

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

PRAGMATUS AV, LLC,
Plaintiff,

v.

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

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

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

I. INTRODUCTION

Nothing in Plaintiff's opposition changes the fact that its Complaint fails to satisfy the pleading standards under Federal Rule of Civil Procedure 8(a), as clarified in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Plaintiff asserts that its direct infringement allegations comply with Form 18, and, therefore, satisfy the pleading standards of *Twombly* and *Iqbal*, but this argument is unavailing because: (1) federal courts have repeatedly held that Form 18 does not govern the sufficiency of a patent infringement complaint under *Twombly* and *Iqbal*; and (2) even if Form 18 did govern, Plaintiff's Complaint provides less detail than Form 18 requires. Plaintiff has also failed to justify the deficiencies in its indirect infringement allegations. For the reasons expressed below and in YouTube's opening brief, YouTube's motion should be granted.

**II. PRAGMATUS'S DIRECT INFRINGEMENT CLAIMS ARE DEFICIENT
BECAUSE THEY FAIL TO IDENTIFY ANY ACCUSED SYSTEMS OR
SERVICES**

Pragmatus's failure to identify any specific accused infringing systems or services

renders the Complaint deficient under *Twombly* and *Iqbal*. In response to YouTube's discussion of *Twombly* and *Iqbal*, Pragmatus argues that its Complaint complies with Form 18. Opp'n at 2-3. In support Pragmatus relies on *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), for the assertion that a "complaint that met the requirements of the Federal form for patent infringement satisfied Rule 8." Opp'n at 3. But Pragmatus fails to explain that the Federal Circuit in *McZeal* did not hold that Form 18 complied with *Twombly*. *McZeal*, 501 F.3d at 1357 (holding that "plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent"); *see also Bender v. Motorola, Inc.*, No. C 09-1245-SBA, 2010 WL 726739, at *3 (N.D. Cal. Feb. 26, 2010) (concluding that *McZeal* did not "reaffirm the validity of" Form 18 under the *Twombly* pleading standards). Pragmatus also relies heavily on *Taltwell, LLC v. Zonet USA Corp.*, 2007 WL 4562874 (E.D. Va. Dec. 20, 2007). Contrary to its assertions, Pragmatus's Complaint is less detailed than the complaint in *Taltwell*. Opp'n at 3. Pragmatus argues that the Court found the identification of "communication devices" sufficient to meet the requirements of Rule 8, but it fails to disclose that the complaint included identification of specific communication devices accused of infringing the asserted patent. *See Taltwell*, 2007 WL 4562874 at *2 ("Taltwell contends that 'Zonet's PCMCIA Hardware Model and/or PCMCIA Wireless Network Adapter include all elements of one or more claims of the '660 patent.'").

Even if Form 18 did govern, Pragmatus's Complaint fails to provide the required level of specificity because it does not identify the accused products or services. In fact, courts applying the *McZeal* decision have held plaintiffs to the standard of identifying specific accused products or services. *See e.g., Bender*, 2010 WL 726739, at *3 (requiring plaintiff to identify "which device is at issue"); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 FJ, 2010 WL 889541, at *3 (N.D. Cal. Mar. 11, 2010) ("By pointing to broad categories of products ... *Bender* simply does not state a plausible claim for relief.") (internal quotation omitted); *Interval Licensing LLC v. AOL, Inc.*, No. C10-1385 MJP, 2010 WL 5058620, at *3 (W.D. Wash. Dec. 10, 2010) ("Plaintiff's complaint does not satisfy Rule 8 or Form 18 because Plaintiff

has failed to identify the infringing products or devices with any specificity.”).

Pragmatus’s attempt to rely on *McZeal* to argue that its broad-brush mentioning of “YouTube’s systems and services that allow users to upload, link to, and comment on videos” somehow provides the level of specificity required to comply with Form 18 must be rejected. *See* Opp’n at 2. The facts of *McZeal* do not support Pragmatus’s contention. First, the appeal in *McZeal* addressed the pleading sufficiency of a *pro se* complaint to which a more deferential pleading standard applies. *McZeal*, 501 F.3d at 1358 (“*McZeal* met the *low bar* for *pro se* litigants to avoid dismissal”) (emphasis added). Second, unlike Pragmatus, the plaintiff in *McZeal* specifically identified the accused infringing product—the “Motorola i930 ‘INTERNATIONAL WALKIE TALKIE.’” *Id.* at 1357. Because Pragmatus is not a *pro se* litigant and did not identify any specific accused product, its reliance on *McZeal* is unavailing.

