

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

STRAIGHT PATH IP GROUP, INC.,

Plaintiff,

v.

VIZIO, INC., et al.,

Defendants.

Civil Action No. 1:13-cv-934 (AJT/IDD)

STRAIGHT PATH IP GROUP, INC.,

Plaintiff,

v.

TOSHIBA CORPORATION, et al.,

Defendants.

Civil Action No. 1:13-cv-934 (AJT/IDD)
[formerly No. 3:13-cv-503, No. 1:13-cv-1070]

STRAIGHT PATH IP GROUP, INC.,

Plaintiff,

v.

LG ELECTRONICS, INC., et al.,

Defendants.

Civil Action No. 1:13-cv-934 (AJT/IDD)
[formerly No. 1:13-cv-933]

**PROPOSED INTERVENOR HULU, LLC'S BRIEF IN SUPPORT OF MOTION TO
INTERVENE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24**

I. PRELIMINARY STATEMENT

Hulu is one of America's leading Internet companies. Hulu offers its millions of users a premium streaming video experience via a wide selection of television shows, movies, original programming, clips, and more. Hulu partners with several leading technology companies, including LG, Toshiba, and VIZIO, to make its streaming service available to Hulu users through those technology companies' Internet-enabled devices, including televisions and Blu-ray players.¹

Patent holder Straight Path sued LG, Toshiba, and VIZIO for patent infringement in August 2013. Those cases were stayed in favor of a parallel proceeding that Straight Path filed in the U.S. International Trade Commission ("ITC"). Straight Path's ITC infringement allegations did *not* implicate Hulu. Having abandoned its ITC action a week before trial, Straight Path now alleges in this Court that LG, Toshiba, and VIZIO infringe three patents. These three patents relate to Voice-over-IP ("VoIP") technology, which allows users to make and receive telephone calls over the Internet. Although Hulu's video-streaming service has nothing to do with telephone calls, Straight Path has accused, in part, the Hulu application available on certain LG, Toshiba, and VIZIO devices.

Hulu seeks to address—and dispel—Straight Path's accusations directly. Only Hulu knows the inner workings of its application; therefore, Hulu is in the best position to defend against Straight Path's allegations. And Hulu has agreed to defend VIZIO and LG against these allegations and assist Toshiba in its defense, pursuant to the parties' respective partnership agreements. Hulu respectfully moves to intervene in this litigation as a matter of right, and in the alternative seeks the court's permission to intervene.²

¹The following abbreviations apply throughout this brief: (1) "Hulu" means "Hulu, LLC"; (2) "LG" means LG Electronics, Inc., LG Electronics U.S.A., Inc., and LG Electronics MobileComm U.S.A., Inc.; (3) "Toshiba" means Toshiba Corporation, Toshiba America, Inc., and Toshiba America Information Systems, Inc.; (4) "VIZIO" means VIZIO, Inc.; and (5) "Straight Path" means "Straight Path IP Group, Inc."

²Pursuant to Civil Local Rule 7(E), Hulu has sought to meet and confer with the parties to narrow the areas of disagreement. None of the defendants objects to Hulu's intervention. Hulu's

II. STATEMENT OF FACTS

A. The action is in its infancy.

Straight Path filed its complaints against LG, Toshiba, and VIZIO on August 1 and 2, 2013, alleging infringement of United States Patent Nos. 6,009,469, 6,108,704, and 6,131,121. *See* Dkt. 1 of 1:13-cv-933; Dkt. 1 of 1:13-cv-934; Dkt. 1 of 1:13-cv-1070. Only a few months later, in October and November of 2013, the Court stayed all three actions in favor of Straight Path's parallel action against LG, Toshiba, and VIZIO before the ITC. *See* Dkt. 7 of 1:13-cv-933; Dkt. 45 of 1:13-cv-934. After Straight Path abandoned its ITC action one week before trial was to begin, the Court lifted the stays in June 2014.

Because of the stay, nothing material has yet happened in the case. Earlier this month, on September 2, 2014, this Court consolidated the LG action with the Toshiba and VIZIO actions for pretrial purposes. Dkt. 114 of 1:13-cv-934. Just ten days ago, on September 22, 2014, this Court entered a scheduling order and opened fact discovery. Dkt. 117 of 1:13-cv-934.

