

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

CELLULAR SOUTH, INC.

Plaintiff,

V.

GOOGLE, LLC

Defendant.

Civil Action No. 6:24-cv-00245-DAE

JURY TRIAL DEMANDED

Trial Date: Not Set

**PLAINTIFF CELLULAR SOUTH'S OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B)(6)**

I. INTRODUCTION

Defendant Google, LLC (“Google”) moves to dismiss the Complaint on the grounds that Plaintiff Cellular South, Inc. (“CSI”) fails to state a plausible claim for patent infringement. Google’s position is without merit. With regard to the ’853 Patent, Google would have the Court adopt wholesale Google’s preferred (and unsupported) construction of the term “fractal” before either side has begun any claim construction discovery. Google hinges its argument on its improper, untimely construction and provides no other basis for its claim that the ’853 infringement allegations are insufficient to satisfy the requirements of Fed. R. Civ. P. 12(b)(6).

With regard to the ’954 and ’972 Patents, Google suggests that the factual support cited in the Complaint contradicts the conclusion that Google’s Cloud Video Intelligence (“Video Intelligence”) software “cross-references” extracted audio text with video data. Notably, Google stops short of stating whether or not Video Intelligence does in fact cross-reference extracted audio data with video data. This is unsurprising, because a live demonstration of the product from the *same video* that Google cites shows Video Intelligence performing this function.

The Complaint far exceeds the minimum pleading standard under *Iqbal/Twombly* and provides detailed, element-by-element allegations, even though such detail is not required. Google does not claim that the Complaint fails to notify it of which products are accused, but instead complains that CSI has not explained precisely how Google’s own, non-public software operates. Because CSI’s allegations specifically allege factual content to support its claims that Google infringes each of the Patents-in-Suit,¹ and because Google’s arguments that the Complaint’s allegations contradict those facts are without merit, the Court should deny the motion.

¹ U.S. Patent Nos. 10,218,954 (“’954 Patent”), 9,940,972 (“’972 Patent”), and 11,126,853 (“’853 Patent”).

II. FACTUAL BACKGROUND

On May 9, 2024, CSI filed the instant lawsuit alleging that Google infringes the Patents-in-Suit. ECF No. 1 (“Compl.”) at ¶ 1. The Complaint alleges that Video Intelligence—a video classification system that Google makes and uses in various forms for various purposes—infringes each of the Patents-in-Suit. *Id.* at ¶¶ 39, 80, 124. Google moved to dismiss on the basis that the Complaint fails to state a plausible claim for relief. ECF No. 26 (“Mot.”).

Google asserts that the Complaint fails to state a plausible claim for infringement of the ’853 Patent. Claim 1 of the ’853 Patent recites, in relevant part: “A system for generating data from a video, comprising . . . an object recognizer configured to compare the image of the object to a fractal, wherein the fractal includes a representation of the object based on the landmarks associated with the object, wherein the recognizer is further configured to update the fractal with the image.” Compl. at ¶ 122; ECF No. 1-3 (’853 Patent), claim 1. In support of its contention that Google infringes this claim element, CSI alleges that “Video Intelligence may be used to perform facial recognition for images extracted from a video using detected attributes of a face” (Compl. at ¶ 136), and that Google “maintains a curated collection of image data for celebrities that can be used for facial recognition with Video Intelligence” (*id.* at ¶ 137). The Complaint cites additional Google public documents and presentations to show Google is “constantly improving” the video recognition models. Compl. at ¶¶ 137–138.

Google further asserts that the Complaint fails to state a plausible claim for infringement of the ’954 and ’972 Patents.² Claim 1 of the ’954 Patent recites, in relevant part, “A method to generate video data from a video comprising . . . cross-referencing the text and the video data with

² Google’s motion addresses the ’954 and ’972 Patents together—for clarity, and for purposes of this Opposition only, Plaintiff does the same.

the video to determine contextual topics.” ECF No. 1-1 (“’954 Patent”) at claim 1. Claim 1 of the ’972 Patent recites, in relevant part, “A method to generate video data from a video comprising . . . cross-referencing the text and the video data based on the generated topical meta-data to determine topics.” ECF No. 1-2 (“’972 Patent”) at claim 1. In support of its contention that the accused products perform each of these claim limitations, CSI alleges, *inter alia*, that “Video Intelligence extracts audio data and converts that data into text,” (Compl. at ¶¶ 47, 89), and uses an “aggregating video classifier that combines the outputs of the analyzed video image data and audio, text, subtitle or other data to determine a contextual topic.” *Id.* at ¶ 58; ¶¶ 59–60, 100–101.

