UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

RIPPLE LABS INC., et al.,

Plaintiffs,

v.

YOUTUBE LLC,

Defendant.

Case No. 20-cv-02747-LB

ORDER GRANTING MOTION TO DISMISS

Re: ECF No. 26

INTRODUCTION

The plaintiffs, Ripple Labs and its CEO Bradley Garlinghouse (collectively, "Ripple"), developed a cryptocurrency called XRP. Scammers impersonated Ripple on YouTube (in part by using Ripple's federally registered trademarks and publicly available content such as interviews with Mr. Garlinghouse) to make it look like they were Ripple and thus perpetuated a fraudulent "giveaway," promising that if XRP owners sent 5,000 to one million XRP to a "cryptocurrency wallet," then the XRP owners would receive 25,000 to five million XRP. In fact, the XRP owners who responded to the scam lost their XRP and received no XRP in return. The plaintiffs sued defendant YouTube for not doing enough to address the scam (including by failing to respond to multiple takedown notices), claiming the following: (1) contributory trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1114(1) (by allowing use — and therefore infringement of Ripple's trademarks); (2) misappropriation of Ripple's CEO's identity and thus his right of

publicity, in violation of Cal. Civil Code § 3344 and California common law; and (3) a violation of California's unfair competition law ("UCL"), Cal. Bus. & Prof. Code § 17200, predicated on the trademark and state-law claims.[1]

YouTube moved to dismiss (1) the Lanham Act claim in part on the ground that the plaintiffs did not plausibly plead its knowledge of the trademark infringement, and (2) the state-law claims on the ground that it is immune from liability under § 230(c)(1) of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1), because it is not a content provider.[2] The court grants the motion (with leave to amend).

STATEMENT

Ripple is an "enterprise blockchain company" that developed and manages the cryptocurrency XRP, which can be used in place of traditional currencies to facilitate cross-border payments.[3] Banks, corporations, and individuals buy XRP.[4]

YouTube is a video-sharing platform.[5]

Ripple and XRP owners were the target of a fraud — the XRP Giveaway Scam — whereby the fraudsters hijacked other users' channels on YouTube and used the channels to impersonate Ripple and its CEO. (Fraudsters can hijack a legitimate YouTube channel through a spear-phishing attack: the fraudsters send an email to the channel's creator, and when the creator responds, he inadvertently discloses his YouTube credentials, thereby allowing the fraudsters to take over his channel and populate its content.) After hijacking the channels, the fraudsters populated the channels with content that included Ripple's trademarks (such as its logo and name), Mr. Garlinghouse's name and likeness, and publicly available content (such as interviews with Mr. Garlinghouse or other members of Ripple's leadership team). Masquerading as Ripple, the

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[1] Compl. – ECF No. 1 at 17–21 (¶¶ 61–99). Citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Mot. – ECF No. 26.

[3] Compl. – ECF No. 1 at 4 (¶¶ 12, 19), at 5 (¶¶ 20–21).

[4] *Id.* at 4–5 (¶¶ 19–20).

[5] *Id.* at 6 (¶ 27).

fraudsters promised XRP owners that if they sent between 5,000 to one million XRP to a digital wallet, then they would receive between 25,000 to five million XRP. After XRP owners sent XRP to the digital wallet, the currency disappeared, and the XRP owners received nothing in return.[6]

Ripple and YouTube users alerted YouTube about the scam, but YouTube allegedly did not respond by taking down the offending content in a reasonable time frame. A Forbes article in November 2019 reported the scam, the hijacking of popular YouTube creator MarcoStyle's channel, the conversion of his channel to Mr. Garlinghouse's profile, the hacker's running of a livestream promoting the scam, and the stealing of $15,000 from viewers' Ripple wallets.[7] MarcoStyle alerted YouTube, and YouTube acknowledged the issue that day but took a week to resolve it.[8] During this time, YouTube verified the hijacked channel as authentic (even though it was masquerading as Mr. Garlinghouse's account).[9]

After the Forbes article, Ripple alleges that it sent YouTube more than 350 takedown notices: 49 related directly to the scam and 305 related to accounts and channels that were impersonating Mr. Garlinghouse or infringing on Ripple's brand, likely to monetize the scam.[10] Ripple alleges that it sent multiple takedown notices for the same conduct because YouTube did not take down the fraudulent channels for days, weeks, or months after notice.[11] New instances of the scam "continued to appear, often amassing thousands of views and creating more victims by the day."[12]

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[6] *Id.* at 7–9 (¶ 35).

