael G. Rhodes (*pro hac vice* pending)

23 101 California St., 5th Floor

24 San Francisco, CA 94111-5800

25 Tel: (415) 693-2000

26 Fax: (415) 693-2222

27 Heidi L. Keefe (*pro hac vice* pending)

28 Mark R. Weinstein (*pro hac vice* pending)

Christen M.R. Dubois (*pro hac vice* pending)

Elizabeth L. Stameshkin (*pro hac vice* pending)

3175 Hanover St.

Palo Alto, CA 94304-1130

Tel: (650) 843-5000

Fax: (650) 849-7400

Attorneys for Defendant FACEBOOK, INC.

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, I electronically filed the following document(s):
**DEFENDANT FACEBOOK, INC.’S JOINDER 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)** with the Clerk of the Court using the CM/ECF
system, which will send an email notification of such filing to the attorney(s) of record listed
below.

Justin A. Nelson
Matthew R. Berry
Susman Godfrey
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Attorneys for Plaintiff Interval Licensing LLC

By Electronic CM/ECF:
jnelson@susmangodfrey.com
mberry@susmangodfrey.com

Eric J. Enger
Michael F. Heim
Nathan J. Davis
HEIM PAYNE & CHORUSH LLP
600 Travis Street, Suite 6710
Houston, TX 77002
Attorneys for Plaintiff Interval Licensing LLC

By Electronic CM/ECF:
eenger@hpcllp.com
mheim@hpcllp.com
ndavis@hpcllp.com

Max L. Tribble
SUSMAN GODFREY
1000 Louisiana Street, Suite 5100
Houston, TX 77002
Attorneys for Plaintiff Interval Licensing LLC

By Electronic CM/ECF:
mtribble@susmangodfrey.com

Brian M. Berliner
Neil L. Yang
O'MELVENY & MYERS LLP
400 South Hope Street, Suite 1050
Los Angeles, CA 90071
Attorneys for Defendant Apple, Inc.

By Electronic CM/ECF:
bberliner@omm.com
nyan@omm.com

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
28

David Almeling
George A. Riley
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Attorneys for Defendant Apple, Inc.

By Electronic CM/ECF:

dalmeling@omm.com
griley@omm.com

Jeremy E. Roller
Scott T. Wilsdon
YARMUTH WILSDON CALFO PLLC
818 Stewart Street, Suite 1400
Seattle, WA 98101
Attorneys for Defendant Apple, Inc.

By Electronic CM/ECF:

jroller@yarmuth.com
wilsdon@yarmuth.com

J. Christopher Carraway
John D. Vandenberg
KLARQUIST SPARKMAN
121SW Salmon Street, Suite 1600
Portland, OR 97204
Attorneys for eBay, Inc.; Netflix, Inc.; Office Depot, Inc.; and Staples, Inc.

By Electronic CM/ECF:

chris.carraway@klarquist.com
john.vandenberg@klarquist.com

Aneelah Afzali
Scott A.W. Johnson
Shannon M. Jost
STOKES LAWRENCE
800 5th Avenue, Suite 4000
Seattle, WA 98104-3179
Attorneys for Defendants Google, Inc. and YouTube LLC

By Electronic CM/ECF:

aneelah.afzali@stokeslaw.com
sawj@stokeslaw.com
shannon.jost@stokeslaw.com

Dimtrios T. Drivas
John Handy
Kevin X. McGann
Aaron Chase
WHITE & CASE
1155 Avenue of the Americas
New York, NY 10036
Attorneys for Defendants Google, Inc. and YouTube LLC

By Electronic CM/ECF:

dtrivas@whitecase.com
jhandy@whitecase.com
kmcgann@whitecase.com
aaron.chase@whitecase.com

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
28

Warren S. Heit
WHITE & CASE
3000 El Camino Real
Bldg. 5, 9th Floor
Palo Alto, CA 94306
*Attorneys for Defendants Google, Inc. and
YouTube LLC*

By Electronic CM/ECF:

wheit@whitecase.com

Michael D. Hunsinger
THE HUNSINGER LAW FIRM
100 South King Street, Suite 400
Seattle, WA 98104
Attorneys for Defendant Office Depot, Inc.

By Electronic CM/ECF:

mike_hunsingerlawyers@yahoo.com

Edward J. Bennett
WILLIAMS & CONNOLLY
712 12th Street NW
Washington, DC 20005-5901
Attorneys for Defendant Office Depot, Inc.

By Electronic CM/ECF:

ebennett@wc.com

Kevin C. Baumgardner
Steven W. Fogg
CORR CRONIN MICHELSON
BAUMGARDNER & PREECE
1001 4th Avenue, Suite 3900
Seattle, WA 98154
Attorneys for Defendant OfficeMax Inc.

By Electronic CM/ECF:

kbaumgardner@corrchronin.com
sfogg@corrchronin.com

Jeffrey D. Neumeyer
OFFICEMAS INCORPORATED
1111 West Jefferson Street
P.O. Box 50
Boise, ID 83728
Attorneys for Defendant OfficeMax Inc.

By Electronic CM/ECF:

JeffNeumeyer@officemax.com

Douglas S. Rupert
John L. Letchinger
WILDMAN, HARROLD ALLEN & DIXON
225 West Wacker Drive, Suite 2700
Chicago, IL 60606
Attorneys for Defendant OfficeMax Inc.

By Electronic CM/ECF:

rupert@wildman.com
letchinger@wildman.com

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
28

Eric W. Ow
Francis Ho
Michael I. Kreeger
Michael A. Jacobs
Richard S. J. Hung
MORRISON & FOERSTER
425 Market Street
San Francisco, CA 94105
Attorneys for Defendants Yahoo! Inc.

By Electronic CM/ECF:

eow@mofo.com
fho@mofo.com
mkreeger@mofo.com
mjacobs@mofo.com
rhung@mofo.com

Mark P. Walters
Dario A. Machleidt
FROMMER LAWRENCE & HAUG LLP
1191 Second Avenue
Seattle, WA 98101
Attorneys for Defendants Yahoo! Inc.

By Electronic CM/ECF:

dmachleidt@flhlaw.com
mwalters@flhlaw.com

/s/Christopher B. Durbin
Christopher B. Durbin (WSBA #41159)
COOLEY LLP
719 Second Avenue, Suite 900
Seattle, WA 98104-1732
Telephone: (262) 452-8700
Facsimile: (262) 452-8800
Email: cdurbin@cooley.com

Attorneys for Defendant
FACEBOOK, INC.