Google requests the Court take judicial notice of two YouTube videos cited in the Complaint. *See* Mot. at 7–8. These videos, the “2017 YouTube Video” and “2023 YouTube Video,” are available at <https://www.youtube.com/watch?v=y-k8oelbmGc> and <https://www.youtube.com/watch?v=F4YKREYPkEI>, respectively.³

III. LEGAL STANDARD

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court “accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also, Repairify, Inc. v. Keystone Auto. Indus., Inc.*, 610 F. Supp. 3d 897, 899 (W.D. Tex. July 6, 2022) (“When considering such motions, this Court . . . draws all reasonable inferences in the plaintiff’s favor.”). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads

³ CSI does not oppose Google’s request that judicial notice be taken of these videos for purposes of deciding the instant motion.

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. at 678. The plausibility standard is not a probability requirement; “it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence to support the plaintiff’s allegations.” *Bell Atl. Corp.*, 550 U.S. at 556. “Review is limited to the contents of the complaint and matters properly subject to judicial notice.” *Castro v. Bexar County*, 2024 WL 3071571, at *2 (W.D. Tex. May 14, 2024) (citing *Tellabs, Inc v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)).

A patent plaintiff need not “prove its case at the pleading stage[.]” nor is it required to plead infringement “on an element-by-element basis.” *Bot M8 LLC v. Sony Corp. of Am.*, 4 F.4th 1342, 1352 (Fed. Cir. 2021). But, “[t]here must be some factual allegations that, when taken as true, articulate why it is plausible that the accused product infringes the patent claim.” *Id.* at 1353. Specific facts are not necessary; it is enough “that a complaint place the alleged infringer ‘on notice of what activity . . . is being accused of infringement.’” *Id.* (quoting *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1379 (Fed. Cir. 2017) (citations omitted)). “The adequacy of the facts pleaded depends on the breadth and complexity of both the asserted patent and the accused product or system and the nature of the defendant’s business activities.” *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1286 (Fed. Cir. 2013).

IV. ARGUMENT

A. Google’s Challenge to the Adequacy of the ’853 Patent Infringement Allegations is an Improper Attempt at Early Claim Construction

Google asserts that CSI’s allegations fail to state a plausible claim for relief because they do not explicitly state that Video Intelligence uses “fractals” or that it updates the image with “fractals.” This argument fails for four reasons: (1) claim construction is improper at this stage; (2) Google’s proposed construction relies solely on unsupported attorney argument; (3) Google’s

proposed construction is inconsistent with the '853 Patent's description (which aligns with the Complaint's allegations); and (4) even assuming Google's construction were correct, the allegations are sufficient in light of the non-public nature of the accused systems.

First, Google's position is an untimely attempt to circumvent a proper claim construction process. *See Repairify, Inc.*, 610 F. Supp. 3d at 902–903 (denying motion to dismiss that “hinge[d] on this Court adopting [the defendant's] proposed constructions”); *see also, Unification Techs. LLC v. Dell Techs., Inc.*, No. 6:20-cv-00499-ADA, 2021 WL 1343188, at *3 (W.D. Tex. Jan. 28, 2021) (“a 12(b)(6) motion is not the appropriate procedure for identifying inconsistent direct infringement contentions. Those are . . . best addressed in claim construction or non-infringement positions.”). As in *Repairify*, neither party here has conducted any claim construction discovery, and the Court has not even scheduled a claim construction hearing. The Court, therefore, lacks sufficient information on the underlying patent and its prosecution history necessary to properly construe this claim limitation. As explained further herein, a plain reading of the claim shows that the allegations—viewed in the light most favorable to CSI—easily satisfy the plausibility standard.

Second, Google's argument is unsupported. Google cites no authority for its definition of “fractal” as “a repeating pattern that looks substantially similar at different size scales, and can be used to describe an object.” Mot. at 3. Nor does Google point to anything in the Complaint, the '853 Patent or its prosecution history to support this interpretation. *Id.* Such unsupported attorney argument would be improper even if timely raised during claim construction proceedings. *See, e.g., Visible Connections, LLC v. Zoho Corp.*, 418 F. Supp. 3d 155, 159 (W.D. Tex. Nov. 26, 2019) (“[C]onclusory, unsupported assertions by experts as to the definition of a claim term are not useful to a court.”). It is even more improper on a motion to dismiss, which is intended to test the *sufficiency* of the pleadings, not to decide the *merits*. *See Nalco Co. v. Chem-Mod, LLC*, 883 F.3d

1337, 1350 (Fed. Cir. 2018) (upheld sufficiency of the complaint, explaining that defendant’s claim construction argument “is particularly inappropriate in the Rule 12(b)(6) context.”).

