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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

STREETSPACE, INC.,

Plaintiff,

v.

GOOGLE INC., et al.

Defendants.

Case No: 3:10-cv-01757-LAB-MDD

**MEMORANDUM IN SUPPORT OF  
 DEFENDANTS' RULE 12(B)(6) MOTION TO  
 DISMISS**

Date: May 9, 2011

Time: 11:15 a.m.

Judge: Hon. Larry Alan Burns

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1 Defendants Google Inc. (“Google”); AdMob, Inc. (“AdMob”); Apple Inc. and Quattro  
2 Wireless, Inc. (collectively “Apple” ); Nokia Corporation, Nokia Inc. and Navteq Corporation  
3 (collectively the “Nokia Defendants”); Millennial Media, Inc. (“Millennial Media”); and  
4 JumpTap, Inc. (“Jumptap”) (collectively “Defendants”) move pursuant to Federal Rule of Civil  
5 Procedure 12(b)(6) to dismiss Plaintiff Streetspace, Inc.’s (“Streetspace”) First Amended  
6 Complaint for Patent Infringement (“First Amended Complaint”; Dkt. No. 30) for alleged  
7 infringement of U.S. Patent No. 6,847,969 (“the ’969 Patent”) for failure to state a claim upon  
8 which relief can be granted. The First Amended Complaint includes many of the same defects as  
9 Streetspace’s original Complaint (“Complaint”; Dkt. No. 1) and should be dismissed with  
10 prejudice without leave to amend.

11 **I. SUMMARY OF ARGUMENT**

12 Streetspace’s First Amended Complaint fails to satisfy the pleading standards under  
13 Federal Rule of Civil Procedure 8(a), as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
14 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Under Rule 8(a), the complaint must  
15 include “a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Twombly*, 550  
16 U.S. at 555 n.3. This “demands more than an unadorned, the-defendant-unlawfully-harmed-me  
17 accusation.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). This standard applies  
18 equally to complaints alleging patent infringement. *See, e.g., Interval Licensing LLC v. AOL,*  
19 *Inc.*, No. C10-1385, 2010 WL 5058620 (W.D. Wash. Dec. 10, 2010) (“The Court disagrees with  
20 Plaintiff’s argument that *Twombly* and *Iqbal* do not apply to patent suits.”); *Bender v. LG Elecs.*  
21 *U.S.A., Inc.*, No. C-09-02114-JF, 2010 WL 889541, at \*5 (N.D. Cal. Mar. 11, 2010); *Ricoh Co.,*  
22 *Ltd. v. ASUSTeK Computer, Inc.*, 481 F. Supp. 2d 954, 959 (W.D. Wis. 2007).

23 The pleading standard for direct patent infringement under the Supreme Court’s *Twombly*  
24 and *Iqbal* decisions requires, at a minimum, the specific identification of the allegedly infringing  
25 products or services. Like Streetspace’s original Complaint, its First Amended Complaint fails  
26 to state a claim for direct infringement against Millennial Media and Jumptap because  
27 Streetspace again fails to identify a single Millennial Media or Jumptap product or service that  
28 allegedly infringes the ’969 Patent. Streetspace’s repeated failure to state a claim for direct

1 infringement is no mere oversight—Streetspace *cannot* specify any Millennial Media or Jumtap  
2 service that directly infringes the '969 Patent because each '969 Patent claim requires a  
3 “terminal,” and neither Millennial Media nor Jumtap sells or otherwise provides a “terminal”  
4 with any of their services. As a result, Streetspace has now twice failed to state a claim for direct  
5 infringement against Millennial Media and Jumtap, and those claims should be dismissed with  
6 prejudice.

7 Streetspace’s allegations of indirect infringement in the First Amended Complaint against  
8 all of the Defendants are also inadequate. Despite having a second bite at the apple, and limiting  
9 its allegations of indirect infringement to only the active inducement type (dropping its claims  
10 for the contributory infringement type of indirect infringement asserted in the original  
11 Complaint), Streetspace has still not adequately plead indirect infringement. In the First  
12 Amended Complaint, Streetspace includes many additional facts, some of which are possibly  
13 relevant, many of which are completely irrelevant and apparently intended only to cast the  
14 Defendants in a negative light. Importantly, Streetspace failed to include in the First Amended  
15 Complaint allegations of fact sufficient to allow the Court to draw a reasonable inference that  
16 any of the Defendants are liable for indirect infringement. Specifically, Streetspace has failed to  
17 plead any facts sufficient to allow the Court to draw a reasonable inference that any of the  
18 Defendants actually knew of the '969 Patent prior to the filing of the suit.

