

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

COOLTVNETWORK.COM, INC.,)	
)	
Plaintiff,)	
)	C.A. No. 19-293-LPS
v.)	
)	JURY TRIAL DEMANDED
INTERNATIONAL BUSINESS MACHINES)	
CORPORATION,)	
)	
Defendant.)	

**DEFENDANT IBM'S OPENING BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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After two bites at the apple, Plaintiff CoolTVNetwork.com, Inc. (“CTVN”) still has not set forth a cognizable infringement claim against IBM. Not only are CTVN’s allegations woefully deficient, IBM told CTVN of these deficiencies weeks *before* CTVN filed its Amended Complaint. Plaintiff fails to state a claim upon which relief can be granted. Dismissal with prejudice is warranted.

I. NATURE AND STAGE OF THE PROCEEDINGS

CTVN filed this action on February 11, 2019, alleging infringement of U.S. Patent No. 7,162,696 (“the ’696 Patent”) against IBM.¹ Complaint, D.I. 1. The Complaint stated that “Defendant is directly infringing, literally infringing, and/or infringing the ’696 patent under the doctrine of equivalents.” D.I. 1, ¶ 12. CTVN also alleged that “Defendant indirectly infringes the ’696 patent by inducing infringement by others, such as sellers, customers and end-use customers, in accordance with 35 U.S.C. §271(b)[.]” D.I. 1, ¶ 14.

IBM answered the initial Complaint on April 5, 2019, and counterclaimed for a declaratory judgment that IBM never infringed the ’696 Patent and that the ’696 Patent was invalid. D.I. 9.

Following service of the Answer, IBM sent a letter to CTVN detailing numerous deficiencies in the Complaint. April 16, 2019 letter, attached as Ex. A. Plaintiff did not even bother to respond. Instead, CTVN moved to amend the Complaint on May 16, 2019. D.I. 12. The Court granted the motion. D.I. 13. IBM now moves to dismiss the Amended Complaint.

¹ CTVN also sued eight other defendants in this District for alleged infringement of the ’696 patent. See related cases: *CoolTVNetwork.com, Inc. v. Snap Inc.* (C.A. No. 19-534); *CoolTVNetwork.com, Inc. v. Trapelo Corp.* (C.A. No. 19-535); *CoolTVNetwork.com, Inc. v. Blackboard, Inc.* (C.A. No. 19-291); *CoolTVNetwork.com, Inc. v. Facebook, Inc.* (C.A. No. 19-292); *CoolTVNetwork.com, Inc. v. Kaltura, Inc.* (C.A. No. 19-294); *CoolTVNetwork.com, Inc. v. Limelight Networks, Inc.* (C.A. No. 19-295); *CoolTVNetwork.com, Inc. v. Microsoft Corp.* (C.A. No. 19-296); and *CoolTVNetwork.com, Inc. v. Ooyala, Inc.* (C.A. No. 19-297).

II. SUMMARY OF THE ARGUMENT

On direct infringement, the Amended Complaint is replete with conclusory and self-defeating allegations. Rather than attempting to find all elements of a claim within a single accused product, CTVN picks and chooses features from a variety of different products, some of which are neither made nor sold by IBM. In particular, CTVN cannot identify a “plurality of modes” from which a user can select a “specific mode.” Its attempt to do so relies upon contradictions that, if applied as CTVN suggests, render the asserted claims nonsensical. CTVN also failed to identify *any* IBM product that meets the “multifunctional hot spot apparatus” claim requirement.

On indirect infringement, CTVN’s allegations rely upon a “mobile banking functionality” completely untethered to any IBM product. CTVN also fails to allege that IBM had any pre-suit knowledge of the patent or of alleged infringement of the patent.

Each of these deficiencies are fatal and warrant dismissal. CTVN should not be permitted to remedy these issues, as it was on notice of these problems, yet utterly failed to address them in its Amended Complaint.

III. STATEMENT OF FACTS

A. Overview of ’696 Patent

The ’696 patent relates to user interaction with multifunctional “hot spots” embedded in a video streamed over a network. D.I. 1-1, ’696 patent, 2:31-35, 45-63. A user watching a video stream can select an embedded multifunctional “hot spot” that appears in a predetermined area of the display with outlines, shading, illumination or some combination thereof—much like a traditional hyperlink in HTML format. *Id.* at 2:57-64. A user may select from different “modes” for the hotspot from a mode control (such as an expandable menu bar). *Id.* at 3:3-32. These modes are then activated by clicking on the “hot spot.” *Id.* The user may select among five different modes: “shop mode,” “bid mode,” “interact mode,” “entertainment mode,” and “link mode.” *Id.*

For example, if the user selected “shop mode,” clicking the hot spot will allow the user to add items to a shopping cart. *Id.* at 5:11-14. “Link mode” will allow the user to “open web pages, websites or other URL addresses in an adjacent browser or window or in a main playback browser/window.” *Id.* at 5:44-47. Each mode permits a user to perform different actions.

Because these “hot spots” can trigger different actions, they are referred to as “multifunctional.” The ’696 patent admits that “the use of hyperlinks and hotspots are known in the art” (*id.* at 1:60-61), but notes that they were “limited to preordained functions and are internally static, such that they have not been programmed or modified to perform a wide variety of functions.” *Id.* at 1:48-51.

Each claim of the ’696 patent requires that the “hot spots” support a “plurality of modes compris[ing] a shop mode, a bid mode, an interact mode, an entertainment mode, and a link mode.” *See, e.g., id.* at claims 1, 15, 17, 18. The Amended Complaint specifically alleges that IBM infringes claim 17. D.I. 14 at ¶¶ 12, 21. Claim 17 recites:

A Multifunctional Hot Spot method comprising:

defining at least one hot spot by a communication with instructions stored on a tangible retaining medium;

accessing at least one of the hot spots from a globally accessible network;

performing at least one of a plurality of predetermined functions executed with the selection of each particular hot spot;

wherein said hot spots reside on and are accessible from a digital video or audio file;

wherein said predetermined functions are selected from a mode control;

wherein the mode control comprises a plurality of modes;

wherein the plurality of modes comprise a shop mode, a bid mode, an interact mode, an entertainment mode, and a link mode;

wherein a specific mode is selected by a user through an expandable graphical user interact bar;

wherein said specific mode further toggles based on time stamps in said digital video or digital audio file;

wherein said hot spots are visualized by outlines, shading, or illumination or a combination of each, at a predetermined area on the display;

wherein said Multifunctional Hot Spot apparatus is made to reside on and is executing on a computing system;

selecting and activating at least one of said predetermined functions by clicking on each particular Multifunctional Hot Spot.

'696 patent, 11:53-12:23.

B. Summary of Direct Infringement Allegations

Claim 17 requires a “Multifunctional Hot Spot *apparatus* [that] is made to reside on and is executing on a computer system[.]” ’696 patent, 12:19-20.² The Amended Complaint defines the “Accused Instrumentality” as “Defendant’s products including IBM Watson Media Advertising Custom Ad Solutions³ and related functionality identified herein.” D.I. 14 at ¶ 12. Plaintiff’s direct infringement allegations rely largely on annotated screenshots from several different products and parroted claim language. *Id.* at ¶ 21. There is no explanation of how any particular IBM product or service allegedly satisfies each element of the claim. *Id.*

1. The Amended Complaint Identifies, At Most, A Single “Mode” for Any “Hot Spot.”

The Amended Complaint states that the Accused Instrumentality includes “software that identifies, programs and activates hot spots with a plurality of functions.” *Id.* at ¶ 12. The Amended Complaint does not expressly identify any “hot spots,” but instead uses screen shots

² All emphasis added unless otherwise noted.

³ None of the excerpts included in the Amended Complaint, nor any of the websites cited therein, refer to any product called “IBM Watson Media Advertising Custom Ad Solutions.”

from a variety of websites along with red colored text and outlining, and a yellow textbox stating “hotspot is linked to Ad unit (ad tags).”

defining at least one hot spot by a communication with instructions stored on a tangible retaining medium;

In Google Ad Manager navigate to Inventory Menu – Ad Units – Ad Units tab – New Ad Unit – Current Level. You will be able to create a new (or modify an old) Ad Unit here. Please see the guidelines on filling

While genres that fit into video advertising are far reaching, there are certain programming types that stand out as great use cases for ads. These use cases, which stretch across pre-roll and mid-roll ads,

SOURCE: <https://video.ibm.com/platform/video-monetization-solution-with-ad-integration#how-it-works>

Once your Ad Manager account is ready just copy paste your 'Google Publisher Tag' onto your Watson Media Dashboard to start serving video ads right away.

Hotspot is linked to Ad unit (Ad tags).

Id. at ¶ 21. For the “plurality of modes” element of Claim 17, the Amended Complaint uses different screenshots, pink text and outlining, and yellow text boxes parroting claim language to state that “Using Ad Manager Integration, different ad-tags (like shop, interact, entertainment, bid and link) can be included in the IBM cloud video channel,” despite failing to identify any so-called “shop,” “interact,” “entertainment,” “bid” and “link” ad-tags in the screenshots.

wherein the mode control comprises a plurality of modes;

Using Ad Manager integration, different ad-tags (like shop, interact, entertainment, bid and link) can be included in the IBM cloud video channel.

TITLE	POSITION	INTERNAL	CONTENT	STATE	MEDIA
<input type="checkbox"/> Live - Pre Test	Before	N/A	Live	Active	ERT
<input type="checkbox"/> VOD - Pre Test	Before	N/A	VOD	Active	ERT
<input type="checkbox"/> Live - Mid Test	During	7 min	Live	Active	ERT

Learn how put ads on your IBM Cloud Video channel

New ad tag

Ad tag URL

Copy from the Google Publisher Tag URL, what you can find on your DFP ad server

Title

Only you will see this

Where should ads be displayed?

Live broadcast

VOD

When should ads be displayed?

Pre-roll (before video)

Mid-roll (during video)

What custom meta fields should be sent to Google Ad Manager as Custom Parameters? (optional)