Indeed, current case law confirms that Pragmatus’s identification of purportedly infringing features of the otherwise ambiguous reference to “YouTube’s systems and services that allow users to upload, link to, and comment on videos” is too generic to satisfy Form 18. The court in *Interval Licensing* addressed a similar situation where the plaintiff accused unidentified products and services that allegedly included features, such as the capabilities to “categorize, compare and display segments of a body of information as claimed in the patent.” 2010 WL 5058620, at *1. The court concluded that the plaintiff’s infringement allegations failed to satisfy both Rule 8 and Form 18 because they did not provide adequate notice to the defendants and were too “generic” to satisfy Form 18. *Id.* at *3. The court dismissed the complaint without prejudice, but made clear that an amended complaint must include the identification of defendants’ “products, devices, or schemes” that allegedly infringe the patents-in-suit and should “set forth the specific websites that are at issue and identify the hardware and software with adequate detail for [d]efendants to know what portions of their business operations are in play in this litigation.” *Id.* at *4. Likewise, other courts have recently dismissed similar patent infringement complaints that failed to identify the specific accused infringing products or services. *Bender*, 2010 WL 889541, at *6; *Motorola*, 2010 WL

726739, at *4; *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *4 (N.D. Cal. Sept. 14, 2009). Accordingly, this Court should dismiss Pragmatius’s insufficiently pled direct infringement allegations.

III. THE COURT SHOULD DISMISS PRAGMATIUS’S INSUFFICIENTLY PLED CLAIMS OF INDIRECT INFRINGEMENT

Pragmatius also insufficiently claims that YouTube indirectly infringed the patents-in-suit: “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.” (Compl. ¶¶ 29, 33, 37.) In its opening brief, YouTube argued that the Court should dismiss these insufficiently pled claims of induced and contributory infringement for three reasons: (1) Pragmatius failed to identify its specific theory of indirect infringement, accusing YouTube of alternative theories of induced and contributory infringement; (2) Pragmatius failed to state a claim for induced infringement because Pragmatius does not allege that YouTube had specific intent to cause acts that constitute direct infringement; and (3) Pragmatius failed to state a claim for contributory infringement because Pragmatius does not allege that YouTube offered to sell or sold any particular component or that such component was a material part of an infringing device. Significantly, in its Opposition, Pragmatius responds directly to only the second reason for dismissal, improperly arguing that it is not required to plead the element of specific intent. Opp’n at 5. However, that argument is contrary to controlling Federal Circuit law.

A. Pragmatius Failed to Plead the Intent Required for Induced Infringement

It is undisputed that specific intent is a required element of a claim for induced infringement. *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990); *see* Opp’n at 5. Here, Pragmatius did not allege that YouTube had specific intent to cause acts that constitute direct infringement of the patents-in-suit, much less that YouTube even had knowledge of the patents-in-suit. Because Pragmatius failed to plead facts sufficient to

support all the elements of its induced infringement claim, the Court should dismiss that claim. *See Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765-66 (4th Cir. 2003) (dismissing claim for failure to plead all required elements).

Pragmatus's argument that Federal Circuit precedent does not require plaintiffs to allege specific intent to plead a viable claim of induced infringement is without merit. Opp'n at 5. Indeed, the case upon which Pragmatus relies to support that argument is inapposite because the Federal Circuit did not address the issue of induced infringement pleading standards in that case, nor in any of the other cases relied upon by Pragmatus in its opposition to Facebook's motion to dismiss. *See Hewlett-Packard Co.*, 909 F.2d at 1469 (analyzing whether patentee had satisfied its burden of proving specific intent on summary judgment); *see also Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 686-87 (Fed. Cir. 1986) (analyzing implied license issues, not pleading standards for induced or contributory infringement); *Phonometrics, Inc. v. Hospitality Franchise Sys. Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000) (analyzing pleading standards for direct infringement, not induced or contributory infringement). Indeed, multiple district courts have recently dismissed induced infringement claims where plaintiffs have failed to allege specific intent. *See, e.g., Koninklijke Philips Elecs. N.V. v. The ADS Group*, 694 F. Supp. 2d 246, 253 (S.D.N.Y. 2010) (dismissing induced infringement claim where plaintiff failed to allege specific intent); *Halton Co. v. Streivor, Inc.*, No. C 10-00655-WHA, 2010 WL 2077203, at *2-3 (N.D. Cal. May 21, 2010) (same); *Motorola*, 2010 WL 726739, at *4 (same).

B. Pragmatus Failed to Plead a Claim for Contributory Infringement

Finally, Pragmatus makes no attempt to defend its failure to allege that (a) YouTube offered to sell or sold any particular component, or (b) such component was a material part of an infringing device. But the law is clear that to state a viable claim for contributory infringement, a plaintiff must allege that the accused infringer 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); *see also Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964). Courts have dismissed similarly deficient contributory infringement claims. *Halton*, 2010 WL 2077203, at *1-2 (plaintiff failed to allege that accused product was a “component of a patented machine ... constituting a material part of the [patented] invention”); *Hewlett-Packard Co. v. Intergraph Corp.*, No. C03-2517-MJJ, 2003 WL 23884794, at *2 (N.D. Cal. Sept. 6, 2003) (“Plaintiff fails to allege that Defendant offered to sell or sold any particular component or that such component was a material part of an infringing device.”).¹

Accordingly, the Court should dismiss Pragmatius’s claims of induced and contributory infringement because Pragmatius has failed to state claims upon which relief may be granted.

