

EXHIBIT A

United States District Court
Northern District of California
Before The Honorable William Alsup

Daniel M. Miller,)
)
 Plaintiff,)
)
 vs.) No. C10-264 WHA
)
 Facebook, Incorporated,)
 et al.,)
)
 Defendant.)
 _____)

San Francisco, California
Thursday, May 27, 2010

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: The Law Office of D. Gill Sperlein
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By: Indra Neel Chatterjee, Esquire

**Reported By: Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California**

(Computerized Transcription By Eclipse)

1 Thursday, May 27, 2010

8:00 A.M.

2 P R O C E E D I N G S

3 **THE COURT:** Daniel Miller versus Facebook and
4 Mr. Yeo; please call that matter.

5 **THE CLERK:** Okay.
6 Civil 10-264, Daniel Miller versus Facebook.
7 Counsel, please state your appearances for the
8 record.

9 **MR. SPERLEIN:** Good morning, Your Honor.
10 Gill Sperlein for plaintiff, Daniel Miller.

11 **THE COURT:** Okay, good morning.

12 **MR. CHATTERJEE:** Good morning, Your Honor.
13 Neel Chatterjee for Facebook.

14 **THE COURT:** Good morning.
15 All right, we got a motion here for -- we have two
16 things, a CMC, and we have a motion to amend the complaint. So
17 I'm going to try to cover both of these, but I want to give
18 each of you on the motion an opportunity to make your most
19 important points.

20 And I also need to ask the plaintiff why you have
21 not served, or have you served the individual Yeo Wei -- how do
22 you say his last name?

23 **MR. SPERLEIN:** Your Honor, your guess is as good as
24 mine.

25 **THE COURT:** Well, have you served this fellow?

1 **MR. SPERLEIN:** We have not.

2 **THE COURT:** Well, why not?

3 **MR. SPERLEIN:** May I step up?

4 **THE COURT:** Yes.

5 **MR. SPERLEIN:** Your Honor. I'm local counsel, and I
6 asked my colleagues in Georgia to respond, you know, I knew
7 that you would be asking that.

8 They have taken measures to find him. When they
9 first -- when this case first started, apparently he was a
10 senior at Cornell University, but, has subsequently moved.
11 Plaintiff's counsel has hired an investigator. They have done
12 Internet searches trying to locate him, and they haven't had
13 any luck.

14 I think there are ways to track him down, but it's
15 going to be through discovery, either on Facebook or on the
16 hosting company that is currently hosting the infringing game
17 that is at the center of this case.

18 At our last meeting before you, you instructed
19 plaintiff's counsel to make a motion for additional time to
20 serve and explain the steps that they had taken. Subsequent to
21 that, you dismissed the entire complaint, so there was really
22 no operative complaint.

23 Obviously, if Facebook is dismissed from this
24 matter, they would re-file. So if he was dismissed with
25 prejudice or without prejudice, they would probably re-file

1 back in Georgia. So they just thought it was premature for
2 that.

3 I do have a declaration stating the steps that my
4 co-counsel took to --

5 **THE COURT:** May I have that?

6 **MR. SPERLEIN:** Yes, Your Honor.

7 Your Honor, this was just forwarded to defense
8 counsel this morning.

9 **THE COURT:** One is enough.

10 All right.

11 **MR. SPERLEIN:** Also, we are not even sure he is in
12 the United States. So if he is outside the United States, of
13 course, the time limit would not have been applicable and would
14 not have been missed.

15 **THE COURT:** We don't know where he is. You say he
16 was at Cornell.

17 **MR. SPERLEIN:** Well, at one point.

18 We'll track him down.

19 **THE COURT:** Okay, what would you like to say, if
20 anything, on the motion to dismiss?

21 **MR. SPERLEIN:** I would like to say a few things.

22 Let me start off by saying in defense counsel's
23 opposition, they mention that the complaint, or the proposed
24 second amended complaint mentions a couple of terms that aren't
25 explained. And I think for the benefit of the Court, if you

1 will indulge me, I'll explain some of those terms. And I think
2 you'll see that with an understanding of those terms, it's
3 pretty clear that there is a valid claim for contributory
4 infringement.