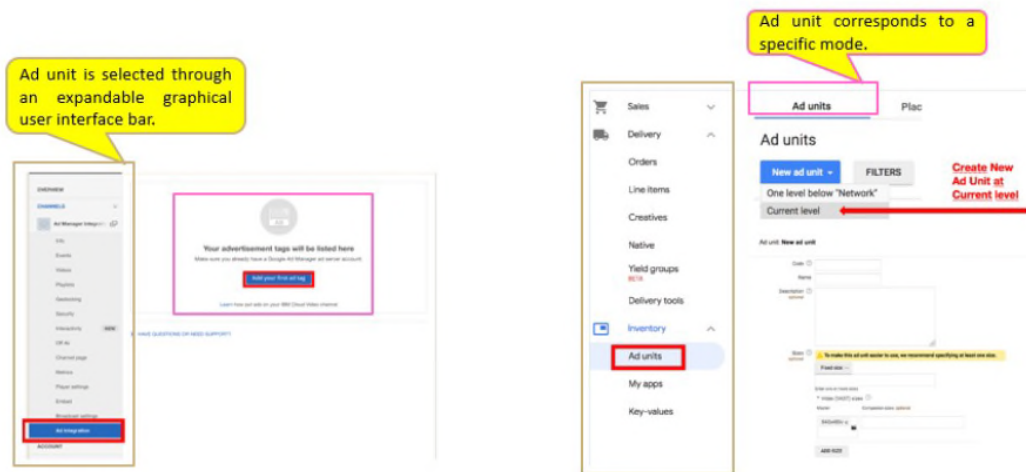
test 1

Save Cancel

SOURCE: <https://support.video.ibm.com/1c/en-us/articles/360000760870-IBM-Watson-Media-Dashboard-Ad-Manager-Integration>

Id. The Amended Complaint also states that an “Ad unit corresponds to a specific mode.”

wherein a specific mode is selected by a user through an expandable graphical user interface bar;



SOURCE: <https://support.video.ibm.com/hc/en-us/articles/360000760379-IBM-Watson-Media-Dashboard-Ad-Manager-integration>

Id. Because the Amended Complaint connects a “hot spot” to an “ad unit,” and also expressly states that an “Ad unit corresponds to a specific mode,” CTVN appears to allege that a hot spot activates only a single specific mode, just like the admitted prior art hot spots.

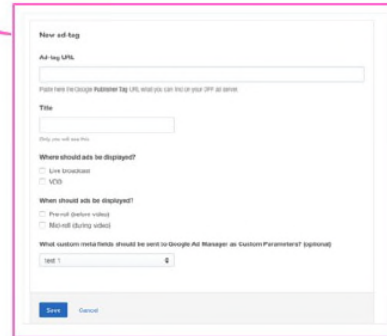
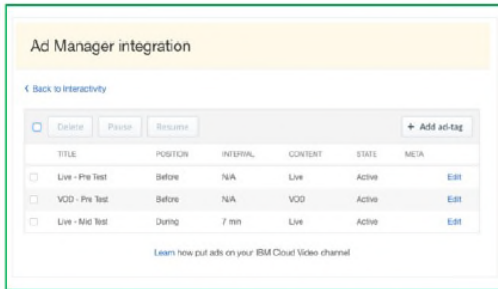
2. *The Amended Complaint Does Not Identify a “Mode Control Compris[ing] a Plurality of Modes”*

Claim 17 requires a “mode control” with *five* distinct modes: “a shop mode, a bid mode, an interact mode, an entertainment mode, *and* a link mode.” ’696 patent, 12:8-11. The Amended Complaint relies only upon excerpts from various websites, color-coded text, and outlining without explaining how the highlighted text relates to the claim, or how the disparate websites cited in the Amended Complaint relate to each other.

For “mode control,” the Amended Complaint uses green text and draws a green outline around “Ad Manager integration,” with a nearby yellow text box stating “Using Ad Manager integration, different ad-tags (like shop, interact, entertainment, bid and link) can be included in the IBM cloud video channel.”

wherein the mode control comprises a plurality of modes;

Using Ad Manager integration, different ad-tags (like shop, interact, entertainment, bid and link) can be included in the IBM cloud video channel.



SOURCE: <https://support.video.ibm.com/it/en-us/articles/360000760876-IBM-Watson-Media-Dashboard-Ad-Manager-Integration>

Id. at ¶ 21. With the exception of the “link mode,” however, the Amended Complaint makes no attempt to link the required “plurality of modes” to the “Ad Manager integration” or any other mode control, advertisements, hot spots, or any of the other plurality of modes.

a. “Link Mode”

In the one instance where CTVN arguably identifies a mode that relates to a function performed by the alleged “hot spot,” the Amended Complaint identifies “a link mode” by gold text, and outlines in gold an excerpt from a website entitled “IBM Watson Media Dashboard Ad Manager Integration.” *Id.* More specifically, a single “click-through URL” can be defined for each advertisement, which is “where viewers are taken when they interact with the advertisement.”

wherein the plurality of modes comprise a shop mode, a bid mode, an interact mode, an entertainment mode, and a link mode;

Video Ads tailored for Live Broadcasting
Mid-rolls, ad-pods, ad cue triggered breaks, Client-side Ad Insertion (CSAI), Server-side Ad Insertion (SSAI), on desktop, mobile browsers, mobile apps and CTV (Connected TV). Our feature lineup covers everything from web-exclusive content monetization to TV style Live-playlist broadcasts with ad breaks encoded into the video stream. In case your business model requires a custom setup, IBM is ready to evolve further with you.

SOURCE: <https://video.ibm.com/blog/streaming-product-updates/video-advertising-integration-mid-pre-roll/#monetization>

Ad Manager integration

← Back to Interactivity

Outline | **Feed** | Programs

+ Add ad tag

TITLE	POSITION	ADVERT	CONTENT	STATUS	ADX
Live - Pre Test	Before	N/A	Live	Active	IBM
VOD - Pre Test	Before	N/A	VOD	Active	IBM
Live - Mid Test	During	7 min	Live	Active	IBM

Learn how you ads on your IBM Cloud Video channel

SOURCE: <https://support.video.ibm.com/hc/en-us/articles/360000760379-IBM-Watson-Media-Dashboard-Ad-Manager-Integration>

IBM utilizes two general approaches for video ad placements. These include both pre-roll and mid-roll options. If these are unfamiliar terms, they differ based on when the advertisement plays, each fitting better with particular types of content.

