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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 MOTION TO
DISMISS OR SEVER FOR
MISJOINDER PURSUANT TO FED.
R. CIV. P. 20 AND 21

Note on Motion Calendar:

November 12, 2010

Pursuant to Fed. R. Civ. P. 20 and 21, defendants Google Inc. and YouTube, LLC (together, “Google”), through their undersigned counsel, respectfully move this Court to dismiss or sever them from the above-captioned action for misjoinder.

I. INTRODUCTION

Interval Licensing LLC (“Interval”) has ignored the Federal Rules of Civil Procedure and Ninth Circuit law by attempting to improperly join eleven disparate and unrelated entities in a single action for patent infringement without alleging any coordinated action between them or any right to relief that arises out of “the same transaction, occurrence, or series of transactions or occurrences.” Fed. R. Civ. P. 20(a)(2)(A). Google should be dropped from the instant action, or the claims against it should be severed, because there is no allegation of, or any factual basis for

DEFENDANTS GOOGLE INC. AND YOUTUBE, LLC’S MOTION TO
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1 alleging, a connection between Google and the other defendants with respect to Interval’s claims
2 of patent infringement.

3 II. FACTUAL BACKGROUND

4 On August 27, 2010, Interval filed its Complaint alleging infringement of U.S. Patent
5 Nos. 6,263,507 (“the ’507 patent”); 6,034,652 (“the ’652 patent”); 6,788,314 (“the ’314 patent”);
6 and 6,757,682 (“the ’682 patent”) (collectively, the “patents-in-suit”) by Google, and
7 infringement of the ’507 and ’682 patents by YouTube. (D.I. 1.) By the same Complaint,
8 Interval also alleged infringement of all four patents-in-suit by AOL, Inc., Apple, Inc., and
9 Yahoo! Inc; infringement of the ’507 and ’682 patents by eBay, Inc., Netflix, Inc., Office Depot,
10 Inc., OfficeMax, Inc., and Staples, Inc.; and infringement of the ’682 patent by Facebook, Inc.
11 *Id.* Interval does not – and cannot – allege that any of the named defendants are jointly or
12 severally liable, conspired with each other, or acted in concert in any way. Likewise, because
13 many of the defendants are competitors and offer distinct products, technology, and services,
14 Interval cannot allege that its claims against them arise out of “the same transaction, occurrence,
15 or series of transactions or occurrences.”¹

16 III. AUTHORITY AND ARGUMENT

17 A. Plaintiff’s Attempted Joinder of Google with Unrelated Defendants Ignores 18 the Law

19 Rule 20 of the Federal Rules of Civil Procedure defines who may be permissively joined
20 as defendants. Joinder is appropriate only if:

- 21 (A) any right to relief is asserted against them jointly, severally, or in the
22 alternative with respect to or arising out of the same transaction, occurrence,
23 or series of transactions or occurrences; **and**
24 (B) any question of law or fact common to all defendants will arise in the action.

25
26 ¹ Concurrent with this motion, Google has filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) based in
27 part on the failure of the Complaint to identify with any particularity what products or services offered by Google
allegedly infringe the patents-in-suit. There is no basis to assume any relation or common transaction or occurrence
as between any of Google’s products or services and any of any other defendant’s products or services.

1 Fed. R. Civ. P. 20(a)(2) (emphasis added). “Thus, Rule 20 permits the joinder of multiple
2 defendants only if two requirements are satisfied: transactional relatedness and commonality.”
3 *Bravado Int’l Grp. Merchandising Servs. v. Cha*, No. CV 09-9066 PSG, 2010 WL 2650432, at
4 *1 (C.D. Cal. June 30, 2010). In this case, Interval cannot meet at least the first part of Rule
5 20(a)(2), requiring “transactional relatedness” of its claims for relief. Transactional relatedness
6 is a fact-specific inquiry that examines whether the claims for relief arise from “related
7 activities.” *Id.* at *4; *see also Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce,*
8 *Fenner & Smith*, 564 F. Supp. 1358, 1370-71 (D. Del. 1983) (interpreting Fed. R. Civ. P.
9 20(a)(2)(A) as requiring “the existence of a right to relief predicated upon or arising out of a
10 single transaction or occurrence or series thereof” and finding that “[a]llegations of [patent]
11 infringement against two unrelated parties based on different acts do not arise from the same
12 transaction”). The Ninth Circuit has interpreted the phrase “same transaction, occurrence, or
13 series of occurrences” to require a degree of factual commonality underlying the claims. *Id.*
14 (citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997)); *Insituform Techs., Inc. v. Cat*
15 *Contracting, Inc.*, 385 F.3d 1360, 1372 (Fed. Cir. 2004) (applying regional circuit law to
16 questions of joinder). No such commonality is alleged to exist here.

17 Where a party has been misjoined, Fed. R. Civ. P. 21 provides that “[on] motion or on its
18 own, the court may at any time, on just terms, add or drop a party.”

19 **B. Defendants Are a Disparate Group of Unrelated Entities**

20 The defendants named in the Complaint either compete with each other, as in the case of,
21 for example, Google and Yahoo!, or have entirely different businesses, as in the case of, for
22 example, Google and Office Depot, Inc. The eleven named defendants offer a wide and
23 unrelated array of products, technologies, and services, from notepads and office furniture to
24 Internet search capabilities. There is no logical relationship between the defendants, and the
25 Complaint contains no allegation that any two defendants (let alone all eleven defendants)
26 conspired to injure Interval, or acted in concert in any way whatsoever. Interval has
27 inappropriately sued all defendants at once apparently to serve its own interests.

