

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PRAGMATIUS AV, LLC,

Plaintiff,

v.

FACEBOOK, INC., YOUTUBE, LLC,
LINKEDIN CORPORATION, and
PHOTOBUCKET.COM, INC.,

Defendants.

Civil Action No. 1:10-cv-1288 (LMB/JFA)

**MEMORANDUM IN SUPPORT OF DEFENDANT YOUTUBE, LLC'S RULE 12(b)(6)
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT**

Veronica S. Ascarrunz (Va. Bar No. 67913)
vascarrunz@wsgr.com
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, NW
Fifth Floor
Washington, D.C. 20006-3817
Telephone: (202) 973-8800
Facsimile: (202) 973-8899

ATTORNEYS FOR YOUTUBE, LLC

Dated: January 6, 2011

On November 15, 2010, Plaintiff Pragmatius AV, LLC (“Pragmatius”) brought this action against Defendant YouTube, LLC (“YouTube”) and others for alleged infringement of U.S. Patent Nos. 7,730,132 (“the ‘132 patent”), 7,822,813 (“the ‘813 patent”), and 7,831,663 (“the ‘663 patent”) (collectively, “patents-in-suit”). On December 22, 2010 Pragmatius filed an agreed motion to extend the time to respond to the Complaint until January 7, 2011, which the Court granted. (Docket Nos. 13 and 19.) Also on December 22, 2010, Defendant Facebook, Inc. (“Facebook”) filed a motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). (Docket Nos. 15 and 16.)

For the reasons set forth in Facebook’s motion to dismiss and the additional reasons set forth below, YouTube hereby moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff’s Complaint for failure to state a claim upon which relief may be granted or, in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

I. SUMMARY OF ARGUMENT

Plaintiff’s Complaint fails to satisfy the pleading standards under Federal Rule of Civil Procedure 8(a), as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Under Rule 8(a), a complaint must make “a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Twombly*, 550 U.S. at 556 n.3. Such a showing “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). This standard applies equally to complaints alleging patent infringement. *See Ricoh Co. v. ASUSTeK Computer, Inc.*, 481 F. Supp. 2d 954, 959 (W.D. Wis. 2007).

Indeed, by failing to identify a single specific allegedly infringing device, Plaintiff's Complaint fails to satisfy even the minimal requirements of Form 18 of the Federal Rules of Civil Procedure. *See e.g., Enlink Geoenergy Servs., Inc. v. Jackson & Sons Drilling & Pump, Inc.*, No. 09-cv-03524, 2010 WL 1221861, at *2 (N.D. Cal. Mar. 24, 2010) ("Form 18 requires a plaintiff to identify the device or method that is accused of infringement"). Following *Iqbal* and *Twombly*, the Federal Circuit has questioned whether compliance with Form 18 is a reliable measure of a sufficient direct infringement pleading. *See Colida v. Nokia, Inc.*, 347 Fed. App'x 568, 571 n. 2 (Fed. Cir. 2009) (suggesting in dicta that compliance with Form 18 may not satisfy the pleading requirements because it was last updated before the Supreme Court's *Iqbal* decision). Even if Form 18 remains a "reliable measure," Pragmatus's Complaint fails to measure up.

Rather, the Complaint makes the general allegation that YouTube infringes each of the patents-in-suit by "making, using, offering for sale, and/or selling the systems and/or practicing the methods covered by one or more claims..., including by providing systems and services that allow users to upload, link to and comment on videos." (Compl. ¶¶ 28, 36; *see also* Compl. ¶ 32¹.) Plaintiff, however, fails to identify a single system that is allegedly sold or a specific instrumentality or service that it accuses of infringement. The Plaintiff's ambiguous, open-ended allegations could apply to any aspect of YouTube's services and, thus, they unfairly prejudice YouTube's ability to investigate the claims and answer the Complaint. Similarly, Plaintiff's allegations of indirect infringement fail to sufficiently plead intent, requisite knowledge of the patent, and the identity of a direct infringer.

¹ Pragmatus applies the same generic allegation in asserting infringement of claims of the '813 patent, though the allegation omits any contention that YouTube infringes by practicing the methods covered by that patent.