- Web-exclusive interviews, meet and greets, backstage
- Interactive chat, integrated moderated Q&A, live chat
- Advertising current product or product just released

SOURCE: <https://video.ibm.com/blog/streaming-product-updates/video-advertising-integration-mid-pre-roll/#monetization>

Click-through URL – landing page URL – this is where viewers are taken when they interact with the advertisement (in a new browser tab or window)

Id. (citing to <https://support.video.ibm.com/hc/en-us/articles/360000760379-IBM-Watson-Media-Dashboard-Ad-Manager-Integration>).

b. “Shop Mode,” “Interact Mode,” and “Entertainment Mode”

For the “shop mode,” “interact mode” and “entertainment mode,” the Amended Complaint uses green, blue and brown text and underlining in combination with an excerpt from a different website entitled “Video Advertising Integration with Mid & Pre Roll Support.” *Id.* CTVN does not, however, state or explain how the “meet and greets, backstage,” “interactive chat,” and “advertising current product or product just released,” underlined in the excerpt relate to the “mode control,” “plurality of modes,” or “hot spot” limitations.

Viewing the excerpted website in its context, these excerpts actually relate to different genres of video in which an advertisement could be embedded—not a function or mode of a “hot spot”:

Video advertising use cases

A variety of **genres** can appeal to video advertising, from sports games with natural breaks to seminars with gaps between speakers. As monetization goes, it’s an appealing model as it’s easier to ask viewers to depart with a bit of their time to watch a video ad as opposed to paying for access to that content through pay per view.

While **genres** that fit into video advertising are far reaching, **there are certain programming types that stand out as great use cases for ads.** These use cases, which stretch across pre-roll and mid-roll ads, include:

Web-Exclusive short form Live Streams

- From 30 minute to 24 hour live shows
- Web-exclusive interviews, **meet and greets, backstage**
- **Interactive chat**, integrated moderated Q&A, live chat
- **Advertising current product or product just released**

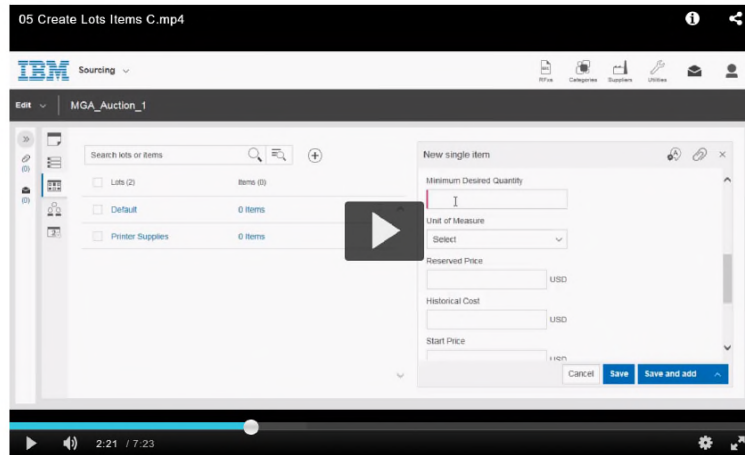
Video Advertising Integration with Mid & Pre Roll Support,” <https://video.ibm.com/blog/streaming-product-upgrades/video-advertising-integration-mid-pre-roll/>, attached as Ex. B at 3-4 (highlighting added to excerpts).⁴

The Amended Complaint does not explain how a genre of video could fulfill the requirement of a “mode control” comprising a “plurality of modes” from which a function for a “hot spot” embedded in a video is selected. Nor does it reconcile the excerpt with the screenshot cited for the “link mode” which shows that there is a single click-through URL for the advertisement to redirect users to a new webpage.

c. “Bid Mode”

The Amended Complaint includes several screen shots annotated with purple text for the “bid mode.” D.I. 14 at ¶ 21. The first of these screen shots is a portion of a video, which the Amended Complaint claims teaches “how to create an auction for the bidding on printer supplies.”

⁴ A district court “may consider documents integral to or explicitly relied upon in a complaint without converting the motion to dismiss into a motion for summary judgment.” *Millington v. GEICO*, 2015 WL 5138266, at *2 (D. Del. Sept. 1, 2015). This prevents the situation here, where “a plaintiff with a legally deficient claim that is based on a particular document” would otherwise “avoid dismissal of that claim by failing to attach the relied-upon document.” *Id.*



05 Create Lots Items C.mp4

12

IBM teaches in a video on its website how to create an auction for the bidding on printer supplies.

Source: https://mediacenter.ibm.com/media/05+Create+Lots+Items+C.mp4/1_ilryiyx4

Id. ¶ 21. CTVN does not, however, explain how such an auction is linked to the previously identified “mode control” or “hot spots,” or how it could be selected from amongst the other “modes.” Indeed, portions of the cited website that were cropped out refer to an unrelated product called “Emptoris Sourcing” that appears nowhere else in the Amended Complaint.

This video demonstrates the creation of Lots and Items.



