Leader Technologies, Inc., v. Facebook, Inc.
Doc. 63 Att. 1

EXHIBIT A

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1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3

4 LEADER TECHNOLOGIES, INC.,	)	C-10-80028-JW/HRL
	)	
5 Plaintiff,	)	
	)	San Jose, CA
6 vs.	)	March 2, 2010
	)	
7 FACEBOOK, INC.,	)	10:04:45-10:23:28
	)	
8 Defendant.	)	
______________________________	)	

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TRANSCRIPT OF PROCEEDINGS
10 OF THE OFFICIAL ELECTRONIC SOUND RECORDING
BEFORE THE HONORABLE HOWARD R. LLOYD
11 UNITED STATES MAGISTRATE JUDGE

12 A P P E A R A N C E S:

13 For the Plaintiff:	King & Spalding LLP By: SEAN M. BOYLE YURIDIA CAIRE 333 Twin Dolphin Drive Suite 400 Redwood City, CA 94065
For the Defendant:	Cooley Godward Kronish LLP By: MELISSA H. KEYES Five Palo Alto Square Ninth Floor 3000 El Camino Real Palo Alto, CA 94306

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1 San Jose, California March 2, 2010

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

3 THE COURT: Okay. Leader Technologies

4 versus Facebook.

5 Would whoever is going to be speaking

6 come up to the lectern here, both sides at once.

7 MR. BOYLE: I'm Sean Boyle for Leader

8 Technologies, Your Honor.

9 MS. KEYES: Good morning, Your Honor.

10 My name is Melissa Keyes. I'm

11 representing non-parties T.S. Ramakrishnan and

12 Stephen Dawson-Haggerty and Karel Baloun. And

13 I'm also counsel for Facebook.

14 THE COURT: Yes, I know. Good morning

15 to you both.

16 All right. The Defendant Facebook and

17 three non-parties whose depositions and documents

18 the Plaintiff wants move to quash the subpoenas

19 and for protective order.

20 Leader holds the '761 patent which was

21 issued on November 21st, 2006 and Leader claims

22 that Facebook infringes that patent.

23 The three individuals whose documents

24 and whose deposition Leader wants all worked for

25 Facebook at some point in time, but all of those

1 times ended prior to the issuance of the patent
2 on November 21st, 2006.
3 Therefore, the question I have for you,
4 Mr. Boyle, is since these folks worked for
5 Facebook prior to the issuance of the patent,
6 what testimony would you hope to get from them
7 which would be relevant to your claims of patent
8 infringement?
9 MR. BOYLE: Yes, Your Honor.
10 While issuance of the patent certainly
11 would impact, say, a damages analysis, it really
12 doesn't impact the infringement analysis in terms
13 of whether the infringing technology was made
14 before the patent issued. So, for example, one
15 of the hotly contested issues is whether or not
16 an application called "Groups" infringes our
17 patent.
18 Testimony from Mr. Moskovitz indicates
19 that that application was probably created in
20 2004 by one of our non-parties.
21 Now, even if -- we have no reason to
22 doubt that, Your Honor. So if this infringing
23 technology was made in 2004, as soon as our
24 patent issued, it infringes our patent. So
25 unless there's some contest as to inventorship,

1 it really doesn't matter when this infringing
2 technology was made. It's infringing now.
3 THE COURT: Well, I agree with that, but
4 so why do you need to talk to these folks who
5 left before the patent issued?
6 MR. BOYLE: Well, in the case of the
7 technology that I've just described --
8 THE COURT: Right.
9 MR. BOYLE: -- it's the gentleman who
10 actually coded -- coded the software. And so he
11 has not only personal knowledge but the best
12 knowledge as to how this -- this application
13 functioned.
14 And while we could ask other people
15 about it, he's the one who made it. We would
16 think that he would have the most relevant
17 information or at least information that would
18 lead to more information that's discoverable.
19 THE COURT: Well, if -- if it infringed
20 before the patent issued -- well, of course, it
21 couldn't infringe before the patent issued. But
22 if upon its issuance it was infringing, then
23 you're entitled to recover damages from the date
24 the patent issued assuming they haven't changed
25 it in some way or in some form or fashion gotten