5 The way this infringing game was developed was using
6 something called the API, it's application, programming,
7 interface. It's a set of tools that Facebook gives to folks
8 that want to create applications that work on the Facebook
9 site. And what's really important here is that these tools
10 allow you to integrate into the Facebook experience. Their
11 whole experience is about this social networking -- I don't
12 know if you have been on Facebook or are familiar with the
13 concept, but everybody has their friends listed and you connect
14 with different people, and whatnot.

15 So when you take their tools and create an
16 application, it's not designed to make a -- an application that
17 acts independently and sits on some server somewhere else, it's
18 specifically designed to interface with Facebook.

19 The canvas page that's referenced in the proposed
20 second amended complaint, you can kind of think of it as a
21 grid. And there is a link there that goes to where the
22 application resides on a server that's not Facebook's, belongs
23 to Yeo, or is either leased or somehow Yeo has access to. So
24 the program is there, but it interfaces with Facebook. So even
25 though the link is going to pick up on this application, the

1 application itself picks up information from Facebook, namely,
2 access to the millions of users that Facebook has.

3 And they are designed so that -- it's difficult --
4 let me explain what's happened.

5 So there is a page, and this a link to the thing,
6 and interacting with all the information that is on Facebook
7 servers. Last time we were here, we mentioned that there was a
8 change at some point after the lawsuit was filed. And what
9 happened was, Facebook or Yeo, I'm not sure, it's hard for us
10 to tell by just looking at the site, but somehow that page that
11 linked over, they moved the whole page off of Facebook's
12 server, and now they put it on Yeo's server.

13 So at that point the page is there, and there is
14 just a link from -- from Facebook over to the page, and the
15 page fills in and you play the game, or whatnot. But it's
16 still going back to Facebook to get all the information.

17 And then recently, I guess within the last --

18 **THE COURT:** Going back there to get what
19 information?

20 **MR. SPERLEIN:** Well, for example -- and again,
21 because in the last week or so, since the last time we've met,
22 they have cut it off entirely, so now it doesn't act the same
23 way it used to, so I can't -- when I went in personally, I
24 couldn't evaluate what was going on except for I could
25 speculate as to some things. But in speaking with Mr. Miller,

1 who designed the game, a good example is when someone starts
2 playing this application and they are logged into their
3 Facebook account, the application no longer does this, but used
4 to, send a notice to all of their friends saying your friend,
5 Joe, is playing this game, why don't you play. And then at
6 other times the game would keep statistics of all your friends
7 and their high scores. So you would see this. And the whole
8 idea is synergy and get as many people to play as possible.
9 And it worked. Facebook profited from that.

10 **THE COURT:** How did they profit?

11 **MR. SPERLEIN:** I don't know, it's advertising,
12 mostly. It's all about traffic. These companies that have --
13 I'm not sure whether what their -- I know it's in the top 100
14 most popular websites. So you have that much traffic coming,
15 you have advertisings, advertisement all around. And that is
16 where they earn the revenue.

17 And it's possible, through massive amounts of
18 traffic, each of those -- that advertising dollars only go up
19 when they have lots and lots of traffic. So they are using
20 Danny's game to get all this traffic, and they are making the
21 game work by providing all the users.

22 So I think it's pretty --

23 **THE COURT:** So how many -- are there records
24 somewhere that would tell us prior to the change that you say
25 occurred how many people actually played this game on the --

1 not the website -- Facebook?

2 **MR. SPERLEIN:** Absolutely.

3 **THE COURT:** What is the answer to that?

4 **MR. SPERLEIN:** Facebook. I mean, and that's the
5 whole idea. And that's the problem with -- you know, when you
6 are in an online environment like this, it concerns me: If we
7 get too exacting a standard on facts on the pleadings -- I'm
8 not saying we can just make bold accusations, but there has to
9 be an understanding that on the online environment, these
10 companies that, you know, may be responsible for the infringing
11 activity have a lot of the information that's required to prove
12 the claims in their control, uniquely.

13 Now I don't know if defendant or if plaintiffs have
14 any additional records of what it was. I know that when I
15 spoke with Mr. Miller, he did say that at one point it was one
16 of the top ten applications. And I know from reading about
17 Facebook they get about a hundred new applications loaded onto
18 their system a day. So there is tens of thousands of these
19 applications. And Danny's was in the top ten, so significant.