Third, Google’s overly restrictive construction of “fractal” is inconsistent with the way that term is used in the ’853 Patent. Google seeks to limit “fractal” to the type of self-repeating, periodic patterns discussed in the broad fields of mathematics and geometry. *See Mot.* at 1 (depicting a Sierpinski triangle). The ’853 Patent uses the term “fractal” approximately 58 times, but never in the context of geometric “repeating patterns.” For instance, the term “fractal” is used: in the context of identifying unknown objects (*id.* at 21:2–13, discussing a “ghost fractal” for identifying a submarine); with reference to information with metadata that is “stored in a reference dataset” (*id.* at 18:38–40); and as a reference dataset itself (*id.* at 18:48–50). The only excerpt that even remotely relates to Google’s construction appears in column 15, where the patent explains that a “human face is a surface lying in the fractal space,” that exhibits many “self-similar” parameters. *Id.* at 15:39–47. A human face, of course, is not a self-repeating pattern similar to a Sierpinski triangle. As a result, Google’s interpretation cannot be correct.

The ’853 Patent also states with regard to fractals, “the system can utilize facial recognition algorithms to identify facial fractals by extracting landmarks from an image of the subject’s face. For example, the algorithm can analyze the relative position, size, and/or shape of the eyes, nose, cheekbones, and jaw.” *Id.* at 13:53–57. This description of “fractal” closely aligns with claim 1 and the allegations in the Complaint. Claim 1 simply states that “the fractal includes a representation of an object [e.g., a face] based on the landmarks associated with the object.” *Id.* at claim 1 (emphasis added). The Complaint similarly alleges that the accused products perform facial recognition for images extracted from a video using detected attributes of a face (Compl. at ¶ 136) and that Google “maintains a curated collection of image data for celebrities that can be

used for facial recognition with Video Intelligence.” *Id.* at ¶ 137.

Fourth, Google asserts that the cited videos and documentation in the Complaint do not specifically mention the term “fractal” in connection with Video Intelligence—if this were the standard, then very few complaints would satisfy Rule 12. But CSI need not prove its case at this stage, and Google cannot immunize itself from an infringement suit by keeping information about the accused products secret. *See K-Tech Telecomms., Inc.*, 714 F.3d at 1286 (“A defendant cannot shield itself from a complaint for direct infringement by operating in such secrecy that the filing of a complaint itself is impossible.”). In such circumstances, courts employ a flexible approach to the pleading standard. *Id.* (“The adequacy of the facts pleaded depends on the breadth and complexity of both the asserted patent and the accused product or system and the nature of the defendant’s business activities.”); *Repairify, Inc.*, 610 F. Supp. 3d at 900 (deciding the sufficiency of the pleadings requires a “flexible approach” based on multiple factors such as the complexity of the technology and nature of the accused product).

Viewing the facts in the light most favorable to CSI, the Complaint’s allegations that (1) Video Intelligence applies facial recognition (a form of object recognition); (2) using “detected attributes of a face,” and that Google (3) maintains a “curated collection” of facial recognition data, and (4) is “constantly updating” its recognition models—more than satisfies the requirement to show a plausible claim that the accused products comprise “an object recognizer configured to compare an image to a fractal, wherein the fractal includes a representation of the object based on the landmarks associated with the object, wherein the recognizer is further configured to update the fractal with the image.” Compl. at ¶ 122.

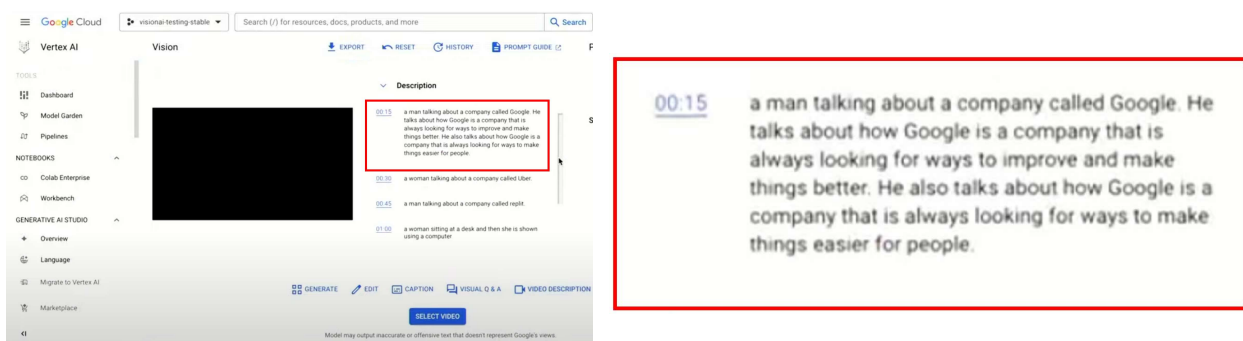
B. The Complaint Properly Alleges Infringement of the ’954 and ’972 Patents

Google next contends that the Complaint fails to allege that the extracted audio text is used in the “cross-referencing” steps of the ’954 and ’972 Patents. Mot. at 5. Further, Google contends

that the allegations suggest that Video Intelligence does not consider the audio signal in the cross-referencing step. As support, Google cites to two YouTube videos referenced in the Complaint. *Id.* at 7–8. The referenced YouTube videos, however, further confirm that Video Intelligence comprises an “aggregating classifier” that cross-references video and audio data.