Accordingly, pursuant to Rule 12(b)(6), this Court should dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Alternatively, should the Court deny YouTube's motion to dismiss, it should at the very least require Plaintiff to provide a more definite statement of its claims pursuant to Rule 12(e).

II. BACKGROUND

The Complaint offers no explanation or guidance about the technology at issue in the patents-in-suit or the scope and nature of the claims that Pragmatus intends to assert. Rather than identify the specific products or services that purportedly infringe the patents-in-suit, Pragmatus merely alleges that YouTube is "making, using, offering for sale, and/or selling the systems and/or practicing the methods covered by one or more claims... , including by providing systems and services that allow users to upload, link to and comment on videos." (Compl. ¶¶ 28, 36; *see also* Compl. ¶ 32.)²

Pragmatus also uses similar stock language to accuse YouTube of alternative theories of indirect infringement: "YouTube has and continues to infringe indirectly one or more claims ... by inducing others to infringe and/or contributing to the infringement by others, including users of YouTube's systems and services that allow users to upload, link to and comment on videos." (*Id.* ¶¶ 29, 33, 37.) Pragmatus's allegations are conclusory, circular, and lack any substance regarding how the unspecified accused systems, services, and methods relate to the claims of the patents-in-suit. In addition, Pragmatus fails to allege—and does not have a basis to allege—certain required elements for its theories of indirect infringement, such as knowledge of the patents-in-suit and/or intent to cause infringement of the patents-in-suit.

² Note that the allegations made against YouTube's co-defendants use nearly identical language.

III. ARGUMENT

A. Legal Principles

Rule 12(b)(6) provides that a party may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” The pleading standard under Federal Rule of Civil Procedure 8(a), as articulated in *Twombly* and *Iqbal*, requires that the complaint provide the grounds of entitlement for relief in factual allegations that are more than just labels and conclusions. *See, e.g., Twombly*, 550 U.S. at 555 (citation omitted). The Supreme Court made clear in *Twombly* that “a formulaic recitation of the elements of a cause of action will not do,” and a plaintiff must include factual allegations sufficient to “raise a right to relief above the speculative level.” *Id.*; *see also Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”).

Under Rule 8, “a plaintiff must provide notice of its claim so that the other side may prepare a defense. In the context of alleged patent infringement, this means at least that the plaintiff must tell the defendant which products allegedly infringe the plaintiff’s patent.” *Ricoh*, 481 F. Supp. 2d at 959.³ Although Rule 8(a)(2) provides that a pleading “that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief,” “mere boilerplate sketching [of] the elements of a cause of

³ Prior to filing suit for patent infringement, a plaintiff must “apply the claims of each and every patent that is being brought into the lawsuit to an accused device and conclude that there is a reasonable basis for a finding of infringement of at least one claim of each patent so asserted.” *View Eng’g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000). “If challenged, a patent holder bringing an infringement claim must be able to demonstrate to the court and the alleged infringer exactly why it believed *before* filing suit that it had a reasonable chance of proving infringement.” *Classen Immunotherapies, Inc. v. Biogen IDEC*, 381 F. Supp. 2d 452, 457 (D. Md. 2005) (citing *View Eng’g.*, 208 F.3d at 986) (emphasis added).

action” is not sufficient to provide fair notice of a patentee’s claims. *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996). Courts have consistently dismissed patent infringement actions under Rule 12(b)(6), where the plaintiff failed to identify specifically the accused infringing product in the complaint or the type of alleged infringement. *See, e.g., Gen-Probe, Inc.*, 926 F. Supp. at 961; *Ondeo Nalco Co. v. Eka Chems., Inc.*, No. Civ. A. 01-537-SLR, 2002 WL 1458853, at *1-2 (D. Del. June 10, 2002) (counterclaims for patent infringement dismissed because they were “too vague to provide plaintiff with fair notice of which products are accused of infringing defendant’s patents”); *see also Wilkerson v. Wendover, Inc.*, Civ. A. No. 06-450-JJF, 2007 U.S. Dist. LEXIS 53299, at *3-4 (D. Del. July 23, 2007).