B. Straight Path asserts infringement based in part on Hulu functionality.

Straight Path's infringement theory against LG, Toshiba, and VIZIO features significant accusations directed at Hulu's product functionality. Fourteen days ago, on September 18, 2014, Toshiba informed Hulu that Straight Path sent Toshiba claim charts accusing Hulu's product functionality on Toshiba's devices. Declaration of Anthony Garza in Support of Hulu, LLC's Motion to Intervene ("Garza Decl.") ¶ 3. VIZIO and LG subsequently also informed Hulu that Straight Path provided claim charts accusing Hulu's product functionality on their respective devices. *Id.*

Hulu has contracts with defendants LG, Toshiba, and VIZIO that provide for certain indemnity and defense obligations with respect to proprietary Hulu software subject to the terms and conditions in those contracts. *Id.* ¶ 2. In response to VIZIO and LG's requests for

lead counsel met and conferred several times by phone and email with Straight Path's counsel. Despite the parties' best efforts, they could not reach agreement on Hulu's intervention.

indemnification, Hulu has agreed to defend those partners for infringement claims made by Straight Path against the Hulu product in this case. *Id.* ¶ 4. Hulu has further agreed to assist Toshiba to the extent that Straight Path's infringement claims require information about Hulu's product. *Id.* ¶ 5.

III. ARGUMENT

Given that Straight Path is systematically targeting Hulu's partners and accusing Hulu's product functionality, the Court should grant Hulu's request to intervene in this action as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Alternatively, based on Straight Path's actions, Hulu requests that the Court permit Hulu to intervene under Federal Rule of Civil Procedure 24(b)(1)(B).

A. Hulu may intervene as a matter of right.

Intervention as of right is governed by Rule 24(a)(2), which provides that the Court must permit anyone to intervene who, on timely motion, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Accordingly, a party seeking to intervene as of right must demonstrate: (1) that its motion is timely; (2) an interest sufficient to merit intervention; (3) that without intervention, its interest may be impaired; and (4) that the present litigants do not adequately represent its interest. *See Cooper Techs., Co. v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007) (quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)).

1. Hulu's motion to intervene is timely.

Hulu filed its motion just fourteen days after learning that Straight Path sent claim charts accusing the Hulu application on Toshiba devices and only ten days after the Court opened discovery. A week of that delay arose because Hulu's lead counsel met and conferred by phone several times with Straight Path's counsel in an effort to avoid this motion, which Hulu originally intended to file on Friday, September 26. In considering the timeliness of a motion to

intervene, the Court considers all of the circumstances, but “[t]he most important consideration is whether the delay has prejudiced the other parties.” *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). Because discovery has only very recently commenced, the existing parties will not be prejudiced by the addition of Hulu. *See Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370 (3d Cir. 1995) (“[T]he stage of the proceeding is inherently tied to the question of the prejudice the delay in intervention may cause to the parties already involved.”). Far from imposing any prejudice, Hulu’s intervention will likely streamline matters for the existing parties by obviating the cumbersome and time-consuming third-party discovery procedures that Straight Path would otherwise be forced to pursue against Hulu.

2. Hulu has a significantly protectable interest related to the products at issue.

An intervenor as of right must have a “significantly protectable interest.” *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

Hulu has a significantly protectable interest in the central issue at stake in this lawsuit: whether Hulu’s partners infringe a family of related patents based, in part, on Hulu’s technology. *See Honeywell Int’l Inc. v. Audiovox Commc’ns Corp.*, No. 04-1337-KAJ, 2005 WL 2465898, at *4 (D. Del. May 18, 2005) (granting manufacturer’s motion to intervene in patent suit “because it puts a willing manufacturer defendant in the forefront of litigation aimed squarely at its product”); *see also Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990) (noting that, “in reality, the manufacturer is the true defendant in the customer suit”) (quoting *Codex Corp. v. Milgo Elecs. Corp.*, 553 F.2d 735, 737-38 (1st Cir. 1977)). A finding in this case that Hulu’s application on Toshiba, LG, and VIZIO devices infringes could have widespread impact on Hulu’s business: users may not be able to enjoy viewing Hulu’s content on those devices and Hulu’s other partners may worry that their devices will also be affected. Thus, Hulu has a significantly protectable interest because it “stand[s] to gain or lose by the direct legal operation of the district court’s judgment” in the cases before this Court. *See Teague*, 931 F.2d at 261.

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