19 In light of such facially inadequate assertions of infringement, pursuant to Rule 12(b)(6),  
20 Defendants respectfully request that this Court dismiss (i) Streetspace’s direct infringement  
21 claims against Millennial Media and Jumtap, and (ii) Streetspace’s indirect infringement claims  
22 as to all of the Defendants.

## 23 **II. BACKGROUND**

24 On August 23, 2010, Streetspace filed its original Complaint against Defendants for  
25 alleged infringement of the '969 Patent. On January 18, 2011, Defendants timely filed a joint  
26 motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Streetspace’s Complaint  
27 for failure to state a claim upon which relief can be granted, or in the alternative, for a more  
28 definite statement pursuant to Rule 12(e). (Dkt. No. 21). In response, Streetspace improperly

1 filed its First Amended Complaint on February 25, 2011, and its opposition to Defendants’  
2 motion on February 28, 2011 (Dkt. No. 32).

3 On March 3, 2011, the Court entered an Order to Show Cause, ordering Streetspace to  
4 show “why its amended complaint should not be stricken from the docket, and why the pending  
5 motions to dismiss and transfer venue should not remain on the Court’s calendar for a March 14,  
6 2011 hearing.” (Dkt. No. 35 at 2.) On March 4, 2011, Streetspace filed its response to the Order  
7 to Show Cause, asserting that “[t]he proposed First Amended Complaint was inadvertently filed  
8 without leave”, and requested leave to file it. (Dkt. No. 39 at 2.) Defendants filed their reply in  
9 support of their motion on March 7, 2011 (Dkt. No. 42). On March 8, 2011, the Court granted  
10 Streetspace leave to file the First Amended Complaint, and denied Defendants’ motion to  
11 dismiss as moot. (Dkt. No. 43.)

12 Streetspace alleges in its First Amended Complaint that it owns and has standing to sue  
13 for infringement of the ’969 Patent. First Amended Compl. ¶ 51. A review of the ’969 Patent  
14 shows that, among other limitations, each independent claim recites a “*terminal* . . . [having] an  
15 identification code,” a “*database*,” and “a *program* for displaying personalized information” or  
16 otherwise “providing selected advertisement and online services to said consumer.” ’969 Patent  
17 claims 1, 12, and 19 (emphasis added).

18 As to Millennial Media and Jumtapp, Streetspace does not name or otherwise specify a  
19 single product or service that purportedly infringes its patent. Instead, just as in the original  
20 Complaint, Streetspace makes a vague assertion of direct infringement against “a method and/or  
21 system for providing personalized information and/or targeted online advertising services based  
22 on location, consumers’ profiles and/or usage history.” *Id.* ¶¶ 175-179, 189-194. This  
23 boilerplate recitation of certain limited aspects of the ’969 Patent leaves Millennial Media and  
24 Jumtapp to speculate as to what product or service is actually at issue in the suit.

25 As for its deficient indirect infringement allegations, Streetspace alleges with respect to  
26 Google, for example, that “Google has had actual knowledge of the ’969 patent since at least  
27 August 23, 2010”, *i.e.*, the filing date of the original Complaint. First Amended Compl. ¶ 72.  
28 Similar allegations of indirect infringement are made against the other Defendants. *Id.* ¶¶ 90, 91,

1 109, 110, 123, 124, 138, 139, 152, 153, 167, 168, 181, 182, 196, and 197. But knowledge of the  
2 patent *after* the filing of a complaint is *not* sufficient for pleading the requisite knowledge for  
3 indirect infringement. See *Xpoint Techs. Inc. v. Microsoft Corp.*, No. 09-628, 2010 WL  
4 3187025, \*6 (D. Del. Aug. 12, 2010).