1. The 2023 YouTube Video

The 2023 YouTube Video clearly shows that Video Intelligence does consider audio signals together with video data. The video contains a demonstration of the accused video classification system, that begins at approximately 11 minutes and 30 seconds. *See* Compl. at ¶¶ 53, 103 (citing 2023 YouTube Video at 11:32–12:16). The video used for the product demonstration is publicly available at <https://www.youtube.com/watch?v=DVn-tBeX7w4>.⁴ The output of the video classification system is displayed at 11 minutes and 49 seconds, shown below.



2023 YouTube Video at 11:49 (generated video description at 00:15 indicated by red box, which has been enlarged to more clearly show its text)

As the presenter explains, “[f]or every 15-second chunk, it gives you a description.”

Compl. at ¶¶ 53, 103. As shown above, the generated video description at 00:15 seconds states:

A man talking about a company called Google. He talks about how Google is a company that is always looking for ways to improve and make things better. He also talks about how Google is a company that is always looking for ways to make

⁴ CSI requests that the Court take judicial notice of this video, titled “*Leading Companies Build with Generative AI*,” which is referenced by filename in the 2023 YouTube Video at 11:38–12:07.

things easier for people.

By paraphrasing what “the man is talking about,” this example indicates that the accused product is considering both visual *and* audio signals. Indeed, review of the video used for this demo confirms that there are no visual cues that could plausibly lead to the generated description of what the man says. This demonstration alone—which is specifically cited in the Complaint—confirms that the allegations state a plausible claim that the accused product infringes the “cross-referencing” elements.

Google’s assertion that the 2023 YouTube Video suggests the accused product “is not speech-to-text or closed captioning,” (Mot. at 7) are taken out of context. These statements do not imply that the accused product is not using speech-to-text or closed captioning for video classification, but suggest only that the accused product involves *more than* either of these technologies individually.⁵ Moreover, the assertion that Video Intelligence does not consider audio signals is plainly contradicted by the live demonstration as discussed above.

2. The 2017 YouTube Video

Google argues that the 2017 YouTube Video, and particularly the underlined sentence below, shows that Video Intelligence does not “cross-reference” audio data with video data.

So far I’ve only talked about the visual features, but we are also considering adding audio or motion or speech or subtitles to this classifier and do a final fusion in this aggregating classifier. So that you don’t assume that you have a video of an animated music video. It will be sad if we give you a label saying it’s an animated cartoon. You definitely want your audio signal in there. So we are looking at various audio signals to improve the accuracy of the model.

See Mot. at 6 (underlining added); *see also*, Compl. at ¶¶ 48, 90, 96.

Google’s argument relies heavily the specific words chosen by the speaker. But the

⁵ Additionally, as set forth in the Complaint, Google’s documentation for the Video Intelligence product describes “SPEECH_TRANSCRIPTION” features. Compl. at ¶¶ 47, 89, 94.

speaker’s word choice is often fragmented and grammatically incorrect, as may be expected in everyday speech. For instance, Google argues that the speaker’s statement, “we are looking at various audio signals. . .” merely suggests a desire to implement such a feature. Mot. at 6. But an equally plausible interpretation of this statement is that the accused product *is presently* looking at said audio signals. Similarly, it is equally plausible that the statement, “we are also considering adding. . .,” viewed in context as statements made during a live product presentation to potential customers, indicates that the system *is actively considering* audio information. At a minimum, such statements provide plausible support for allegations that Google was actively experimenting with the use of audio signals in the accused product—this, by itself, constitutes an infringing use. Indeed, such interpretation of these statements aligns with the broader focus of the discussion—that is, the importance of including audio information in Video Intelligence to ensure accuracy.

The allegations pertaining to the 2017 YouTube Video statements—viewed in the light most favorable to CSI—support a plausible claim that the accused system performs the “cross-referencing” step. *See Repairify, Inc.*, 610 F. Supp. 3d at 899 (“When considering such motions, this Court . . . draws all reasonable inferences in the plaintiff’s favor.”). Even if the statements in the 2017 YouTube Video are considered purely aspirational in nature (a conclusion that would be preemptive at this stage), the 2023 YouTube Video clearly shows Google did in-fact go on to implement the “cross-referencing” of audio and video data in Video Intelligence.

V. CONCLUSION

CSI respectfully requests that the Court deny Google’s Motion to Dismiss.

DATED: July 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5, I hereby certify that, on July 29, 2024, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's ECF system.

/s/ Robert S. Hill

Robert S. Hill