20 **THE COURT:** Sounds like thousands and thousands of
21 applications.

22 **MR. SPERLEIN:** Yes, that's correct, Your Honor.

23 **THE COURT:** And for a while, you are saying his was
24 in the top ten?

25 **MR. SPERLEIN:** Yes, sir.

1 **THE COURT:** How would he know that?

2 **MR. SPERLEIN:** I'm sorry, I don't know. I would
3 imagine that, you know, I don't know if there is some sort of
4 interface where they talk with their developers. That's what
5 they call the folks that develop the applications where they
6 provide those statistics. I would imagine there is, you know,
7 some --

8 **THE COURT:** But your client did not -- your client
9 did not give Facebook the game, did it?

10 **MR. SPERLEIN:** No, that's right, Your Honor.

11 **THE COURT:** So it was the --

12 **MR. SPERLEIN:** It was Mr. --

13 **THE COURT:** The guy at Cornell. So it would be the
14 guy at Cornell who was in the top ten, right?

15 **MR. SPERLEIN:** Well, yes, the infringing game, which
16 was exactly the same as his.

17 **THE COURT:** The code is the same?

18 **MR. SPERLEIN:** They are exactly the same except for
19 all this interaction with Facebook. My client didn't have
20 that, my client just operated his on a website that people
21 could go to and link to and play the game, if they wanted to.

22 I don't know if he had intentions of working with
23 Facebook to develop it or not, but certainly, when Mr. Yeo made
24 that infringing copy and got together with Facebook, they took
25 it to that level.

1 **THE COURT:** So your client, does he have a copyright
2 on the code as well as the name?

3 **MR. SPERLEIN:** He has a copyright on the code.

4 **THE COURT:** Did he have one at the time it was
5 allegedly copied?

6 **MR. SPERLEIN:** No, Your Honor, he did not.

7 **THE COURT:** I guess that doesn't matter.

8 **MR. SPERLEIN:** It would matter for statutory damages
9 and attorney's fees but not for liability.

10 **THE COURT:** All right. So you're saying -- so the
11 guy at Cornell somehow downloaded the code when he was playing
12 the game from your website, Mr. Miller's website, and then
13 wrote his own game but used exactly the same code and then gave
14 it to Facebook on a face page -- on a page, and it became the
15 top ten?

16 **MR. SPERLEIN:** I might quibble with some of that. I
17 don't know for certain how he accessed the code or how he did
18 that, I think that's, you know, something, again, would take
19 place in discovery with expert witnesses and computer engineers
20 that would know a lot more about how the game is developed than
21 I could tell you.

22 **THE COURT:** So how much money could be involved?
23 Can't be very much money at stake here.

24 **MR. SPERLEIN:** Oh, Your Honor, I mean, Facebook --

25 **THE COURT:** A few hundred dollars? What would it

1 be?

2 **MR. SPERLEIN:** I have no idea. And, you know, with
3 all due respect --

4 **THE COURT:** I don't know what these things are --
5 I'm just asking, sounds like something somebody is in the back
6 room doing this -- people put things on the Internet all the
7 time, and they go nowhere.

8 So what is your damage claim? How would you
9 characterize it?

10 **MR. SPERLEIN:** Well, I think, once more, this is
11 factual issues that are going to take place in discovery. How
12 many times was this game accessed? What advertisement was
13 around the game when that happened? What's the rate that those
14 advertisers get every time someone sees them or if they click
15 through or they actually buy something? All of that stuff is
16 just very fact intensive. That is going to have to come forth
17 in discovery.

18 Obviously, my colleagues who took this case on
19 thinks that it's a great deal, and I think so, too. In a top
20 ten game on Facebook, with -- you know, I can't tell you how
21 many users they have or advertisers, but they are a force.

22 **THE COURT:** Well, okay.

23 You got more to say?

24 **MR. SPERLEIN:** Just a little bit.

25 **THE COURT:** All right, go ahead.