IV. ALTERNATIVELY, THE COURT SHOULD ORDER PRAGMATIUS TO PROVIDE A MORE DEFINITE STATEMENT

If the Court does not dismiss Pragmatius’s Complaint, it should require Pragmatius to provide a more definite statement under Rule 12(e) to identify the specific products or methods alleged to infringe the patents-in-suit.

Pragmatius argues that a more definite statement is not required because its Complaint satisfies the “basic pleading requirements of Rule 8.” Opp’n at 6; Ex. A., Opp’n to Facebook at 7. But, as explained above, Pragmatius has not satisfied the Rule 8 pleading standard for several reasons. Pragmatius has not identified any specific product or system that allegedly directly infringes the patents-in-suit. Nor has Pragmatius specifically identified the precise services or features that it accuses of direct infringement. Furthermore, Pragmatius has failed to allege all the required elements of induced and contributory infringement.

Pragmatius also argues that a more definite statement is not necessary because YouTube

¹ To the extent that Pragmatius relies on Form 18 to justify its indirect infringement allegations, such reliance is misplaced. “Form 18 is silent as to any theory of patent infringement besides direct infringement. ... Nowhere in Form 18 are theories and elements of induced infringement or contributory infringement referenced.” *Halton*, 2010 WL 2077203, at *3 (rejecting plaintiff’s reliance on Form 18 to demonstrate sufficiency of its indirect infringement allegations and dismissing those allegations); *see, e.g., Bender*, 2010 WL 889541, at *5-6 (same); *Elan*, 2009 WL 2972374, at *2 (same).

“can fully explore the basis for Pragmatus’s claims of infringement during the discovery phase” of this case. Opp’n at 6; Ex. A, Opp’n to Facebook at 9. However, the law is clear that YouTube should not have to wait until discovery to learn (a) which of its products Pragmatus accuses of infringement, and (b) the particular theory of infringement. *See Bay Indus., Inc. v. Tru-Arx Mfg. LLC*, Case No. 06-C1010, 2006 U.S. Dist. LEXIS 86757, at *5 (E.D. Wis. Nov. 29, 2006) (“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.”). Particularly where there is little time between the filing of a complaint and the commencement of discovery, as in this Court, the provision of such basic information to the accused infringer is critical.

Accordingly, if the complaint is not dismissed outright, the Court should grant YouTube’s alternative request for a more definite statement.

V. CONCLUSION

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

Dated: January 26, 2011

Respectfully submitted,

/s/ Veronica S. Ascarrunz

Larry L. Shatzer (*pro hac vice*)

lshatzer@wsgr.com

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

Stefani E. Shanberg (*pro hac vice*)

sshanberg@wsgr.com

Robin L. Brewer (*pro hac vice*)

rbrewer@wsgr.com

WILSON SONSINI GOODRICH & ROSATI

650 Page Mill Road

Palo Alto, CA 94304

Telephone: (650) 493-9300

Facsimile: (650) 493-6811

ATTORNEYS FOR YOUTUBE, LLC

CERTIFICATE OF SERVICE

I certify that on the 26th day of January 2011, I will electronically file the foregoing
REPLY 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

David E. Finkelson
dfinkelson@mcguirewoods.com
MCGUIRE WOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23210

ATTORNEYS FOR LINKEDIN CORPORATION

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 YOUTUBE, INC.

David M. Foster
dfoster@fulbright.com
Kimberly S. Walker
kwalker@fulbright.com
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

ATTORNEYS FOR PHOTOBUCKET.COM, INC.

I hereby certify that on the 26th day of January 2011, REPLY IN SUPPORT OF DEFENDANT YOUTUBE, LLC'S RULE 12(B)(6) MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT was served on the following by email:

Heidi L. Keefe
hkeefe@cooley.com
COOLEY LLP
3175 Hanover Street
Palo Alto, California 94304

ATTORNEYS FOR FACEBOOK, INC.

Daralyn J. Durie
ddurie@durietangri.com
Clement S. Roberts
croberts@durietangri.com
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, California 94111

ATTORNEYS FOR LINKEDIN CORPORATION

Dan D. Davison
ddavison@fulbright.com
Miriam L. Quinn
mquinn@fulbright.com
FULBRIGHT & JAWORSKI LLP
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201

ATTORNEYS FOR PHOTOBUCKET.COM, INC.

/s/ Veronica S. Ascarrunz

Larry L. Shatzer (*pro hac vice*)

lshatzer@wsgr.com

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

Stefani E. Shanberg (*pro hac vice*)

sshanberg@wsgr.com

Robin L. Brewer (*pro hac vice*)

rbrewer@wsgr.com

WILSON SONSINI GOODRICH & ROSATI

650 Page Mill Road

Palo Alto, CA 94304

Telephone: (650) 493-9300

Facsimile: (650) 493-6811

ATTORNEYS FOR YOUTUBE, LLC