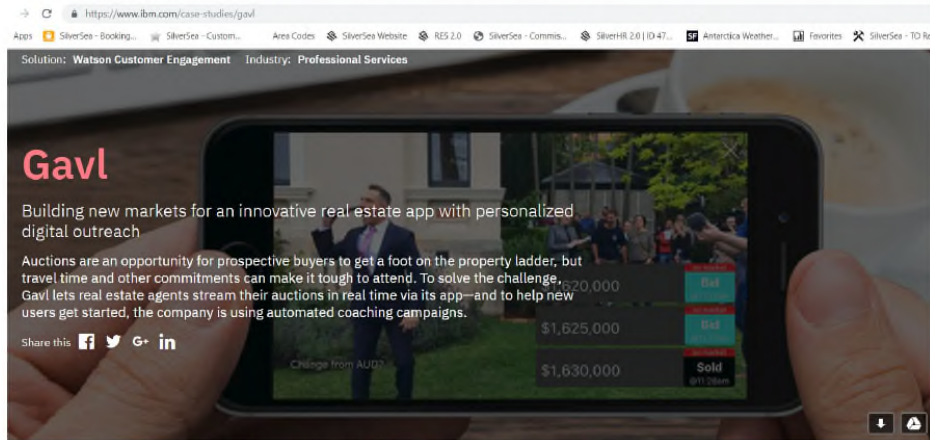
Appears In **Emptoris Sourcing**

“05 Create Lots Items C.mp4,” https://mediacenter.ibm.com/media/05+Create+Lots+Items+C.mp4/1_ilryiyx4, attached as Ex. C at 1 (highlighting added).

The next screenshot the Amended Complaint relies on for a “bid mode” is a case study video for third party application Gavl. D.I. 14 at ¶ 21. CTVN alleges this video uses “IBM Watson Campaign Automation.” *Id.*

Driving international growth

With IBM Watson Campaign Automation driving its customer engagement processes, Gavl can provide its customers with the help they need to broadcast and bid on live-streaming real estate auctions.



IBM further teaches in a video on its website that auctions can be created for real estate.

Source: www.ibm.com/case-studies/gavl

Id. Even if true, the Amended Complaint is again devoid of any description for how Gavl or IBM Watson Campaign Automation are linked to any of the previously mentioned mode control, advertisements or hot spots, or how they could be selected from a plurality of modes.

The final attempted support for a “bid mode” in the Amended Complaint again uses purple text, underlining, and outlining with various screenshots from IBM websites relating to the “Polls for Live Broadcasting” feature in IBM Watson Media.

Polls for Live Broadcasting is a feature that is available on the IBM Watson Media. With the Polls feature you can engage your audience with specific questions and receive real-time feedback from your audience. Live audience polling is a powerful tool that can be used to dynamically adapt live content based on feedback. This can alter performances, steering content in a direction the audience wants it to go, while also gathering valuable information from the audience as well.

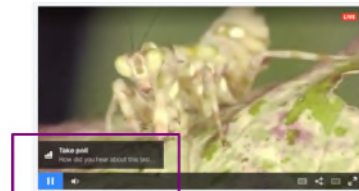
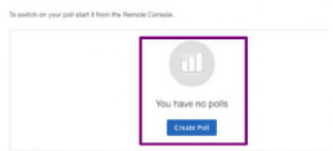
Setting up a Poll

To set up your first Poll, log into your account and select the channel the poll should be applied to, then select Interactions.

Interactions > Polls > Create Poll

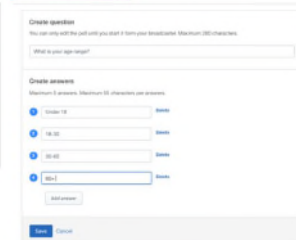


If you have not yet created a Poll, click the “Create Poll” button.



To take the poll, viewers must click the notification. Then they will see an overlay with the multiple choice answers displayed.

Enter the first question at the top, followed by the multiple answers that your viewers can select from. In the following example, we’ve used a simple “Yes/No” format.

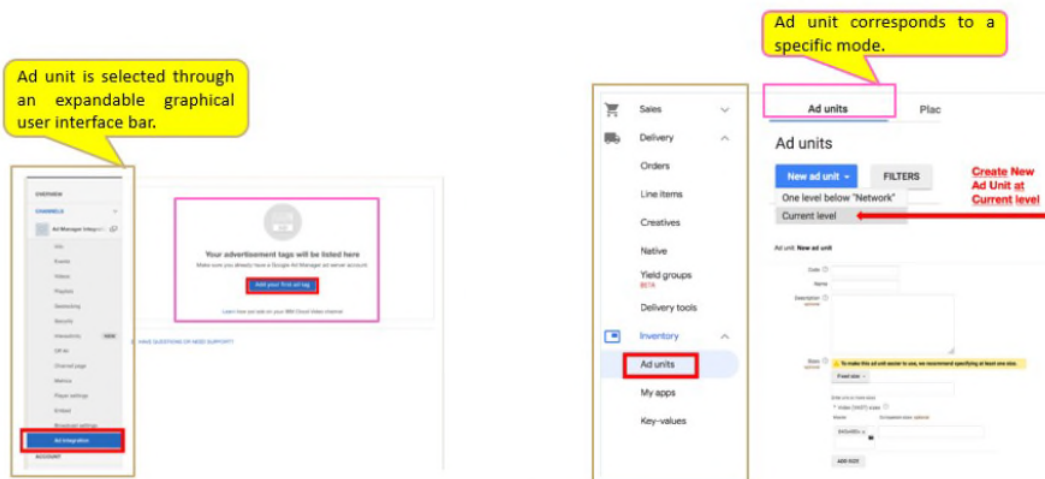


SOURCE: <https://support.video.ibm.com/hc/en-us/articles/115005851985-Polls-for-Live-Broadcasting>

Id. at ¶ 21. CTVN alleges that a poll is set up by logging into an account, selecting the channel the poll should be applied to, and then selecting “Interactivity.” *Id.* Again, the Amended Complaint makes no attempt to link this poll feature with the “mode control” or “hot spots,” or how the poll feature could be selected from a plurality of modes.