1 **MR. SPERLEIN:** They raise a lot of issues in their
2 opposition, primarily trying to attack that idea that any
3 direct infringement took place; your earlier order acknowledged
4 that Yeo was a direct infringer. I'm not going to go into
5 detail and drill down as to why I think each of their
6 attacks -- as to whether there was direct infringement or not.
7 I don't think that they are valid, but I think the fact that
8 you have already said in your order that direct infringement
9 has been established, I think we are really here to figure out
10 why Facebook is in this case and how they are contributorily
11 liable.

12 And, you know, they got a letter that said this game
13 is infringed, and they continued to allow the program to
14 operate. They continued to let Yeo profit from their user
15 base. And they have continued to profit from the game,
16 apparently.

17 **THE COURT:** All right.

18 I'll give you a moment or two to respond to
19 Mr. Chatterjee, but why don't you have a seat and let's hear
20 from the other side.

21 **MR. SPERLEIN:** Thank you, Your Honor.

22 **MR. CHATTERJEE:** Good morning, Your Honor.

23 **THE COURT:** Good morning.

24 **MR. CHATTERJEE:** I was hoping to bring one of my
25 fourth-year associates, the same one who was here last time,

1 but fortunately for him, his wife had a baby.

2 **THE COURT:** Congratulations.

3 **MR. CHATTERJEE:** So you'll be seeing him again, but
4 not today.

5 **THE COURT:** All right.

6 **MR. CHATTERJEE:** Let me talk a little bit about this
7 case if I can. I'll probably toggle a little bit between the
8 case management issues and the motion for leave to file an
9 amended complaint because I do think at some level they are
10 related and there is some degree of overlap.

11 The way this case started was Mr. Miller decided to
12 sue Facebook and Yeo in Georgia. That was a long time ago,
13 maybe as much as nine months ago, I don't know exactly, but it
14 was quite a while ago.

15 The plaintiff, as far as I know, and I got the
16 declaration this morning when I walked into court today,
17 despite Your Honor's request that they file a motion 60 days
18 ago at the hearing. As far as I know, they did nothing to find
19 him. They say he was in Cornell; there is no allegation as to
20 whether he was in the U.S. or outside the U.S.

21 And then we filed a motion to transfer because the
22 terms of use that their client signed onto said that the case
23 should be handled here. We successfully transferred the case.

24 Then we file a motion to dismiss. That's granted
25 because Your Honor found that the allegations were somewhat

1 spartan, and you said that they could seek leave to file an
2 amendment.

3 We then opposed their motion. And we raised what we
4 believed to be pretty serious challenges to what they were
5 proposing in their complaint. They don't file a reply.

6 **THE COURT:** They what?

7 **MR. CHATTERJEE:** They did not file a reply to our
8 opposition. All of the things that Mr. Sperlein says may or
9 may not be accurate, none of those things, by the way, are
10 really in their complaint. But my view, Your Honor, is because
11 they didn't respond to any of the key issues and not even the
12 argument, they have waived their objection on the issues that
13 we have raised.

14 Now, I'm happy to walk through the issues, but I'm
15 concerned about the fact that they are bringing Facebook into
16 this Court. They sued us in a jurisdiction that they never
17 agreed to, that they don't file reply briefs, that they don't
18 diligently go forward and go after the person that they really
19 have an issue with, Mr. Yeo, and haven't really diligently gone
20 forward and found him, yet they are trying to pull us into this
21 action.

22 **THE COURT:** Well, do you have records that would
23 show where he is?

24 **MR. CHATTERJEE:** No. Every piece of information
25 that we have, or nearly every piece, I believe, we have given

1 to them. In fact, we believe that they E-mailed Mr. Yeo
2 directly.

3 **THE COURT:** They what?

4 **MR. CHATTERJEE:** That they E-mailed Mr. Yeo
5 directly. The information on how to contact him is available
6 on our website.

7 They kind of play this -- a little bit of confusion,
8 Your Honor. And Your Honor asked two important questions that
9 I want to address. The first one is they say Chain Reaction,
10 which is -- I'm sorry, not Chain Reaction. Mr. Miller's game
11 was a top-ten game. For purposes of anything here, that point
12 is virtually irrelevant.

13 The question is, and Your Honor asked it correctly,
14 was the defendant Yeo's game a top-ten game? Because
15 otherwise, how do you even assess what the damage is? And as
16 far as I can tell, they have no indication as to whether or not
17 it was popular or not popular.

18 **THE COURT:** But wait. He -- that's not true.

19 Mr. -- I'm sorry.

20 **MR. SPERLEIN:** Sperlein.

21 **THE COURT:** Sperlein. Sperlein said specifically
22 that the infringing game was in the top ten.

23 **MR. CHATTERJEE:** He did not, Your Honor. He kept
24 talking -- as far as I understood what he said here, and this
25 is not in the pleadings, so I don't know if I understood it

1 incorrectly, he was talking about the plaintiff's game, not the
2 defendant's game.

3 The second question that Your Honor asked was about
4 code. There is no allegation, none in this complaint about
5 code theft. There is no evidence that Mr. Yeo had access to
6 that code. There is no allegation that he copied the code.
7 There is no allegation that he reverse engineered the code.
8 There is nothing.

9 If their registration is about code, and Exhibit A
10 to the Sutton declaration suggests that that is what they
11 copyrighted, they are not alleging infringement properly. And
12 they provided no facts of direct infringement of the code.

13 It's important to note, Your Honor, that in that
14 registration they didn't register this as an audio visual work,
15 they didn't do that.

16 Now, as to the complaint itself --

17 **THE COURT:** If they had registered it as an audio
18 visual work, what is the significance of that?

19 **MR. CHATTERJEE:** Well, Your Honor, in their
20 complaint what they appear to be saying is that the games look
21 the same. And if they are talking about the way something
22 looks, it's an audio visual work. Because the exclusive rights
23 under the Copyright Act are different, depending on the type of
24 work you register.

25 **THE COURT:** Okay. All right, so the look and feel

1 has to be audio visual.

2 **MR. CHATTERJEE:** Correct, Your Honor, but it's more
3 than that, because once you go past the look and feel issue in
4 an audio visual work, you then have to look at what exclusive
5 rights are implicated. And there are three exclusive rights
6 that the plaintiff alleges are implicated here. And this is
7 set forth in our opposition brief.

8 The first one is the reproduction right. The
9 reproduction right is kind of what the right in a copy is, it's
10 making a copy of something. There is no allegation that
11 Facebook encouraged infringement of a reproduction right
12 because the game resides on a website separate from us that
13 they developed without any of our knowledge of the Chain
14 Reaction game. There is no allegation that we had any notice
15 before that game was created.

16 The second right that they allege is invoked is the
17 distribution right. The distribution right requires
18 distribution of copies of an infringing article. Because this
19 is a game residing on a website, there are not copies
20 distributed. It's really that simple. It's not a case of
21 selling unauthorized CDs out of the back of their truck,
22 instead, you are going to a website and you are interacting
23 with it.

24 **THE COURT:** When you do that, when you go to that
25 website, does the code for the game get shipped to the player's

1 computer, or is the code running only on the host computer?

2 **MR. CHATTERJEE:** I'm not sure, Your Honor, of the
3 technology there. There is no allegation that that's what
4 happens, but my understanding is when you are playing a game on
5 a website, it's the website code that is operating there. It's
6 not all downloaded onto your computer. It would make that
7 Internet work very, very slow if that is what you are doing.

8 **THE COURT:** Go ahead.

9 **MR. CHATTERJEE:** The third issue that's implicated
10 is the public display right. And the public display right that
11 they assert, that actually does not apply to an interactive
12 audio visual work. Instead, it would protect individualized
13 images. And Perfect 10 versus Google and other cases talk
14 about this. And if you read the language of the statute
15 itself, it says that. They have not identified any static
16 image. Instead, they say when you have a randomized ball
17 jumping around on the screen that someone can click on, somehow
18 that infringes their copyright. That is not a static image.
19 And there is no static image they can identify where it's
20 identical or even substantially similar. And they don't make
21 any allegation about that.

22 So as to the three exclusive rights that they say
23 Mr. Yeo infringed, there is no indication of any activity by
24 Facebook that encouraged or induced infringing behavior as to
25 those three rights.

1 They also make no allegation that Mr. Yeo is
2 operating this in the United States; that's another element.
3 For there to be direct infringement, the direct infringement
4 has the occur in the United States. Now they are saying that
5 Mr. Yeo may have moved outside of the United States.