The Federal Rules of Civil Procedure provide Form 18 as the example complaint for patent infringement. The model complaint requires a plaintiff to set forth the patent number, the date on which the patent was issued and the general nature of the patented invention, and “some specificity as to defendant’s product that purportedly infringes the patent.” *See Fed. R. Civ. P. Form 18; Interval Licensing LLC v. AOL, Inc. et al.*, 2010 WL 5058620, * 2 (W.D. Wash. Dec. 10, 2010). Following *Iqbal* and *Twombly*, the Federal Circuit has questioned whether compliance with Form 18 of the Federal Rules of Civil Procedure is a reliable measure of a sufficient direct infringement pleading. *See Colida v. Nokia, Inc.*, 347 Fed. App’x 568, 571 n. 2 (Fed. Cir. 2009) (suggesting in dicta that compliance with Form 18 may not satisfy the pleading requirements because it was last updated before the Supreme Court’s *Iqbal* decision). Even if it remains a reliable measure, Form 18 requires a plaintiff to identify the device or method that is accused of infringement. *See e.g., Enlink*, No. 09-cv-03524, 2010 WL 1221861, at *2.

Rule 12(e) provides that a party “may move for a more definite statement of a pleading” where the pleading “is so vague or ambiguous that the party cannot reasonably prepare a response.” Rule 12(e) is applicable where, as here, a pleading is unintelligible or the issues cannot be determined. *See Fischer & Porter Co. v. Sheffield Corp.*, 31 F.R.D. 534, 536 (D. Del. 1962). Courts have consistently granted motions for more definite statement in patent cases where pleadings failed to identify specifically the products accused of infringement. *See, e.g., In re Papst Licensing GmbH Patent Litig.*, No. Civ. A. MDL 1298 & Civ. A. 99-3118, 2001 WL 179926, at *2 (E.D. La. Feb. 22, 2001) (concluding that the plaintiff’s complaint must be amended to identify specifically which of the defendant’s products are alleged to have infringed the plaintiff’s patents); *Bay Indus., Inc. v. Tru-Arx Mfg. LLC*, Case No. 06-C-1010, 2006 WL 3469599, at *1 (E.D. Wis. Nov. 29, 2006) (“courts have found Rule 12(e) relief appropriate where the complaint fails to identify any allegedly infringing product or at least set forth a limiting parameter”).

B. The Court Should Dismiss the Complaint Because Pragmatius Has Failed to Accuse Specific Systems or Services and Specify Its Theory of Infringement

Pragmatius’s direct infringement allegations do not meet the Rule 8 standard for pleading as clarified by *Twombly* and *Iqbal*, or as set forth in Form 18, because they fail to identify the specific instrumentality accused of infringement. For example, Pragmatius accuses YouTube of “selling the systems and/or practicing the methods covered by one or more claims” but fails to identify the actual system that is allegedly sold. (Compl. ¶¶ 28, 36; *see also* Compl. ¶ 32.) Significantly, YouTube does not sell or offer for sale any “system” to either the users of its website or advertisers. Furthermore, Pragmatius’s allegations point to unidentified methods “that allow users to upload, link to and comment on videos.” *Id.*

Pragmatus can and should specifically identify the allegedly infringing methods that YouTube purportedly practices, and not hedge its bets through the use of alternative and open-ended language such as “and/or” and “including.” Indeed, the alleged accused YouTube products and/or services are so vague and ambiguous that they could arguably encompass the entirety of YouTube’s service offerings. Pragmatus should be required to identify specifically the accused infringing instrumentalities and services at the commencement of litigation, especially in this District where the time for investigation prior to commencement of discovery is quite limited.

This and other courts have properly dismissed overly vague infringement allegations. For example, this Court granted a 12(b)(6) motion to dismiss where the complaint alleged that a defendant “uses and supplies dial-up technology” or the defendant’s “products contain and use dial-up technology”—similar to Pragmatus’s insufficient allegation that YouTube allegedly sells unidentified “systems and services” that “allow users to upload, link to and comments on videos” which purportedly infringe the patents-in-suit. *See Rembrandt Data Techs., LP v. AOL, LLC*, No. 1:08-cv-1009-GBL (E.D. Va.) (D.I. 1 Compl. ¶¶ 15 and 21 dated Sept. 26, 2008 and D.I. 113 Order dated Dec. 12, 2008); *see also Ondeo Nalco Co. v. Eka Chems., Inc.*, Civ. A. No. 01-537-SLR, 2002 WL 1458853, at *1-2 (D. Del. June 10, 2002) (granting a motion to dismiss counterclaims accusing unnamed products); *Gen-Probe*, 926 F. Supp. at 962 (granting Rule 12(b)(6) dismissal because “pointing vaguely to ‘products and/or kits’ . . . does not provide adequate notice as required by the Rules, and does not reflect the reasonable inquiry required by the Rules”); *see also Interval Licensing*, 2010 WL 5058620 at *1-3 (granting Rule 12(b)(6) dismissal because allegations that defendants infringe by “making and using websites, hardware, and