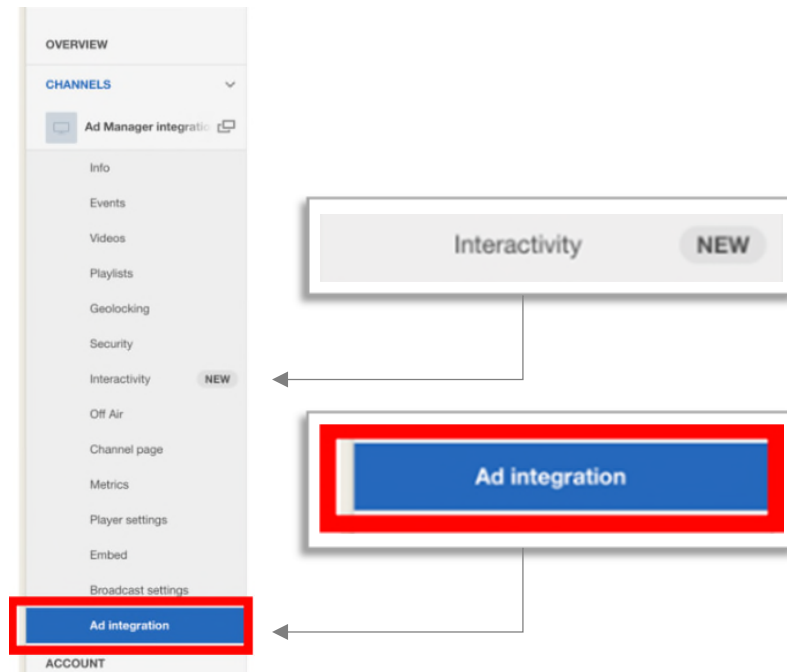
Instead, the Amended Complaint contradicts itself. In addressing the “specific mode is selected by a user” limitation, the Amended Complaint identifies (i) interface bars for selecting “Ad integration” and (ii) an “Ad unit” which “corresponds to a specific mode.”

wherein a specific mode is selected by a user through an expandable graphical user interface bar;



SOURCE: <https://support.video.ibm.com/hc/en-us/articles/360000760379-IBM-Watson-Media-Dashboard-Ad-Manager-integration>

Id. at ¶ 21. The fatal flaw with this allegation, although not readily apparent from the low resolution images used in the Amended Complaint, is that the “Interactivity” feature is *separate* from the “Ad integration” previously identified as the “mode control.”



IBM Watson Media Dashboard Ad Manager Integration, <https://support.video.ibm.com/hc/en-us/articles/360000760379-IBM-Watson-Media-Dashboard-Ad-Manager-Integration>, attached as Ex. D at 37 (callouts added).

In other words, the poll that CTVN identifies as a “bid mode” is separate from an “Ad unit” that CTVN claims “corresponds to a specific mode.” CTVN does not, and cannot, explain this contradiction.

3. “Multifunctional Hot Spot Apparatus”

Claim 17 requires a “Multifunctional Hot Spot apparatus [that] is made to reside on and is executing on a computer system.” ’696 patent, 12:19-20. CTVN attempts to illustrate this limitation as follows:

wherein said Multifunctional Hot Spot apparatus is made to reside on and is executing on a computing system;



IBM's video streaming solutions now offer a Google Ad Manager integration. This allows content owners to monetize their live and on-demand video assets through using virtually any 3rd party ad server that can run inside of Google Ad Manager.

SOURCE: <https://video.ibm.com/blog/streaming-product-updates/google-ad-manager-integration-for-live-and-on-demand-video/>

Once your Ad Manager account is ready just copy paste your 'Google Publisher Tag' onto your Watson Media Dashboard to start serving video ads right away.

SOURCE: <https://support.video.ibm.com/it/en-us/articles/360000760379-IBM-Watson-Media-Dashboard-Ad-Manager-integration/>

Id. ¶ 21. The apparatus shown in the image above is a smartphone. Yet the Amended Complaint contains no allegations that IBM sells, provides or controls such a device. Nor does CTVN allege that any IBM feature is a multifunctional hot spot apparatus made to reside on and execute on a computer system provided by IBM.

C. Summary of Indirect Infringement Allegations

CTVN alleges that IBM induces “resellers, customers, and end-use customers” to perform acts of direct infringement when they utilize “the mobile banking functionality.” D.I. 14 at ¶ 14. None of the other allegations in the Amended Complaint, however, identify any “mobile banking functionality” or link it to Claim 17 or the rest of the Accused Instrumentality. *E.g., id.* at ¶ 21.

CTVN also alleges that IBM has had notice of the '696 patent “at least as of the date this lawsuit was filed.” *Id.* ¶ 15. But the Amended Complaint lacks any allegation of pre-suit notice of the patent as required for any pre-suit inducement claim.

IV. ARGUMENT

A. Standard

To comply with Rule 12(b)(6), “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. 544, 570 (2007)). A plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged ... more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. A complaint should be dismissed “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” *Id.* at 679.