6 If they believe that to be true and they are right,
7 their case is over because there is no direct infringement in
8 the United States. You can't induce someone to infringe a
9 foreign copyright. The direct infringement has to occur here,
10 as a matter of law.

11 **THE COURT:** Where do you think Mr. Yeo is?

12 **MR. CHATTERJEE:** I don't know, Your Honor. I know
13 he was in Cornell, from what they said.

14 **THE COURT:** Well, but you said you gave him the
15 e-mail information.

16 **MR. CHATTERJEE:** Correct. We have an e-mail address
17 for him.

18 **THE COURT:** Can we tell where that goes to?

19 **MR. CHATTERJEE:** The only way that one could do that
20 would be to maybe e-mail the Internet service that provides the
21 account, or something like that. That's something that they
22 would have to do to try and locate him. There is no indication
23 that they did.

24 You know, the way we make this system available is
25 people will register and give an e-mail address and a website

1 name, and that's the information we have. And they know all
2 that. The URL, the Internet address is actually in the
3 complaint, it's zwigglers.com.

4 All right, let me hear from the other side.

5 **MR. CHATTERJEE:** Your Honor, if I could just add one
6 final point?

7 **THE COURT:** Sure.

8 **MR. CHATTERJEE:** In your order you wanted them to
9 explain in detail what it is Facebook does that invokes the
10 copyright laws, because it's significant as to which rights get
11 implicated and how an inducement theory would work.

12 Apparently, Your Honor, they didn't do that. And I think
13 that's really important because while I can walk through the
14 direct infringement problems there, what I heard from
15 Mr. Sperlein today, that isn't really in their complaint.

16 And that may or may not be true. There is some
17 details which I would quibble with as to the accuracy of them,
18 but in their complaint, it still has all of this confusion and
19 somewhat inconsistent language as to what it is that Facebook
20 does for us to be hauled into a courtroom.

21 Your Honor, they should not be given leave to amend
22 to proceed against Facebook unless they have actually
23 identified a clear exclusive right that is violated, that the
24 exclusive right is violated in the United States, and what it
25 is, specifically, that Facebook does that invokes the copyright

1 laws under an induced infringement theory.

2 All of those things are not in their complaint.
3 They didn't reply to those issues. And even Mr. Sperlein's
4 argument just a moment ago didn't address any of those issues.
5 At this point, at least as to Facebook, this case should end.

6 Thank you, Your Honor.

7 **THE COURT:** Okay.

8 Mr. Sperlein, you have the last word.

9 **MR. SPERLEIN:** Okay. Let me first go to
10 Mr. Chatterjee's concerns about actually which rights were
11 violated and the direct infringement.

12 Um, first of all, as far as the reproduction right,
13 Your Honor, you had it exactly right: When the game is played,
14 the entire swift file is not only -- it's downloaded onto the
15 computer of the user.

16 **THE COURT:** Is that right?

17 **MR. SPERLEIN:** Well, his point is exactly right: If
18 you didn't do that, the Internet would act slow. The idea is
19 it downloads it, and it gets information from your computer and
20 you play it on your computer. So there is reproduction each
21 time someone plays it. And that is alleged in the complaint.

22 And again, at least you indicated earlier that you
23 felt direct infringement was taking place. I know that new
24 arguments have been raised, but I'm assuming that -- well, so
25 that's reproduction rights.

1 Distribution, same issue there: They are
2 distributing -- the copies are being downloaded to each of
3 these different places. So Yeo is continuing as long as it was
4 still up, which was I think about -- it was up for a good year
5 after they got this letter telling them it was infringing. He
6 was still distributing, so they had knowledge before these
7 direct -- these acts of direct infringement took place.

8 And then, finally, the public display, this concerns
9 me a little bit because I don't think Mr. -- that defense
10 counsel is really being candid. I'm going to read what the --
11 what that law says:

12 "In the case of literally, music, dramatic, and
13 choreographed works, pantomimes and pictorial graphic or
14 sculptural works, including the individual images of a motion
15 picture or other audio visual work to display the copyrighted
16 work" -- it says including. That doesn't say that it's only
17 the individual pictures of an audio visual work. And Perfect
18 10 said nothing like that. So I think that he's
19 misrepresenting the law in that particular case.

20 As far as it being in the U.S., we did allege that
21 the infringing activity took place in California, which, of
22 course, is in the United States, so it is in the complaint.

23 I concede that the complaint could be more clear,
24 that the infringement is continuing to take place. The servers
25 that actually host the infringing game, at least at this time,

1 appear to be in California, down in Culver City, I think. And
2 if it weren't, then all of these individuals, each time they
3 download that game, then part of the infringement is taking
4 place in the United States. I don't think that's a significant
5 issue at all.

6 I think the proposed second amended complaint does
7 cover these issues, but I concede not as clearly as it should.
8 And I think a few additional sentences could be added. The
9 very beginning of defense counsel's opposition they said, you
10 know, it would be hopeless, it would be useless to give leave
11 to file an amended complaint, that's simply not true. I think
12 I've presented significant facts that -- to the Court today.
13 Admittedly, they could be a little bit clearer in the
14 complaint. And if the Court so instructs, I'll be glad to make
15 a few minor changes.

16 But I think even as it stands, the complaint
17 certainly -- you know, they understand what our claims are and
18 they understand exactly where we are going with this and they
19 understand the facts are in our favor.

20 **THE COURT:** I don't know what they understand, but I
21 know what the rules of pleading require you to say, put people
22 on notice as to what that claims are and touch the elements,
23 whether or not they understand it or not and -- let me ask
24 this: Mr. Chatterjee says that Facebook gave you all the
25 information they had on how to contact Mr. Yeo and that you

1 then e-mailed Mr. Yeo, that you were in e-mail communication
2 with him; what is your view on that?

3 **MR. SPERLEIN:** Well, I will first say that an e-mail
4 address is not finding a person, that is finding a way to
5 perhaps send them an e-mail, and maybe they'll respond.

6 **THE COURT:** But did he?

7 **MR. SPERLEIN:** I'm sorry, Your Honor, I'm not
8 familiar with all of the procedural aspects in this case, but I
9 don't believe that that's true -- wait a second. The plaintiff
10 did, the plaintiff, when he first became aware of the
11 infringing activity, I know he did e-mail Mr. Yeo and was
12 essentially told to go away. But that doesn't get us any
13 closer to finding out where he is.

14 **THE COURT:** But here is what disturbs me a little
15 bit here, and I know you are acting in good faith, but when a
16 tough question gets raised sometimes you say, I'm sorry, you
17 would have to ask the lawyer back in Georgia.

18 **MR. SPERLEIN:** You know --

19 **THE COURT:** Maybe next time you say to the guy in
20 Georgia, spend the money to get on an airplane and come to
21 these hearings and not just ask you to come out here and plead
22 I don't know whenever something comes up.

23 I am disturbed that you haven't got Mr. Yao in the
24 case.

25 **MR. SPERLEIN:** Your Honor --

1 **THE COURT:** I've given you a lot of time to get him
2 in the case, and you never got him in the case, and now you
3 say, well, ask the lawyer in Georgia.

4 **MR. SPERLEIN:** Well, let me just respond to two
5 things.

6 First of all, I understand what you said. I fully
7 tried to anticipate all of the questions that you would have.
8 I spent an hour on the phone yesterday with co-counsel,
9 followed up with e-mails, and really tried to get answers to
10 any questions that you might ask. And I apologize that there
11 were a few that I couldn't respond to. I perhaps should have
12 been -- drilled them a little bit further.

13 **THE COURT:** I want to know, did somebody get in
14 touch with Mr. Yeo by e-mail, say, in the last seven months?

15 **MR. SPERLEIN:** I can say no to that. I know that
16 there was this earlier e-mail exchange through the plaintiff
17 before counsel was in the case. I don't know if it was any
18 earlier, but certainly after they filed the case, my impression
19 is that they were not able to contact him at all.

20 Now, I think we can find him. Like I said earlier,
21 we can look at where his game currently resides and know where
22 those servers are and go to that company that hosts those
23 servers and say, who is -- who do these files belong to. Most
24 likely, he has some sort of payment with them, so -- and an
25 address, and whatnot, but we can't just go to them and ask them

1 that, we need a subpoena.

