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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.: 2:10-cv-01385-MJP

DEFENDANTS GOOGLE INC. AND
YOUTUBE, LLC’S REPLY IN
SUPPORT OF THEIR MOTION TO
DISMISS OR SEVER FOR
MISJOINDER PURSUANT TO FED.
R. CIV. P. 20 AND 21

Note on Motion Calendar:

November 12, 2010

ORAL ARGUMENT REQUESTED

Defendants Google Inc. and YouTube, LLC (together “Google”) submit this reply in support of their Motion to Dismiss or Sever For Misjoinder Pursuant to Fed. R. Civ. P. 20 and 21.

I. ARGUMENT

Interval Licensing LLC’s (“Interval”) Opposition Brief demonstrates why Interval’s attempt to join eleven separate defendants with distinct products and services is improper and prejudicial to the defendants.

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MJP

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1 **A. Interval’s Brief Demonstrates The Prejudice Caused By Improper Joinder**

2 Interval’s Opposition Brief misconstrues what it means for a right to relief to arise out of
3 the “same transaction, occurrence, or series of transactions or occurrences.” Joinder is not
4 proper just because a plaintiff makes common allegations of patent infringement. Rather, as is
5 the case here, when the allegations of infringement involve a multitude of disparate products and
6 offerings,¹ each of which is unique except in the broadest sense (*e.g.*, that they relate to the
7 Internet and websites), joinder is improper. In failing to recognize that its claim does not arise
8 from a common set of operative facts, Interval’s brief illustrates the exact kind of harm that the
9 joinder rules are designed to guard against.

10 For example, Interval makes unsupported allegations concerning Office Max’s website,
11 and then concludes that joinder is appropriate because all of the defendants “display[]
12 information on their websites in a format equivalent to Office Max’s ‘Related Products’ lists.”
13 (Dkt. No. 122 at 5:19-22.) Taking this example at face value,² Interval inappropriately assumes
14 that each of the defendant’s underlying systems operate in the same manner. It is naïve, at best,
15 for Interval to suggest that because both Office Max and Google purportedly have websites that
16 “display[] a list of other items captioned ‘Related Products’” that any difference between the
17 defendants’ offerings would be immaterial to the issue of non-infringement. (Dkt. No. 122 at
18 3:19-20). Moreover, it would be improper for Interval to attempt to prove its claims against
19 Google by reference to another defendant’s unrelated operations rather than by showing that
20 each of Google’s (as yet unidentified) products or services include every limitation of one of
21 Interval’s patent claims. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir.
22 1995) (infringement analysis requires comparison of properly construed claims to accused
23 product), *aff’d*, 517 U.S. 370 (1996). For this very reason, joinder is improper and severance is
24 appropriate.

25 _____
26 ¹ As explained more fully in Google’s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be
27 Granted Pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. No. 62), Interval has not identified any products of any of the
defendants that are allegedly infringing, nor has it identified any of the asserted claims of any of the patents-in-suit.

² Although Interval contends without explanation that the defendants infringe one of its patents with “similar”
functionality (Dkt. No. 122 at 3:18-22), Interval made no factual allegations to support such a claim in its complaint.

1 Although there may be some overlap in invalidity arguments advanced by the defendants,
2 this does not support joinder and does nothing to negate the very real prejudice Google will face
3 as a result of the potentially numerous and/or conflicting non-infringement and remedies
4 arguments that may be advanced by other defendants. *WIAV Networks LLC v. 3COM Corp.*,
5 2010 WL 3895047, at *3 (N.D. Cal. Oct. 1. 2010) (“FRCP 20(a)(2)(A) does not encompass
6 defenses asserted by a defendant. Rather, only a ‘right to relief’ asserted *by the plaintiff* can
7 satisfy the requirements for joining defendants under FRCP 20(a)(2)(A).”) (emphasis in
8 original). For example, differences in defendants’ systems and accused products may cause
9 them to develop different non-infringement or claim construction positions. Lumping all the
10 defendants together, by improper joinder without factual commonality, will likely impair
11 Google’s ability to advance positions that are different from, or conflict with, the positions of
12 other defendants during claim construction and trial. At a minimum, Google will be prejudiced
13 by the sheer number of different arguments that this Court or a jury will be asked to consider if
14 all eleven defendants are joined in a single action. The resulting confusion and prejudice is
15 precisely why Rule 20 requires “transactional relatedness” for joinder of unrelated defendants.

16 The only commonality between the defendants here is that they are improperly joined co-
17 defendants in a patent case. This is not enough to justify joining all the defendants in one action.

18 **B. Interval Has Failed Allege Facts that Show a Common Transaction or**
19 **Occurrence**

20 As explained in Google’s Motion, the Ninth Circuit has interpreted the phrase “same
21 transaction, occurrence, or series of occurrences” to require a degree of factual commonality
22 underlying the claims. *Bravado Int’l Group Merchandising Servs. v. Cha*, 2010 WL 2650432, at
23 *4 (C.D. Cal. June 30, 2010) (citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997)).
24 A party typically must assert rights that arise from related activities. *WIAV Networks*, 2010 WL
25 3895047, at *1 (citation omitted).

26 Interval’s interpretation of joinder would read the “same transaction or occurrence”
27 requirement out of Rule 20 (Dkt. No. 122 at 7) because Interval has put forth no allegations that

1 show any degree of factual commonality underlying its claims. Under Interval’s reasoning, any
2 time multiple entities are accused of the same legal wrong, those entities could be joined in a
3 single action. In other words, under Interval’s interpretation, the “same transaction or
4 occurrence” requirement is met simply because a single plaintiff asserts that a disparate set of
5 companies infringe one or more of several asserted patents. This is not what Rule 20 means.

6 The very cases cited by Interval demonstrate what relatedness means in the context of
7 Rule 20 – there must be facts common to the claims asserted by the plaintiff or plaintiffs that
8 apply to claims against the defendants, not merely that there is a similar legal claim. (Dkt. No.
9 122 at 6:6-23.) For example, in *League to Save Lake Tahoe v. Tahoe Reg’l Planning Agency*,
10 558 F.2d 914, 917 (9th Cir. 1977) (“*League*”) the plaintiffs alleged in their complaint that one of
11 the defendants had illegally approved the developer defendants’ projects and, if those approvals
12 were found to be illegal, the plaintiffs could prohibit the developers’ activities. The court found
13 that joinder was proper because these facts showed that the claim against the developers arose
14 out of the same occurrence. *League*, 558 F.2d at 917. Likewise, *Fisher v. CIBA Specialty*
15 *Chemicals Corp.*, 245 F.R.D. 539, 540 (S.D. Ala. 2007) involved claims brought by nearby
16 property owners against a manufacturer for release of chemicals at a particular manufacturing
17 site. In *Alexander v. Fulton County Ga.*, 207 F.3d 1303, 1324 (11th Cir. 2000), the plaintiffs
18 claims arose out of allegations of a pattern of discriminatory conduct by the same sheriff in the
19 same year.

20 In contrast, Interval has not alleged that its claims against the defendants arise out of any
21 concerted actions or related activities or that there are any common facts regarding defendants’
22 accused products that would support joinder in this case. (See Dkt. No. 63 at 5:1-14.) Moreover,
23 even if Interval had alleged in the complaint that all of the defendants’ websites are “similar,”
24 this is not enough to satisfy the “transactional relatedness” prong of Rule 20. *WIAV Networks*,
25 2010 WL 3895047 at *1-3 (joinder of only the subset of defendants that manufactured laptop
26 computers would still be improper because there were no allegations of any related actions
27 among those defendants). “The mere fact that twelve defendants all manufacture, sell, or

1 distribute their own laptop computers does nothing to obviate the bone crushing burden of
2 individualized methods of proof unique to each product.” *Id.* at *1-2. Interval’s allegations here
3 likewise fail to provide any suggestion of factual relatedness; thus, joinder is improper.

4 **C. Interval Mischaracterizes Authority as Applying a Per Se Rule Against**
5 **Joinder of Multiple Defendants in Patent Cases**

6 Contrary to Interval’s assertion (Dkt. No. 122 at 8:1-18), the courts in the cases Google
7 relies upon did not apply a *per se* rule. Instead, the allegations in those cases, like those here,
8 failed to show any factual commonality that would support joinder. The courts in those cases
9 were able to deal with the joinder issue without a lengthy discussion because none of the
10 defendants were related, the accused products were separate and distinct, and there were no
11 allegations that any acts of alleged infringement were connected in any manner. (See Dkt. No.
12 62 at 3:7-12 & 5:1-6:14 and cases cited therein.) In other words, those cases involved exactly
13 the same situation that is before the Court in this instance. It was not the adoption of a *per se*
14 rule, but the clarity of what was wrong with the plaintiffs allegations that allowed the courts to
15 resolve the issue in short order.

16 **II. CONCLUSION**

17 Google respectfully requests that the Court dismiss Google from this case, or sever the
18 claims against it, because joinder of defendants here is improper.

19 DATED this 12th day of November, 2010.

20 STOKES LAWRENCE, P.S.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on November 12, 2010, I caused the foregoing DEFENDANTS GOOGLE,
3 INC. AND YOUTUBE, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR
4 SEVER FOR MISJOINDER PURSUANT TO FED. R. CIV. P. 20 AND 21 to be:

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

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