This Court explained that to adequately plead direct infringement, a plaintiff “needs to have pleaded facts that plausibly indicate that Defendant’s accused products practice each of the limitations” in the asserted claims. *N. Star Innovations, Inc. v. Micron Tech., Inc.*, 2017 WL 5501489, at *1 (D. Del. Nov. 16, 2017), *report and recommendation adopted*, D.I. 37 (D. Del. Jan. 3, 2018). If any claim limitation is totally missing from an accused device, there can be no infringement. *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 796 (Fed. Cir. 1990). A plaintiff fails to meet this standard where it “merely cop[ies] the language of a claim element, and then baldly stat[es] (without more) that an accused product has such an element.” *N. Star*, 2017 WL 5501489, at *2. This Court “is not obligated to accept as true ‘bald assertions,’ ‘unsupported conclusions and unwarranted inferences,’ or allegations that are ‘self-evidently false.’” *Inventor Holdings, LLC v. Gameloft, Inc.* 135 F. Supp. 3d 239, 244 (D. Del. 2015) (citations omitted).

With respect to indirect infringement, pre-suit inducement requires that the defendant have pre-suit knowledge of the patent. *See, e.g., DoDots Licensing Sols. LLC v. Lenovo Holding Co.*, 2018 WL 6629709, at *4 (D. Del. Dec. 19, 2018); *Neology, Inc. v. Kapsch Trafficcom IVHS, Inc.*, 2014 WL 4675316, at *3-7 (D. Del. Sept. 19, 2014), *report and recommendation adopted*, D.I. 39 (D. Del. Oct. 22, 2014) (concluding insufficient facts to show pre-suit inducement where the complaint failed to “sufficiently allege that before the [Defendants] received the initial Complaint, they had knowledge that the Accused Products infringed the Asserted Patents or of how they did

so.”). Dismissal of plaintiff’s pre-suit inducement claims is therefore warranted where the plaintiff does not meet its burden in showing pre-suit knowledge of the patent. *See Princeton Digital Image Corp. v. Ubisoft Entm’t SA*, 2017 WL 6337188, at *3 (D. Del. Dec. 12, 2017).

B. The Amended Complaint Does Not Allege Sufficient Facts to Show that Any IBM Product Allows a User to Select From a Plurality of Modes.

The net result of CTVN’s scattershot approach in its Amended Complaint is that, at best, only a link mode is connected to an Accused Instrumentality. None of the other required modes are identified. No screenshots indicate that the “ad units”—alleged to meet the “hot spot” limitation—perform any other function aside from taking a user to a single website. And the patent itself admits that simple hyperlinks are prior art. ’696 Patent 1:60-63.

1. CTVN Fails to Identify A “Shop Mode,” “Interact Mode” or “Entertainment Mode” That Can Be “Selected by a User.

The Amended Complaint relies on different genres of video to supply the “shop mode,” “interact mode” and “entertainment mode.” A genre of video is not a “mode.” CTVN itself admits that an “Ad unit corresponds to a specific mode,” not the genre of the video. D.I. 14 at ¶ 21.

More specifically, as set forth in Claim 17, the “hot spots reside on and are accessible from a digital video or audio file.” ’696 Patent, Claim 17. The “mode control,” however “comprises a plurality of modes” and a “specific mode is selected by a user through an expandable graphical user interface bar.” *Id.* If the genre of video in which the hot spot resides is the “mode,” then the “mode control” and selection of a mode through a graphical user interface bar cannot work. The mode would not be selected by a “user,” but rather by whomever created the video in the first place. Nor could the mode “toggle based on time stamps” as required by Claim 17.

The ’696 Patent itself makes clear that these “modes” require something more than a different genre of video. Specifically, the specification states that (i) the “shop mode allows a user to click a hot spot and add items to a shopping cart,” (ii) “the interact mode facilitates interaction

between the user and live-streamed internet programs” where “the user is able to communicate and/or interact with network designated queues by clicking on hot spots,” and (iii) “in the entertainment mode, the activation of hot spots causes the opening of related or targeted audio and video and/or video files related to the designated hot spot and an auxiliary browser/window.” ’696 Patent 5:13-14, 5:32-37, 5:47-50. CTVN’s recitation of the various modes in the amended complaint mirrors the descriptions in the specification. D.I. 14 at ¶ 12. Each “mode” therefore relates to a hotspot-activated function that allows a user to do something other than merely watch the video in which the hot spot resides. The “genres” of video identified in the Amended Complaint cannot meet these claim terms.

2. *The Amended Complaint Fails to Identify A “Bid Mode.”*

None of CTVN’s three attempts to identify a “bid mode” result in a plausible claim for infringement. The screenshots from Emptoris and GavI do not implicate any products accused of infringement. As a result, even assuming that these excerpts showed a “bid mode,” they cannot support a claim that the bid mode is “found in *an accused product* or process exactly or by a substantial equivalent.” *Becton Dickinson*, 922 F.2d at 796. CTVN cannot state a claim for infringement by pointing to products not accused of infringement in the Amended Complaint.

CTVN’s third attempt, the Polls for Live Broadcasting feature, also falls short.⁵ The Amended Complaint on page 15 states that “Ad unit corresponds to a specific mode.” D.I. 14 at ¶ 21. But as set forth above in Section III.B.2.c, polls are a distinct feature which are created

⁵ IBM takes the same position as the defendants in *CoolTVNetwork.com, Inc. v. Microsoft Corp.* (C.A. No. 19-cv-00296) (D.I. 14 at 11), and *CoolTVNetwork.com, Inc. v. Ooyala, Inc.* (C.A. No. 19-cv-00297) (D.I. 12 at 10). Like these Defendants, in order to allege that IBM infringes the “bid mode” limitation, Plaintiff points to a polling feature and the ability “to vote.” To the extent this Court finds that voting functionality falls outside of the “bid mode” in either of these cases, the Amended Complaint here should similarly be dismissed.

separately from ad units. D.I. 14 at ¶ 21. The polling feature is not a “specific mode” that can be “selected by a user” or that is part of the “mode control.” CTVN’s allegations relating to the “bid mode” are “self-evidently false.” *Inventor Holdings, LLC*, 135 F. Supp. 3d at 244.