[7] *Id.* at 10 (¶ 40); Paul Tassi, *A YouTuber with 350,000 Subscribers Was Hacked, YouTube verified His Hacker*, Forbes (Nov. 14, 2019), https://www.forbes.com/sites/paultassi/2019/11/14/a-youtuber-with-350000-subscribers-was-hacked-youtube-verified-his-hacker/?sh=23bd01a76fe6, Ex. 8 to Compl. – ECF No. 1-1 at 141–42. The court considers the documents attached to the complaint under the incorporation-by-reference doctrine. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

[8] Forbes Article, Ex. 8 to Compl. – ECF No. 1-1 at 142

[9] Compl. – ECF No. 1 at 10 (¶ 40).

[10] *Id.* at 12 (¶ 47).

[11] *Id.* (¶ 48) (14 takedown notices (starting November 12, 2019) about hijacked channel purporting to be Mr. Garlinghouse's channel that resulted in a takedown months later, on February 19, 2020; January 2, 2020 takedown notice that took three weeks to resolve; nine takedown notices (starting January 21, 2020) about channel promoting the scam that remained active until March 18, 2020; January 27, 2020 notice about hijacked channel promoting the scam resolved on February 3, 2020).

[12] *Id.* (¶ 49)

For example, on March 20, 2020, a YouTube user told YouTube about a channel using Ripple's marks and Mr. Garlinghouse's image to promote the scam, YouTube did not take action, and by the next day, 85,000 users viewed the fraudulent video.[13]

YouTube allegedly profited from the scam because it sold ads to the fraudsters that featured Mr. Garlinghouse's name, infringed on Ripple's trademarks, and promoted the scam.[14]

According to its guidelines and policies, YouTube removes offending content when it learns about it, including "scams and other deceptive practices."[15]

The parties do not dispute that the court has federal-question jurisdiction over the Lanham Act contributory trademark-infringement claim and supplemental jurisdiction over the state-law claims.[16] 28 U.S.C. §§ 1331, 1367. All parties consented to magistrate jurisdiction.[17]

STANDARD OF REVIEW

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds upon which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a claim for relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (cleaned up).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which when accepted as true, "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when

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[13] *Id.* at 14 (¶ 52).

[14] *Id.* at 10 (¶ 37).

[15] *Id.* at 6–7 (¶¶ 30–33); YouTube Policies, Ex. 1 to Compl. – ECF No. 1-1 at 2–6; YouTube Community Guidelines Enforcement, Ex. 4 to Compl. – ECF No. 1-1 at 114–122.

[16] *Id.* at 4 (¶¶ 15–16); Mot. – ECF No. 26.

[17] Consents – ECF Nos. 13–14.

the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citing *Twombly*, 550 U.S. at 557). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (cleaned up) (quoting *Twombly*, 550 U.S. at 557).

If a court dismisses a complaint, it should give leave to amend unless the "pleading could not possibly be cured by the allegation of other facts." *United States v. United Healthcare Ins. Co*., 848 F.3d 1161, 1182 (9th Cir. 2016) (cleaned up).

ANALYSIS

YouTube moved to dismiss the trademark and state-law claims under Rule 12(b)(6) for failure to state a claim. The court grants the motion with leave to amend.

1. Contributory Trademark Infringement

"To be liable for contributory trademark infringement, a defendant must have (1) intentionally induced the primary infringer to infringe, or (2) continued to supply an infringing product to an infringer with knowledge that the infringer is mislabeling the particular product supplied." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 807 (9th Cir. 2007) (cleaned up). If the alleged infringer supplies a service (as opposed to a product), then "the court must consider the extent of control exercised by the defendant over the third party's means of infringement." *Id*. A plaintiff must show that the defendant "continued to supply its services to one who it knew or had reason to know was engaging in trademark infringement." *Louis Vuitton Malletier, S.A. v. Akanoc Sols, Inc.*, 658 F.3d 936, 942 (9th Cir. 2011).

Contributory trademark infringement claims about conduct on an online platform often involve the sale of infringing goods in an online marketplace. In that context, courts have held that "a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings

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