**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**SOUTHERN DIVISION**

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| **INTERTAINER, INC.,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**HULU, LLC**<br><br>**Defendant.** | **Case No.: SACV 11-01208-CJC(RNBx)**<br><br>**ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** |

## I. INTRODUCTION AND BACKGROUND

Plaintiff Intertainer, Inc. ("Intertainer") brought this action for patent infringement against Defendant Hulu, LLC ("Hulu") on August 15, 2011. (Dkt. No. 1.) Intertainer filed the operative First Amended Complaint ("FAC") on October 7, 2011. (Dkt. No. 14.) Hulu now moves to dismiss Intertainer's FAC pursuant to Federal Rule of Civil

Procedure 12(b)(6). For the reasons provided below, Hulu's motion to dismiss is DENIED.[1]

### A. Intertainer's Allegations

In the FAC, Intertainer alleges that it is the owner of United States Patent No. 7,870,592 ("the '592 patent") for a "Method for Interactive Video Content Programming," which relates to a method of creating and streaming an interactive video program permitting a user to view ancillary content, such as advertisements. (FAC ¶¶ 5, 6 & Exh. A.) Intertainer alleges that the interactive video program includes an interface link, which when selected, displays ancillary material for the user and interrupts the streaming of the video. (*Id.* ¶ 6.) When the user returns to watching the video content, the video program resumes streaming from the point in time at which it was interrupted. (*Id.*) Intertainer further alleges that Hulu operates the website www.hulu.com, which streams television shows, movies, and other video content to users over the Internet. (*Id.* ¶ 9.) Hulu's media player displays video content and video advertisements as well as advertising banners on its website. (*Id.*) Intertainer alleges that users watching videos on Hulu's website may choose to view additional advertising content by clicking on the video advertisement or advertisement banner, after which the user is directed to another web page displaying the advertisement content, and Hulu interrupts the streaming of the video content from its web servers. (*Id.*) When the user returns to the media player and clicks on the "play" button, Hulu resumes streaming the video at the point when it was interrupted. (*Id.*) Intertainer alleges that by providing its video streaming service, Hulu has directly infringed at least claim 83 of the '592 patent, which states as follows:

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for January 9, 2012 at 1:30 p.m. is hereby vacated and off calendar.

A method for creating an interactive video, the method comprising:

encoding and storing the video onto a remote storage medium at a first site;

creating a link program adapted to both;

(a) interrupt streaming of the video at the remote storage medium to prevent streaming of the video over an Internet protocol-based network to a second site; and

(b) access ancillary content accessible over the network with a universal resource locator (URL) to a remote site where ancillary content is stored, the link program linking the ancillary content and the video to a point in time when the streaming of the video from the remote storage medium is interrupted;

associating the link program with the video;

streaming the video and the link program over the network;

displaying the video on the visual display;

interrupting, at the first site, the streaming of the video in response to interacting with the link program so as to prevent the streaming of the video over the network; and

continuing the streaming of the video over the network from the point in time when the streaming of the video was interrupted.

(*Id.* ¶ 11 & Exh. A, at 14:37–61.)

**B. Motion to Dismiss**

On October 17, 2011, Hulu filed its motion to dismiss the FAC. (Dkt. No. 15.) Intertainer filed its opposition on November 4, 2011, and Hulu filed its reply on November 11, 2011. (Dkt. Nos. 20, 21.) With permission of the Court, Intertainer also filed a sur-reply, and Hulu filed a response to Intertainer's sur-reply. (Dkt. Nos. 27, 31.)

Hulu moves to dismiss on the ground that Intertainer's infringement claim hinges on coordinated actions of multiple actors—namely Hulu and its website users—and that as such, Intertainer needs to allege a claim for "joint infringement," which Intertainer has failed to do because it has not alleged that Hulu "directs or controls" its users to interact with Hulu's website in an infringing manner, as required by the standard articulated in *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007). (Def.'s Mem. in Supp. Mot. to Dismiss, at 1, 6–10.)

Intertainer argues that it has sufficiently alleged a claim for direct patent infringement according to the level of detail required by Form 18 in the Appendix to the Federal Rules of Civil Procedure. (Pl.'s Opp., at 5–6.) Intertainer further argues that Hulu relies on an improper construction of claim 83 by requiring the Court to construe claim 83 as requiring multiple actors to perform the method under the '592 patent. (*Id.* at 7.) Intertainer contends that such a claim construction is contradicted by the plain language of claim 83, which makes clear that all the steps in the method are performed by Hulu. (*Id.* at 7–10.) Intertainer further argues that such a construction of claim 83 is premature in a motion to dismiss. (*Id.* at 7–8.) In its reply, Hulu does not take issue with whether Intertainer has stated allegations for patent infringement as instructed under Form 18, but argues that '592 patent cannot be infringed by Hulu acting alone and that, as such, Intertainer must allege a claim for joint infringement by stating "which single party is the mastermind that directs or controls the performance of each and every step of the claimed method"—an allegation that Hulu asserts is absent in the FAC. (Def.'s Reply in Supp. Mot. to Dismiss, at 5 (citation and quotes omitted).)