5 **III. STREETSPLACE’S CLAIMS FOR INDIRECT INFRINGEMENT AGAINST ALL**  
6 **DEFENDANTS, AND ALL CLAIMS AGAINST JUMPTAP AND MILLENNIAL,**  
7 **SHOULD BE DISMISSED UNDER RULE 12(b)(6)**

8 **A. Legal Standards**

9 A complaint must contain “a short and plain statement of the claim showing that the  
10 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). However, Rule 8 “does not unlock the  
11 doors of discovery for a plaintiff armed with nothing more than conclusions.” *Iqbal*, 129 S. Ct.  
12 at 1950. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the  
13 elements of a cause of action will not do.’” *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).  
14 Unless the plaintiff has pleaded “enough facts to state a claim to relief that is plausible on its  
15 face,” and thereby “nudged [his] claims . . . across the line from conceivable to plausible,” the  
16 complaint “must be dismissed.” *Twombly*, 550 U.S. at 570 (dismissing complaint pursuant to  
17 Fed. R. Civ. P. 12(b)(6)).

18 In considering a motion to dismiss under Rule 12(b)(6), a court must assume all factual  
19 allegations in a complaint as true and view them in the light most favorable to the plaintiff.  
20 *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). However, pleadings containing “no more  
21 than conclusions[] are not entitled to the assumption of truth.” *Iqbal*, 129 S. Ct. at 1950. Only  
22 when there are “well-pleaded factual allegations” may a court “assume their veracity and then  
23 determine whether they plausibly give rise to an entitlement to relief.” *Id.* A claim has facial  
24 plausibility “when the plaintiff pleads factual content that allows the court to draw the reasonable  
25 inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949 (citing *Twombly*,  
26 550 U.S. at 556). The “sheer possibility that a defendant has acted unlawfully” is insufficient.  
27 *Id.* Such a complaint “has alleged—but has not ‘show[n]’—‘that the pleader is entitled to  
28 relief.’” *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).



1           **B.       Streetspace’s Allegations of Direct Infringement Against Millennial Media**  
2           **and Jumptap Should Be Dismissed Because They Do Not Identify Any**  
3           **Allegedly Infringing Products or Services**

4           Following *Iqbal*, a complaint must “at a minimum, [include] a brief description of what  
5           the patent at issue does, and an allegation that certain named and specifically identified products  
6           or product components also do what the patent does, thereby raising a plausible claim that the  
7           named products are infringing.” *LG Elecs.*, 2010 WL 889541, at \*6. Applying *Twombly* and  
8           *Iqbal*, the court in *LG Electronics* reasoned that only with a brief description of the patent and an  
9           allegation of specifically identified products that fits the description of what the patent does,  
10          would the pleading “provide enough specificity for the defendant to formulate a response,” and  
11          “permit the Court to ‘draw the reasonable inference that the defendant is liable for the  
12          misconduct alleged.’” *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

13          With respect to the patent infringement allegations against Millennial Media and  
14          Jumptap, ***Streetspace has failed to identify a single infringing service.*** Streetspace’s general  
15          assertion of infringement against Millennial Media and Jumptap “for providing personalized  
16          information and/or targeted online advertising services based on location, consumers’ profiles  
17          and/or usage history,” is far too vague to state a claim of patent infringement that is “plausible on  
18          its face.” *Iqbal*, 129 S. Ct. at 1949.

19          This court and others have properly dismissed patent infringement claims where plaintiffs  
20          have not identified specific products or services. *See, e.g., Gen-Probe, Inc. v. Amoco Corp.*, 926  
21          F. Supp. 948, 962 (S.D. Cal. 1996) (granting Rule 12(b)(6) dismissal because “pointing vaguely  
22          to ‘products and/or kits’ . . . does not provide adequate notice as required by the Rules, and does  
23          not reflect the reasonable inquiry required by the Rules”); *LG Elecs.*, 2010 WL 889541, at \*4  
24          (requiring plaintiff to specifically identify allegedly infringing products and finding list of  
25          allegedly infringing product types to be insufficient); *Hewlett-Packard Co. v. Intergraph Corp.*,  
26          No. C 03-2517 MJJ, 2003 U.S. Dist. LEXIS 26092, at \*6 (N.D. Cal. Sept. 6, 2003) (dismissing  
27          plaintiff’s complaint that defendant’s “software and hardware products” infringed the patent  
28          because the allegations did not provide defendant with “fair notice” as to what claims to defend);  
*Realtime Data, LLC v. Morgan Stanley*, No. 6:09CV326, 2010 WL 2403779, at \*5 (E.D. Tex.

1 June 10, 2010) (granting Rule 12(b)(6) dismissal because plaintiff’s allegations did not  
2 “specifically identify any accused products or services” and finding the identification of “data  
3 compression products and/or services” too vague).