C. The Amended Complaint Does Not Allege Sufficient Facts to Show a “Multifunctional Hot Spot Apparatus.”

An image of an unidentified smart phone fails to allege that an *IBM* product or service meets this limitation. *N. Star*, 2017 WL 5501489, at *2; *Modern Telecom Sys., LLC v. TCL Corp.*, 2017 WL 6524526, at *3 (D. Del. Dec. 21, 2017) (“[S]imply parroting back the words of the claim and stating (without more) that the [accused device] infringes that claim is not helpful.”) Indeed, as set forth above in Section III.B.3, the screenshot does not even show what software is running on the phone, whether it has anything to do with the rest of steps set forth in claim 17, or whether the pictured individual is alleged to be responsible for performing some or all of the steps. D.I. 14 at ¶ 21. The Amended Complaint contains no allegation that IBM makes or sells any such smart devices or even that any portion of the Accused Instrumentality could run on such a device.

D. The Amended Complaint Does Not Allege Sufficient Facts to State a Claim for Inducement.

CTVN’s inducement claim fails as a matter of law for several reasons. First, the Amended Complaint failed to identify any direct infringement performed by a single direct infringer. *See* 35 U.S.C. §271(b)-(c); *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir. 2004) (“Indirect infringement, whether inducement to infringe or contributory infringement, can only arise in the presence of direct infringement.”). CTVN alleges that “[d]irect infringement is a result of the activities performed by the resellers, customers and end-use customers of the *mobile banking functionality*[.]” Amended Complaint ¶ 14. As discussed above in Section IV (B)-(C), however, the Amended Complaint fails to identify how any one party practices each element

of the claimed invention as a direct infringer, much less how those entities align with the “resellers, customers and end-users” identified for indirect infringement.

Second, CTVN fails to explain how any party’s use of the “mobile banking functionality” relates to any aspect of the asserted claim or the accused functionality. Plaintiff’s bald assertions, unsupported conclusions, and unwarranted inferences are insufficient and this court is not required to accept them as true. *Inventor Holdings, LLC*, 135 F. Supp. 3d at 244. An unidentified mobile banking functionality cannot plausibly support a claim for indirect infringement.

Third, even if CTVN adequately pleaded direct infringement, it fails to allege any pre-suit knowledge of the ’696 patent as required to claim pre-suit indirect infringement. Dismissal is appropriate where a complaint alleges pre-suit indirect infringement, but fails to provide factual allegations suggesting that “before the [Defendant] received the initial Complaint, they had knowledge that the Accused Products infringed the Asserted Patents or of how they did so.” *See Neology, Inc.*, 2014 WL 4675316, at *3-7; *see also DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006) (knowledge requirement “necessarily includes the requirement that he or she knew of the patent.”). The Amended Complaint alleges only that IBM “has had knowledge of the ’696 patent at least as of the date this lawsuit was filed,” (D.I. 14 at ¶ 18), and fails to raise any allegations relating to IBM’s pre-suit knowledge of the patent, much less that IBM “specifically intended [another party] to infringe [the asserted patent] and knew that the [other party]’s acts constituted infringement.” *Lifetime Indus., Inc. v. Trim-Lock, Inc.*, 869 F.3d 1372, 1379 (Fed. Cir. 2017).

E. Further Amendment Would be Futile and the Complaint Should be Dismissed with Prejudice.

Many of the deficiencies explained herein were present in CTVN’s original Complaint, filed on February 11, 2019. On April 16, 2019, IBM outlined these problems in a letter to CTVN.

Ex. A. These deficiencies included CTVN's failure to identify a multifunctional hot spot or a plurality of modes. *Id.* at 1-2. In particular, the letter explained that several of the "modes" identified by CTVN were in fact merely "genres" of video, as was evident from the documents cited in CTVN's own Complaint. *Id.* at 2. The April 16 letter also explained that CTVN was relying on irrelevant mobile banking functionality in support of its indirect infringement allegations, and had insufficiently pleaded indirect infringement. *Id.* at 3.

CTVN offered no substantive response to IBM's letter. Instead, a month later, CTVN sought IBM's consent to amend its complaint. CTVN did not provide the Amended Complaint to IBM for review before filing.

The Amended Complaint did not remedy the deficiencies identified in IBM's April 16 letter. CTVN's continuing inability to state a plausible claim for infringement, despite IBM spelling out these deficiencies and allowing CTVN a chance to correct them, demonstrates that any further amendment would be futile. The Court should therefore dismiss CTVN's Amended Complaint with prejudice. *See Bolden v. City of Wilmington*, 2019 WL 133314, at *6 (D. Del. Jan. 8, 2019); *Talley v. Christiana Care Health Sys.*, 2019 WL 668272, at *6 (D. Del. Feb. 19, 2019); *Citrix Sys., Inc. v. Avi Networks, Inc.*, 363 F. Supp. 3d 511, 525 (D. Del. 2019).

V. CONCLUSION

The Amended Complaint relies on a hodgepodge of different accused products and features and fails to plausibly connect them to show that all elements of an asserted claim could be found in any one IBM product or service, either directly or indirectly. Having already had one opportunity to amend its complaint to fix these deficiencies, and ignoring IBM's concerns in the meantime, CTVN's claims should be dismissed with prejudice.

Respectfully submitted,

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