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## II. DISCUSSION

### A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

### B. Patent Infringement Claim

In a complaint for patent infringement, "a patentee need only plead facts sufficient to place the alleged infringer on notice" of the claim to enable the alleged infringer to answer and defend itself. *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d

790, 794 (Fed. Cir. 2000). A claim for direct patent infringement is governed by 35 U.S.C. § 271(a), which states that "whoever without authority makes, uses, offers to sell, or sells any patented invention . . . during the term of the patent therefor, infringes the patent." Form 18 in the Appendix to the Federal Rules of Civil Procedure provides a sample complaint for direct patent infringement. Form 18 instructs a plaintiff to include allegations of: (1) jurisdiction; (2) the plaintiff's ownership of the patent; (3) defendant's infringement of the patent "by making, selling, and using [the device] that embody the patented invention; (4) that the plaintiff has given the defendant notice of the infringement embodying the patent; and (5) a demand for an injunction and damages. *See McZeal v. Spring Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007) ("It logically follows that a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend."); Fed. R. Civ. Proc. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."); *Phonometrics*, 203 F.3d at 794 (finding that the patentee's allegations of patent ownership, identity of each of the defendants, the allegedly infringed patent, the means by which the defendants allegedly infringed the patent, and the patent law at issue contained enough detail under Rule 12(b)(6) for the defendants to answer).

The Court finds that Intertainer has alleged sufficient facts to state a claim for direct patent infringement. Intertainer has alleged jurisdiction (FAC ¶¶ 3–4); that it owns the '592 patent (*id.* ¶¶ 5–6); that Hulu has directly infringed at least claim 83 of the '592 patent by providing its video streaming service (*id.* ¶¶ 6, 9–10 & Exh. A); that Hulu had knowledge of the '592 patent at least as early as the filing of the original Complaint (*id.* ¶ 11; and that Intertainer is entitled to injunctive relief and damages (*id.* ¶ 11 & Prayer). More specifically, the FAC alleges that Hulu owns and operates its website which streams video content, video advertisements, and advertising banners; that Hulu interrupts the streaming of the video content when users click on a video advertisement or advertising banner; and that Hulu resumes the streaming once the user returns to the

media play and clicks "play" button, in violation of at least claim 83 of the '592 patent, a description of which is attached to the FAC. (*Id.* ¶¶ 9–10.) At the pleading stage, nothing more is required under Rule 12(b)(6) to place Hulu on sufficient notice to enable Hulu to answer the FAC and defend itself.

Furthermore, contrary to Hulu's characterization of Intertainer's claim, the Court finds that a claim for joint infringement is not at issue in the FAC. Hulu relies on *Paymentech*, but in that case, the issue of joint infringement by multiple parties of a single claim was clearly presented in the context of a motion for summary judgment, as the parties agreed that the defendant did not perform every step of the method at issue in the case. *See Paymentech*, 498 F.3d at 1378. Here, Intertainer does not allege in the FAC a claim for joint infringement by Hulu and its website users. Rather, Intertainer attributes the infringing steps to Hulu under claim 83, which describes a method for essentially *creating* an interactive video in which the enumerated actions are performed by a video streaming service. Moreover, at the pleading stage, Intertainer is not required to specifically include each element of the claims of the asserted patent, as such a requirement "would contravene the notice pleading standard, and would add needless steps to the already complex process of patent litigation." *Phonometrics*, 203 F.3d at 794; *see also Vellata, LLC v. Best Buy Co., Inc.*, No. CV 10-6752, 2011 WL 61620, *3, *4 (C.D. Cal. Jan. 7, 2011) (rejecting defendant's argument that plaintiff failed to state a claim under Rule 12(b)(6) for infringement of patented marketing systems because plaintiff's claims included limitations requiring actions to be performed by outside users accessing a web page, and the complaint did not contain allegations that the defendant performed, directed, or controlled the steps of a claimed method, pursuant to the standard for direct infringement under *Paymentech*).

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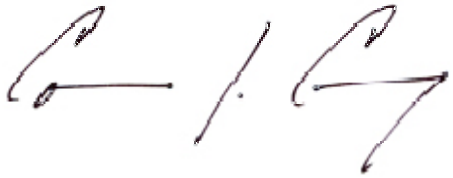
## III. CONCLUSION

For the foregoing reasons, Hulu's motion to dismiss Intertainer's First Amended Complaint is DENIED.

DATED: January 4, 2012



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE