

**IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
TEXAS WACO DIVISION**

SAFECAST LIMITED,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 6:22-cv-00678-ADA

JURY TRIAL DEMANDED

**PLAINTIFF SAFECAST LIMITED’S RESPONSE TO GOOGLE LLC’S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

BACKGROUND

Plaintiff SafeCast Limited (“SafeCast”) sued Defendant Google LLC (“Google”) alleging that Google infringes U.S. Pat. No. 9,392,302 (“the ’302 patent”),¹ On September 29, 2022, Google filed a Motion to Dismiss SafeCast’s Amended Complaint for Failure to State a Claim (“Google’s Motion”).² SafeCast opposes Google’s Motion as follows:

I. INTRODUCTION

Referring to claim 1, the ’302 Patent is directed to “a system for automating compliance with local broadcasting regulations laid down by a broadcasting authority and applicable to advertisements, said advertisements being provided during time-shifted viewing.”³ While Google

¹ Doc. No. 23. Plaintiff’s Amended Complaint.

² Doc. No. 24.

³ ’302 patent, 8:28-31.

claims that “no local broadcasting time regulation is applicable to YouTube TV because YouTube TV is not a broadcasting service”, Google also admits that “YouTube complies with applicable rules and regulations.”⁴

SafeCast’s Claim Chart for the ’302 Patent⁵

Referring to SafeCast’s Claim Chart, SafeCast’s Amended Complaint alleges:

YouTube enforces local regulations that it refers to as “Community Guidelines” that “set the rules of the road for what we don’t allow on YouTube.” See <https://transparencyreport.google.com/youtube-policy/removals?hl=en>. YouTube enforces these regulations with a “combination of people and technology to flag inappropriate content and enforce these guidelines.” *Id.* YouTube relies on members of the “Trusted Flagger program (NGOs, government agencies, and individuals)” as well as YouTube-employed Policy Enforcement Specialists to enforce the policies.

Google’s Google Ads program provides advertisements for YouTube TV; **its Display Network targeting allows advertisers to “set where or when ads are shown based on features of their ideal audience.”** See https://ads.google.com/intl/en_id/home/resources/reach-larger-new-audiences/.

Google’s Google Ads provides Ad Scheduling services, which **allow advertisers to “specify certain hours or days of the week when [they] want [their] ads to show.”** See <https://support.google.com/google-ads/answer/2404244?hl=en>.

Google’s Google Ads provides advertisements that “are designed” to “abide by laws.” See <https://support.google.com/adspolicy/answer/6008942>. Additionally, Google attests that its ads will “comply with the local laws for any area [its] ads target.” See <https://support.google.com/adspolicy/answer/6023676>.

Google Ads on YouTube are provided during time-shifted viewing, as the company has offered this service to advertisers since 2009. See <https://web.archive.org/web/20090201032257/http://google-tvads.blogspot.com/2009/01/google-tv-ads-offers-time-shifted.html>.

⁴ Doc. No. 24 at 6, Google’s Motion at 5.

⁵ Doc No. 23-1, Exhibit A to SafeCast’s Amended Complaint.

Google Inc. (Google), provides YouTube TV an on-demand and live TV streaming service that supplies broadcast digital video programs with differing levels of access depending on the package that a user subscribes to, and “lets you watch live TV, on demand video, and cloud-based DVR from major broadcast and popular cable networks.” See https://tv.youtube.com/welcome/?utm_servlet=prod, emphasis added.

Google’s YouTube TV includes advertisements that comply with local regulations [as referenced above in limitation [1a]]; this **includes time-shifted programs that “have not recently aired live.”** See <https://support.google.com/youtubetv/answer/7126139>.

Google, via its advertising subsidiary Google Ads, provides customizable advertising through which advertisements may be tailored based on the appropriateness of content for different age ranges and/or timing rules.

For example, YouTube TV content can be filtered to only show content or movies “with a rating of G and PG.” See <https://support.google.com/youtubetv/answer/7454855?hl=en>. Additionally, YouTube can ensure that advertisements are only run “on family-oriented content.” See <https://support.google.com/google-ads/answer/6030919>.⁶

SafeCast did not create these allegations from nothing. All allegations listed above are supported by Google’s own published documents.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a complaint if the complaint “fail[s] to state a claim upon which relief can be granted.” The question resolved on a motion to dismiss for a failure to state a claim is not whether the plaintiff will ultimately prevail, “but whether [the] complaint was sufficient to cross the federal court’s threshold.” *Skinner v Switzer*, 562 U.S. 521, 530, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011). When considering a motion to dismiss under Rule 12(b)(6), a court “accept[s] all well-pleaded facts as true, and view[s] those facts in the light most favorable to the plaintiff.” *Bustos v Martini Club, Inc.*, 599 F.3d 458, 461

⁶ Doc No. 23-1, Exhibit B to SafeCast’s Amended Complaint. (Emphasis added).

(5th Cir.2010). (*See, Script Security Solutions, LLC v Amazon, Inc.*, 170 F. Supp.3d 928 (E.D. Texas 2016).

“A motion to dismiss under rule 12(b)(6) ‘is viewed with disfavor and is rarely granted.’” *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982)). “The court’s task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff’s likelihood of success.” *Panasonic Corp. v. Magna Int’l, Inc.*, 6:21-cv-00319-ADA, 2022 WL 174513 (W.D. Tex. Jan 20, 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). Plaintiff is not required to provide evidence of infringement at the pleading stage beyond “stat[ing] a claim to relief that is plausible on its face.” *Id.* “Courts will not dismiss a claim unless the plaintiff ‘would not be entitled to relief under any set of facts or any possible theory that it could prove consistent with the allegations in the complaint.’” *Id.* (quoting *Slyce Acquisition, Inc. v. Syte – Visual Conception, Ltd.*, 422 F. Supp. 3d 1191, 1198 (W.D. Tex. 2019)). Based upon the assumption that all the allegations in the complaint are true, the factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When the nonmovant pleads factual content that allows the court to reasonably infer that the movant is liable for the alleged misconduct, then the claim is plausible on its face. *Iqbal*, 556 U.S. at 678.

The plausibility standard “does not give district courts license to look behind [a complaint’s] allegations and independently assess the likelihood that the plaintiff will be able to prove them at trial.” *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 803 n. 44 (5th Cir.2011)). Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a plaintiff is generally required to provide “only a plausible ‘short and plain’ statement of the plaintiff’s claim, not an

exposition of [the plaintiff's] legal argument.” *Skinner*, 562 U.S. at 530, 131 S.Ct. 1289. The “short and plain” statement does “not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.” *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 346, 190 L.Ed.2d 309 (2014) (citing 5 C. Wright & A. Miller, § 1215, p. 172 (3d ed. 2002)) (Rule 8(a)(2)) “indicates that a basic objective of the rules is to avoid civil cases turning on technicalities”). *Script Sec. Sols.*, 170 F. Supp. 3d 928, 936.

To state a claim for patent infringement under 35 U.S.C. § 271, a plaintiff need only give the defendant “fair notice” of the infringement claim and “the grounds upon which it rests.” *Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018). “Fair notice,” in turn, requires the plaintiff to plausibly allege that the accused products meet “each and every element of at least one claim” of the asserted patent. *Disc Disease*, 888 F.3d at 1260, *Qwikcash, LLC v. Blackhawk Network Holdings, Inc.*, No. 4:19-CV-876-SDJ, 2020 WL 6781566, at *3 (E.D. Tex. Nov. 17, 2020) (*See, also, Hunton Energy Holdings, LLC v. HL Seawater Holdings, LLC*, 539 F. Supp. 3d 685, 694 (S.D. Tex. 2021), a defendant has fair notice of a direct infringement claim if the complaint specifically identifies the allegedly infringing product and the patent the product infringes.)

III. SAFECAST HAS SUFFICIENTLY ALLEGED DIRECT PATENT INFRINGEMENT AGAINST GOOGLE

SafeCast respectfully submits that it adequately pleaded a claim of direct patent infringement to withstand Google’s Motion to Dismiss. The Claim Chart attached to the Amended Complaint, as illustrated above, plausibly alleges that the accused product meets “each and every element of at least one claim” of the asserted patent. *See, Disc Disease*, 888 F.3d at 1260. To that end, that SafeCast has alleged that Google’s product (1) automates compliance with local broadcasting regulations laid down by a broadcasting authority and applicable to advertisements,

said advertisements being provided during time-shifted viewing/listening, (2) supplies means to supply broadcast digital video/audio programs having therein periodic breaks for the insertion of advertisements, and (3) supplies means to supply advertisements within the periodic breaks, each advertisement having associated therewith a header comprising a first field related to a local broadcasting time regulation laid down by the broadcasting authority, which local broadcasting time regulation.⁷ The fact that Google is allegedly not obligated to follow local broadcasting regulations is irrelevant. What is relevant is the fact that SafeCast has alleged Google's products comply with local broadcasting regulations, regardless of whether Google claims it is obligated to do so. (See also, Google's admission that, "YouTube complies with applicable rules and regulations.")⁸ Therefore, SafeCast submits that it has provided "fair notice" under *Disc Disease* to overcome Google's Motion.

Moreover, Google attempts to narrowly construe "broadcast authority" and "local broadcasting regulations" throughout its motion. Although issues of claim construction need not be decided at the pleading stage, Safecast respectfully submits that one of ordinary skill would interpret local broadcasting regulations as "general rules/criteria utilized/implemented upon local broadcasting content." United States Patent and Trademark Office (USPTO) Office Action dated August 14, 2014, p. 4. Even though Google attempts to skirt responsibility of the broadcast content it shows by distinguishing itself from the original source⁹, it cannot deny that it implements general rules/criteria on YouTube TV content that falls within the definition of broadcast content as understood by one of ordinary skill.

"The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in

⁷ Doc No. 23-1, Exhibit A to SafeCast's Amended Complaint.

⁸ Doc. No. 24 at 6, Google's Motion at 5.

⁹ Doc. No. 24 at 5.

the complaint must be taken as true.” *Morgan Stanley Dean Witter*, 224 F.3d at 498 (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982)). The “plausibility standard is met when ‘the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Disc Disease Solutions Inc. v. VGH Solutions, Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). SafeCast has gone above and beyond the requirements of the pleading stage. The fact that Google disagrees with SafeCast’s claim interpretation and infringement read is not a proper basis for dismissal of the complaint with a 12(b)(6) motion.

For all the foregoing reasons, Google’s Motion to Dismiss SafeCast’s Amended Complaint must therefore be denied.

IV. CONCLUSION

For the foregoing reasons, SafeCast respectfully requests that the Court deny Google’s Motion to Dismiss Plaintiff’s Amended Complaint.

Dated: October 13, 2022,

Respectfully Submitted

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CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure, I hereby certify that all counsel of record who have appeared in this case are being served on this day of October 13, 2022, with a copy of the foregoing via ECF.

/s/ William P. Ramey, III
William P. Ramey, III