2 **THE COURT:** Why -- in other cases the plaintiff
3 comes to me right at the outset, I sign an order that gives
4 them the right to go to the -- what is it called, IPO?

5 **MR. SPERLEIN:** ISP, sir.

6 **THE COURT:** And they turn that information over by
7 court order.

8 You know, seems to me like that should have been
9 done in this case a long time ago, and that there is an aura
10 about this case that you are trying to just go after the deep
11 pockets and make life miserable for them and make these
12 grumbling noises about Mr. Yeo without doing anything to bring
13 him into the case, and that has not such a good flavor to it.

14 **MR. SPERLEIN:** I absolutely --

15 **THE COURT:** So if I allow this case to go forward,
16 maybe it's going to go to the Court of Appeals. And maybe the
17 guy from Georgia will get on an airplane and come out here and
18 go to the Ninth Circuit. He is not spending the money
19 prosecuting this case if it's worth so much money.

20 **MR. SPERLEIN:** Your Honor, irrespective of what
21 co-counsel has done to this point, I can give you my word that
22 shall we go forward, we will take immediate steps to identify
23 where Mr. Yao is and get him served. I certainly desire to
24 have him in this case. I think he is important to the factual
25 record, and I want him before the Court.

1 **THE COURT:** All right. I'm going to change the
2 subject. Without prejudice to possibly tossing the entire case
3 out, I'm going to give you your case management order. I got
4 to get this at some point.

5 All initial disclosures have already been done, but
6 I'm going to give you to June 4th to do them. Leave to add any
7 disclosures are just, you know, you list what -- you don't have
8 to produce anything. You just have to disclose it. Like
9 employment file on plaintiff or contract with Mr. Yeo. You
10 have to list what you are going to rely on.

11 Leave to add any new parties or pleading amendments
12 and to serve Yeo is going to be July 30.

13 **MR. SPERLEIN:** July 30?

14 **THE COURT:** Yes. If he is not in the case by then,
15 I may just throw the whole thing out.

16 Expert -- I'm sorry, fact discovery cutoff, January
17 31. Expert designations, January 31. Last date to file
18 summary judgment, March 3. Final pretrial conference,
19 March 18th. Jury trial, March -- final pretrial conference,
20 April 18th, next year. Jury trial on April 25. This case will
21 be referred to Judge Bernard Zimmerman for mediation and
22 settlement.

23 Okay, anyone want to talk me out of those dates?

24 **MR. SPERLEIN:** Just check one thing.

25 March 3rd deadline to file summary judgment motions,

1 not to hear them, correct?

2 **THE COURT:** Right. And it will be 35 days after
3 that for the hearing.

4 You want to try to talk me out of this?

5 **MR. CHATTERJEE:** I do, Your Honor.

6 **THE COURT:** Go ahead.

7 **MR. CHATTERJEE:** Just on two issues. I think Your
8 Honor correctly notices the, I'll call it the failure to
9 prosecute by the plaintiff. I think that is an independent
10 basis and independent of the motion for leave to amend that the
11 Court should be considering.

12 The primary issue that I have with Your Honor's
13 schedule is the June 4th date.

14 **THE COURT:** What's wrong with that?

15 **MR. CHATTERJEE:** The only reason I raise that is it
16 depends on what -- when your -- when Your Honor rules on the
17 motion for leave or if you are going to give them another shot
18 at it. Because whatever the operative complaint says will
19 inform what we might put in the initial disclosure, although,
20 to be candid, I don't think Facebook has had that much
21 documentation.

22 **THE COURT:** I'll give you until June 16th. But you
23 can at least list what you have. It won't be that hard for you
24 to make your --

25 **MR. CHATTERJEE:** Your Honor, it will be a very short

1 list, you are correct.

2 **THE COURT:** I'm going to try to get an order out
3 soon. So June 16th will be plenty of time.

4 All right, interesting problem. Thank you.

5 **MR. SPERLEIN:** Thank you, Your Honor.

6 **MR. CHATTERJEE:** Thank you, Your Honor.

7 **(Proceedings adjourned at 9:57 a.m.)**

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Thursday, June 3, 2010