4 By failing to identify any specific service, Streetspace has not put Millennial Media and  
5 Jumtapp on fair notice as to what services are subject to the infringement claim. Streetspace’s  
6 allegations against Millennial Media and Jumtapp are even more vague than the allegations at  
7 issue in *Gen-Probe*, *LG Electronics*, *Hewlett-Packard* and *Realtime Data*. As the Supreme  
8 Court has cautioned, “a district court must retain the power to insist upon some specificity in  
9 pleading before allowing a potentially massive factual controversy to proceed.” *Associated Gen.*  
10 *Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). Millennial Media and  
11 Jumtapp should not be required to engage in a time-consuming investigation without knowing  
12 the specific services alleged to infringe the ’969 Patent. As such, the court should at a minimum  
13 dismiss the First Amended Complaint against Millennial Media and Jumtapp.

14 Moreover, the dismissal should be with prejudice. In granting Streetspace leave to file an  
15 amended complaint in the face of the Defendants’ first motion to dismiss, the Court already has  
16 provided Streetspace the opportunity to amend its complaint to fix the foregoing deficiencies.  
17 Streetspace’s First Amended Complaint, however, still does not specify any service provided by  
18 Millennial Media or Jumtapp that directly infringes the ’969 Patent. It cannot because direct  
19 infringement “requires that each and every limitation set forth in a claim appear in an accused  
20 product,” *Franks Casing Crew & Rental Tools, Inc. v. Weatherford Int’l, Inc.*, 389 F.3d 1370,  
21 1378 (Fed. Cir. 2004) (internal citation omitted). Among other limitations, each claim in the  
22 ’969 patent requires a “terminal.” ’969 patent claims 1, 12, and 19. Neither Millennial Media  
23 nor Jumtapp sells, uses, or otherwise provides a “terminal” when providing any of their services  
24 to their customers. Thus, even under Streetspace’s incorrect and baseless apparent construction  
25 of “terminal,” it cannot identify any specific service provided by Millennial Media or Jumtapp  
26 that includes a “terminal”. Indeed, as admitted in the First Amended Complaint, the alleged  
27 “terminal” is provided and used by the consumer, not Millennial Media or Jumtapp:  
28

- 1 • “Streetspace is informed and believes and based thereon alleges that Millennial  
2 Media utilizes server software and/or tracking cookies located on consumer  
3 terminals in order to identify consumers and target ads.” First Amended Compl. ¶  
4 179.
- 5 • “Streetspace is informed and believes and based thereon alleges that Jumtap  
6 utilizes server software and/or tracking cookies located on consumer terminals in  
7 order to identify consumers and target ads.” First Amended Compl. ¶ 194.

8 Thus, although Streetspace alleges that Millennial Media and Jumtap directly infringe  
9 the '969 Patent by “providing [some unspecified] services,” it does not and cannot identify any  
10 specific service provided by these defendants in which Millennial Media and Jumtap sell, use,  
11 offer or otherwise provide the required “terminal.” Streetspace has not stated and cannot state a  
12 claim for direct infringement against Millennial Media and Jumtap, and those claims should be  
13 dismissed with prejudice.

14 **C. Streetspace’s Indirect Infringement Allegations Are Insufficiently Stated and**  
15 **Fail to Meet the Pleading Requirements of *Twombly* and *Iqbal***

16 Streetspace also fails to sufficiently allege claims for inducement under 35 U.S.C.  
17 § 271(b). The First Amended Complaint does not adequately allege the requisite pre-filing  
18 knowledge of the '969 Patent on the part of any Defendant.

19 There are two types of indirect patent infringement: active inducement under 35 U.S.C.  
20 § 271(b) and contributory infringement under 35 U.S.C. § 271(c). In its original Complaint,  
21 Streetspace accused all Defendants of both types of indirect infringement. Now, with its First  
22 Amended Complaint, Streetspace has not asserted any claim for contributory infringement, but  
23 still asserts a claim for active inducement against each Defendant. Despite having had the  
24 benefit of a do-over with its First Amended Complaint, Streetspace has still failed to plead any  
25 facts that would allow a court to draw a reasonable inference that any of the Defendants is liable  
26 for indirect infringement. Accordingly, Streetspace’s allegations “do not suffice,” and its First  
27 Amended Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a  
28 claim upon which relief can be granted, at least as to all claims for indirect infringement.