software to categorize, compare, and display segments of a body of information as claimed in the patent,” by “making, using, offering, providing, and encouraging customers to use products that display information in a way that occupies the peripheral attention of the user as claimed in the patent,” and 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,” do not satisfy Rule 8 or Form 18, because “Plaintiff has failed to identify the infringing products or devices with any specificity” and “[t]he Court and Defendants are left to guess what devices infringe on the four patents.”).

As the Supreme Court has cautioned, “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). YouTube should not be required to engage in a time consuming investigation without knowing the specific products, services, and methods that Pragmatius believes infringe its patents-in-suit.

In short, the Court should dismiss Pragmatius’s Complaint because of its failure to identify the specific allegedly infringing instrumentalities.

C. The Court Should Dismiss Pragmatius’s Insufficiently Pled Claims of Indirect Infringement

The Court should also dismiss Pragmatius’s claims of induced and contributory infringement. As a threshold matter, Pragmatius again improperly hedges by accusing YouTube of “inducing others to infringe *and/or* contributing to the infringement by others,” and by failing entirely to plead the required elements of knowledge and/or intent to infringe. (Compl. ¶¶ 17, 21, 25 (emphasis added).) Based upon its pre-filing investigation, Pragmatius should know exactly the theory of indirect infringement it has a

good-faith basis to pursue, including who the alleged direct infringers are (i.e., not just “others”). Thus, YouTube should not be left to guess as to which theory (or both) it must defend against in this case. Pragmatus wholly fails to set forth sufficient factual allegations to state claims of induced and contributory infringement.

To state a claim for induced infringement, a plaintiff must allege that (1) the inducer had specific intent to cause the acts that constitute direct infringement, and (2) the acts that constitute direct infringement were performed by a party other than the inducer. *See Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990); *XPoint Tech. v. Microsoft Corp.*, 2010 WL 3187025, *5-6 (D. Del. August 12, 2010) (“a complaint for inducement must allege the requisite knowledge and intent” and “knowledge after filing of the present action is not sufficient for pleading the requisite knowledge for indirect infringement”). Here, Pragmatus has not alleged that YouTube had any specific intent, much less that YouTube even had knowledge of the patents-in-suit. Thus, Pragmatus has failed to state a claim for induced infringement. *See Hewlett-Packard Co. v. Intergraph Corp.*, No. C03-2517-MJJ, 2003 WL 23884794, at *2 (N.D. Cal. Sept. 6, 2003) (dismissing insufficiently pled induced infringement claim).

In order to state a claim for contributory infringement, Pragmatus must allege that YouTube offered to sell or sold a “component of a patented machine ... constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent.” 35 U.S.C. § 271(c); *XPoint*, 2010 WL 3187025, *6 (“an allegation of contributory infringement must also plead requisite knowledge of the patent-in-suit at the time of the infringement” and “knowledge after filing of the present action is not sufficient for pleading the requisite knowledge for indirect

infringement”). Pragmatus fails to allege that YouTube offered to sell or sold any particular component or that such component was a material part of an infringing device. Rather, Pragmatus merely alleges that YouTube has “contribut[ed] to the infringement by others, including users of YouTube’s systems and services that allow users to upload, link to and comments on videos” (Compl. ¶¶ 29, 33, 37.) But that is not sufficient to state a claim of contributory infringement. *See Hewlett-Packard*, 2003 WL 23884794, at *2 (dismissing plaintiff’s contributory infringement claim for failure to identify material component of an infringing device).

Accordingly, the Court should dismiss Pragmatus’s claims for indirect infringement because Pragmatus has failed to state claims upon which relief may be granted.

