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

DEFENDANT AOL INC.'S JOINDER IN GOOGLE'S MOTION TO DISMISS

Note on Motion Calendar: Nov. 19, 2010

I. INTRODUCTION AND RELIEF REQUESTED

Defendant AOL Inc. ("AOL") respectfully joins in Defendants Google Inc. and YouTube, LLC's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6) ("Google's Motion to Dismiss"). As discussed in Google's Motion to Dismiss, Plaintiff Interval Licensing LLC's ("Interval") claims against all defendants—including AOL—fail to meet the pleading requirements of Fed. R. Civ. P. 8(a)(2) as defined by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). Accordingly, AOL joins Google's motion for dismissal.

II. INTERVAL'S CLAIMS FAIL TO SATISFY THE PLEADING STANDARD

Under the *Iqbal* and *Twombly* standards, a plaintiff may not simply state that the law has been violated, but must also plead sufficient facts to show a plausible claim for relief. To be facially plausible, a claim must plead "*factual content* that allows the court to draw the

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reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (emphasis added). "A pleading that offers 'labels and conclusions,' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Finally, while a court must accept all allegations in a complaint as true, that is not the case with legal conclusions: "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Interval's infringement claims against AOL offer no more than the "threadbare recitals" and "conclusory statements" that the Supreme Court has repeatedly warned are insufficient. As with its allegations against Google, Interval has failed to plead specific facts in support of its claims that AOL infringes the patents-in-suit:

> Defendant AOL has infringed and continues to infringe one or more claims of the '507 patent. AOL is liable for infringing the '507 patent under 35 U.S.C. § 271 by making and using websites, hardware, and software to categorize, compare, and display segments of a body of information as claimed in the patent.
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> ***
>
> Defendant AOL has infringed and continues to infringe one or more claims of the '652 patent. AOL is liable for infringing the '652 patent under 35 U.S.C. § 271 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.
>
> ***
>
> Defendant AOL has infringed and continues to infringe one or more claims of the '314 patent. AOL is liable for infringing the '314 patent under 35 U.S.C. § 271 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.
>
> ***
>
> Defendant AOL has infringed and continues to infringe one or more claims of the '682 patent. AOL is liable for infringing the '682 patent under 35 U.S.C. § 271 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.

Dkt. 1, Complaint, ¶¶ 21, 33, 39, 45.

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These generic and conclusory paragraphs are devoid of the "factual content" required by *Twombly* and *Iqbal*. The claims fail to identify basic information like (1) the products or services offered by AOL that are alleged to infringe Interval's patents; (2) how AOL's products or services have allegedly infringed the patents-in-suit; or (3) the underlying technology or mechanism of the alleged infringement.

Additionally, for the reasons discussed in Google's Motion to Dismiss, Interval's Complaint also fails to state a claim for indirect infringement against any Defendant, including AOL.[1] First, to the extent Interval asserts that AOL induces or contributes to direct infringement by another, it fails to plead any specific facts regarding the alleged direct infringement. Because direct infringement is a predicate to indirect infringement, Interval's claims against AOL are deficient to the extent they allege indirect infringement. *See BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1379 (Fed. Cir. 2007). Moreover, to the extent Interval attempts to allege that AOL induces or contributes to another's infringement by way of an unspecified encouragement to customers, Interval also fails to state a claim upon which relief may be granted. A claim for indirect infringement requires, at a minimum, knowledge of the asserted patent at the time of the allegedly infringing activities. *See Mallinckrodt Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 354-55 (D. Del. 2009). Further, "knowledge after filing of the present action is not sufficient for pleading the requisite knowledge for indirect infringement." *Xpoint Techs., Inc. v. Microsoft Corp.*, 09-cv-628, 2010 WL 3187025, at *6 (D. Del. Aug. 12, 2010) (citing *Mallinckrodt*, 670 F. Supp. 2d at 354 n.1). The Complaint contains no such allegations of knowledge; therefore, it cannot support a claim for indirect infringement.

By failing to specify these essential facts about AOL and its accused products or services, Interval has made it impossible for AOL to prepare a defense. Moreover, these facts are required in order for a complaint to perform its central function—to set forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

[1] It is not clear whether the Complaint pleads indirect infringement, but the Prayer for Relief requests "[p]ermanently enjoining Defendants ... from further infringement, including contributory infringement and/or inducing infringement." (Dkt. 1 at 14.)

alleged." *Iqbal*, 129 S. Ct. at 1949. The pleading requirements of Fed. R. Civ. P. 8—and the recent Supreme Court authority interpreting these requirements—demand more. Dismissal is proper.

III. CONCLUSION

For the foregoing reasons, and for the reasons discussed in Google's Motion to Dismiss, AOL respectfully joins Google's Motion to Dismiss and requests that the Court dismiss Interval's Complaint for failure to state a claim upon which relief can be granted, including all claims alleged against AOL.

DATED this 22nd day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, I caused the foregoing DEFENDANT AOL INC.'S JOINDER IN GOOGLE'S MOTION TO DISMISS 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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