1 “Inducement requires a showing that the alleged inducer *knew of the patent*, knowingly  
2 induced the infringing acts, and possessed a specific intent to encourage another’s infringement  
3 of the patent.” *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009)  
4 (citing *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006 (*en banc* in relevant  
5 part) (emphasis added). Streetspace admits that it had no factual basis to allege that any of the  
6 Defendants knew of the ’969 Patent prior to the filing of the Complaint, and that it can allege  
7 only that “Defendants knew of the ’969 patent since at least August 23, 2010 (the filing date of  
8 the original complaint).” (Response to Order to Show Cause, Dkt. No. 39, at 3). But that  
9 allegation is inadequate as a matter of law: “knowledge *after* filing of the present action is *not*  
10 sufficient for pleading the requisite knowledge for indirect infringement.” *Xpoint Techs. Inc., v.*  
11 *Microsoft Corp.*, No. 09-628, 2010 WL 3187025, \*6 (D. Del. Aug. 12, 2010) (emphasis added)  
12 (citing *Mallinckrodt v. E-Z-Em, Inc.*, 670 F.Supp.2d 349, 354 n.1 (D. Del. 2009)). If the law  
13 were otherwise, a plaintiff could fabricate a claim of indirect patent infringement simply by  
14 filing a complaint, and then—perhaps the next day—filing an amended complaint alleging that  
15 Defendants were on notice of the patent-in-suit at least as early as the date of the original  
16 complaint. Thus, by its own admissions, Streetspace has not and cannot plead a legally sufficient  
17 claim for indirect infringement against any Defendant.

18 As to Google, Streetspace asserts that:

19 Streetspace is informed and believes and based thereon alleges that Google  
20 operates a search engine and database called Google Patents comprising patents  
21 and published patent applications from the United States Patent & Trademark  
22 Office. All of the approximately 7 million U.S. patents have been put in the  
23 database including the ’969 patent.

24 First Amended Compl. ¶ 72. But the mere presence of the ’969 Patent within the comprehensive  
25 Google Patents database is not sufficient to support a reasonable inference that anyone at Google  
26 actually was aware of the existence of the ’969 Patent. Thus, this factual assertion is not  
27 sufficient to support any inference that Google had actual awareness of the ’969 Patent prior to  
28 the filing of the Complaint. *See, e.g., Twombly*, 550 U.S. at 555, 570 (holding that a complaint  
must “raise a right to relief above the speculative level” and must “state a claim to relief that is  
plausible on its face.”); *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) (holding that

1 federal courts “are not bound by conclusory allegations, unwarranted inferences, or legal  
2 conclusions” stated in a complaint).

3           Streetspace asserts that it should, nonetheless, be entitled to a discovery fishing  
4 expedition because “it remains to be seen whether any Defendant actually knew of the ’969  
5 patent . . . , which will be the subject of discovery.” (Response at 3.) But “remains to be seen” is  
6 not a cognizable placeholder allowing Streetspace to take discovery to ascertain whether the  
7 Defendants had any knowledge of the ’969 Patent prior to Streetspace’s Complaint. Either  
8 Streetspace can plead that Defendants had the requisite knowledge of the ’969 Patent at the time  
9 it filed the original Complaint, or it cannot. The pleading standard under Rule 8 “does not  
10 unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Iqbal*,  
11 129 S. Ct. at 1950. By admitting that it does not have any factual basis to allege that Defendants  
12 knew of the ’969 Patent prior to the filing of the original Complaint, Streetspace’s allegations are  
13 nothing more than “formulaic recitations of the elements” and specifically prohibited by the  
14 Supreme Court. *Twombly*, 550 U.S. at 555. Further, because by Streetspace’s own admissions  
15 that “it remains to be seen whether any Defendant actually knew of the ’969 patent,” (Response  
16 at 3), any amendment would be futile and the inducement claims should be dismissed with  
17 prejudice.

18 **IV. CONCLUSION**

19           Streetspace’s First Amended Complaint does not and cannot state a claim for direct  
20 infringement against defendants Millennial Media and Jumtap, and those claims should be  
21 dismissed with prejudice. In addition, Streetspace’s First Amended Complaint does not and  
22 cannot to state a claim for indirect patent infringement upon which relief can be granted against  
23 any of the Defendants, and those claims should be dismissed without leave to amend.

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Dated: March 22, 2011

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