D. Alternatively, the Court Should Order Pragmatus to Provide a More Definite Statement

At a minimum, Pragmatus should be required to provide a more definite statement. Rule 12(e) provides that “[a] party may move for a more definite statement of a pleading” where the pleading “is so vague or ambiguous that the party cannot reasonably prepare a response.” Here, Pragmatus failed to allege the most basic fact underlying its Complaint—the specific products or methods alleged to infringe the patents-in-suit.

Courts have granted motions under Rule 12(e) in patent cases for this very reason. *See, e.g., Bay Indus.*, 2006 WL 3469599 (E.D. Wis. Nov. 29, 2006), at *2 (“Defendant should not have to guess which of its products infringe nor guess how its products might fall within plaintiff’s interpretation of the claims of the patent.”); *Agilent Techs., Inc. v. Micromuse, Inc.*, No. 04 Civ. 3090 (RWS), 2004 WL 2346152, at *6 (S.D.N.Y. Oct. 19, 2004) (granting a motion for a more definite statement where the complaint did not specify which products infringed the plaintiff’s patents). By failing to identify the allegedly

infringing products or methods in its Complaint, Pragmatius has impermissibly attempted to “foist the burden of discerning what products it believes infringe[] the patent onto defense counsel.” *eSoft, Inc. v. Astaro Corp.*, No. 06-cv-00441-REB-MEH, 2006 WL 2164454, at *2 (D. Colo. July 31, 2006) (granting a motion for a more definite statement). Indeed, Pragmatius’s Complaint leaves YouTube to guess what products, services, or methods allegedly infringe the patents-in-suit.

The Complaint in its current state prevents YouTube from framing a proper responsive pleading, conforming its conduct, if necessary, to avoid allegations of willful infringement, or alerting third parties to any indemnification obligations for the purported conduct at issue. *See Gen-Probe*, 926 F. Supp. at 960-61 & n.20. Accordingly, if the complaint is not dismissed outright, the Court should grant YouTube’s alternative request for a more definite statement.

IV. CONCLUSION

For the foregoing reasons, YouTube respectfully requests that the Court dismiss Pragmatius’s Complaint pursuant to Rule 12(b)(6) or, in the alternative, require Pragmatius to provide a more definite statement pursuant to Rule 12(e).

Dated: January 6, 2011

Respectfully submitted,

/s/ Veronica S. Ascarrunz

Veronica S. Ascarrunz (Va. Bar No. 67913)

vascarrunz@wsgr.com

WILSON SONSINI GOODRICH & ROSATI

1700 K Street, NW

Fifth Floor

Washington, D.C. 20006-3817

Telephone: (202) 973-8800

Facsimile: (202) 973-8899

ATTORNEYS FOR YOUTUBE, LLC

CERTIFICATE OF SERVICE

I certify that on the 6th day of January 2011, I will electronically file the foregoing MEMORANDUM IN SUPPORT OF DEFENDANT YOUTUBE, LLC'S RULE 12(B)(6) MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Mark W. Wasserman (Va. Bar No. 22638)
mwasserman@reedsmith.com
Matthew R. Sheldon (Va. Bar No. 41892)
msheldon@reedsmith.com
Brent R. Gary (Va. Bar No. 66592)
bgary@reedsmith.com
REED SMITH LLP
3110 Fairview Park Drive
Suite 1400
Falls Church, Virginia 22042
Telephone: (703) 641-4229
Facsimile: (703) 641-4340

ATTORNEYS FOR PLAINTIFF PRAGMATUS AV, LLC

Justin P.D. Wilcox (Va. Bar No. 66067)
jwilcox@cooley.com
Scott A. Cole (Va. Bar No. 74771)
scole@cooley.com
COOLEY LLP
One Freedom Square, Reston Town Center
11951 Freedom Drive
Reston, VA 20190-5656
Telephone: (703) 456-8000
Facsimile: (703) 456-8100

ATTORNEYS FOR FACEBOOK, INC.

/s/ Veronica S. Ascarrunz
Veronica S. Ascarrunz (Va. Bar No. 67913)
vascarrunz@wsgr.com
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, NW
Fifth Floor
Washington, D.C. 20006-3817
Telephone: (202) 973-8800
Facsimile: (202) 973-8899

ATTORNEYS FOR YOUTUBE, LLC