1 **C. Defendants Do Not Share Common Transactions or Occurrences**

2 Courts have held that “[c]learly the common transaction requirement [of Fed. R. Civ. P.
3 20] has not been met” where “separate companies that independently design, manufacture and
4 sell different products in competition with each other” are putatively joined in a patent
5 infringement action. *Androphy v. Smith & Nephew*, 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998); *see*
6 *also Paine, Webber*, 564 F. Supp. 1358 at 1371 (“[a]llegations of infringement against two
7 unrelated parties based on different acts do not arise from the same transaction.”).

8 Interval has not alleged that Google is related to any other defendant or has acted in
9 concert with any other defendant to infringe the patents-in-suit. Google is at best, as to certain
10 defendants such as Yahoo!, a competitor. There is no – and can be no – factual commonality
11 underlying the claims asserted against Google and the other defendants because the defendants
12 offer a diverse and distinct array of products and services. *WiAV Networks, LLC v. 3Com Corp.*,
13 No. 10-03448, 2010 WL 3895047, at *3-4 (N.D. Cal. Oct. 1, 2010) (in a patent infringement
14 case, finding that “plaintiff cannot escape the fact that it is suing unrelated and competing
15 defendants for their own acts of patent infringement,” and dismissing all but the first named
16 defendant for misjoinder.); *see also Philips Elecs. N. Am. Corp. v. Contec Corp.*, 220 F.R.D.
17 415, 418 (D. Del. 2004) (granting defendant CMT’s motion to sever because “the only
18 connection between CMT and Hango is that they may have infringed the same patents . . . ,
19 which is an insufficient basis to join unrelated parties as defendants in the same lawsuit”).
20 Moreover, Interval’s failure to allege any coordination or common action between the defendants
21 is fatal to its choice of defendants in this action. *Arista Records, LLC v. Does 1-4*, 589 F. Supp.
22 2d 151, 154 (D. Conn. 2008) (“The ‘same transaction’ requirement [of Fed. R. Civ. P. 20] means
23 there must be some allegation that the joined defendants ‘conspired or acted jointly.’”) (citation
24 omitted). Interval has not even accused all of the named defendants of infringing all of the
25 asserted patents – rather, accusing certain defendants of infringing subsets of the asserted
26 patents.

1 Unrelated, competing companies offering different products, technologies, and services
2 in different transactions do not participate in the same factual transaction or occurrence.
3 Numerous courts have found that “joinder is often improper where [multiple] competing
4 businesses have allegedly infringed the same patent by selling different products.” *WiAV*
5 *Networks, LLC*, 2010 WL 3895047, at *3 (citing *Spread Spectrum Screening, LLC v. Eastman*
6 *Kodak Co.*, No. 10 C 1101, 2010 WL 3516106, at *2 (N.D. Ill. Sept. 1, 2010)); *see also Reid v.*
7 *General Motors et al.*, 240 F.R.D. 260 (E.D. Tex. 2007) (granting defendant’s motion to sever in
8 a patent infringement case where co-defendants used different systems); *Philips Elecs.*, 220
9 F.R.D. 415 at 417 (granting defendant’s motion to sever in a patent infringement case and
10 finding that “[a]llegations of infringement against two unrelated parties based on different acts
11 do not arise from the same transaction”); *New Jersey Mach. Inc. v. Alford Indus., Inc.*, Civ. A.
12 No. 89-1879 (JCL), 1991 WL 340196, at *2 (D.N.J. Oct. 7, 1991) (holding in a patent
13 infringement case that “claims of infringement against unrelated defendants, involving different
14 machines, should be tried separately against each defendant”).

15 In order to prove infringement, Interval must show that each and every limitation of the
16 asserted claims is present in each asserted product or service. *Read Corp. v. Portec, Inc.*, 970
17 F.2d 816, 821 (Fed. Cir. 1992). While it is impossible to tell from the Complaint which products
18 or services Interval contends infringe its patents, both infringement and remedies analyses are
19 intensely fact-specific processes. Joinder is improper here because each (as yet unknown)
20 product or service accused of infringement will be subjected to its own, independent
21 infringement analysis and damages evaluation, involving different evidence and witnesses.
22 *Spread Spectrum*, 2010 WL 3516106 at *2 (in a patent infringement action, finding improper
23 joinder under Rule 20 and severing claims pursuant to Rule 21 where “[t]he accused infringing
24 software, other evidence and witnesses are all different and unique” as to defendants).

25 Finally, Google would be prejudiced by the sheer number of disparate, yet
26 simultaneously presented, infringement and remedies arguments that a jury would necessarily be
27 asked to analyze and parse if Interval were permitted to join all defendants. Compounding this

1 problem are Interval’s allegations that each defendant has infringed either one, two, or all four of
2 the patents-in-suit. Google should be dismissed from this case, or the claims against it should be
3 severed, because a jury would become confused by a proceeding involving a multitude of
4 unrelated products, infringement theories, and defenses. This likelihood of confusion and
5 prejudice is precisely the reason why Rule 20 requires “transactional relatedness” for joinder of
6 unrelated defendants.²

7 **IV. CONCLUSION**

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

10 DATED this 19th day of October, 2010.

11 STOKES LAWRENCE, P.S.

12
13 By: s/ Shannon M. Jost
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26 ² Google would not object to any re-filed cases being heard in this Court in order to realize certain judicial
27 efficiencies. Further, other tools, such as coordination or consolidation of discovery, particularly, for example as it
relates to claim construction and/or validity of the patents-in-suit, may be employed to preserve judicial efficiency
and party resources.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2010, I caused the foregoing DEFENDANTS GOOGLE, INC. AND YOUTUBE, LLC'S MOTION TO DISMISS OR SEVER FOR MISJOINDER PURSUANT TO FED. R. CIV. P. 20 AND 21 to be:

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

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