1 around or modified the application so that it
2 didn't infringe.
3 And so you just need to prove it
4 infringes.
5 MR. BOYLE: Yes, Your Honor.
6 THE COURT: I don't understand why you
7 need these folks to do that.
8 MR. BOYLE: Again, the -- we believe
9 that they probably have the best information.
10 Facebook is -- I'm sorry.
11 THE COURT: I'm not clear. The best
12 information of what?
13 MR. BOYLE: So, for example, Your Honor,
14 Facebook suggested we depose Mr. Moskovitz or
15 Mr. D'Angelo.
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19 **REDACTED**
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10 THE COURT: Well, I have to admit I
11 don't understand the facts or appreciate them
12 nearly as well as you do, but why is it important
13 to talk to the coder? If you have the code,
14 presumably you analyze the code and come up with
15 a determination of whether or not it infringes
16 your patent.
17 So I don't -- I'm still not clear on why
18 you need to go to the code writer, if that's what
19 you're talking.
20 MR. BOYLE: To the extent that there are
21 questions about the coding or any annotations
22 about the coding, that would be relevant. These
23 other -- these non-parties also have other
24 information that would impact our case.
25 For example, we have a claim of

1 willfulness in our case. Did Mr. Dawson see any
2 signs of copying or did he copy? What
3 information did he use to make this code? There
4 is a white paper that's at issue in this case.
5 Did he see that white paper? Was he aware of
6 Leader Technologies at all?
7 And there's a lot of questions that can
8 be asked not just about the coding but about what
9 he knew at that time or what his company may have
10 known at that time.
11 THE COURT: Well, how is that relevant
12 if the patent hadn't yet issued?
13 MR. BOYLE: Well, in the case of
14 willfulness -- and, again, in terms of the
15 damages, it's not going to be relevant because
16 damages only run from when the patent issues.
17 In terms of our willfulness claim,
18 again, whatever was done prior to the issuance of
19 the patent is still relevant to the question of
20 willfulness. The only impact is that it won't --
21 it won't impact the amount of money recovered,
22 but it would certainly inform us about the
23 questionable things.
24 THE COURT: Give me a for instance. I'm
25 not sure I follow your logic.

1 MR. BOYLE: So I'm back in 2004 and I'm
2 creating this Groups application, which is what
3 we think Mr. Dawson-Haggerty did. And I see this
4 white paper that's out there or I see some
5 information from Leader Technologies describing
6 some technology and I copy that into my --
7 THE COURT: Well, this is apparently
8 information in the public realm.
9 MR. BOYLE: Well, the white paper may
10 have been labeled "patent pending" or there may
11 have been some indication that this was patented
12 information.
13 THE COURT: Patent pending information.
14 MR. BOYLE: Yes, Your Honor.
15 THE COURT: And is that relevant? When
16 you say "may have," I mean, do you know?
17 MR. BOYLE: I don't know, Your Honor.
18 THE COURT: Well, what's the
19 significance -- assuming it said it and you said
20 you didn't know. Assuming it said "patent
21 pending," but it was a publicly disseminated
22 document. Otherwise Mr. Dawson-Haggerty
23 shouldn't have had it, I guess. What's the
24 significance of him being inspired by or even
25 borrowing from that paper?

1 MR. BOYLE: Yes, Your Honor. Thus far
2 Facebook, I believe, denies having ever seen the
3 white paper or used it. This would go to intent
4 for our willfulness case.
5 We could argue one of their coders had
6 seen this, one of the coders had been using this
7 information. Clearly there was an intent to --
8 to willfully infringe our patent. Because you
9 were aware of this or should have been aware that
10 the patent had issued and yet you continued to
11 infringe.
12 THE COURT: Well, that patent hadn't
13 issued.
14 MR. BOYLE: But in 2006 when it issued.
15 THE COURT: Right. Well, that's a
16 separate issue. Let's assume they -- this is
17 hypothetical. I don't know what the facts might
18 actually show.
19 Let's assume they had seen the white
20 paper. Let's assume it said patent pending.
21 Let's assume they borrowed from it. Come
22 November 21, 2006 they've got to stop if indeed
23 they have borrowed something which you've got
24 patented as of then.
25 So, therefore, the question isn't what

1 they were doing in 2004. It's what they were
2 doing after November 2006.
3 MR. BOYLE: I agree, Your Honor. But in
4 terms of willfulness, we need to find out if they
5 were aware that this patent was issuing or did it
6 issue. I mean, if they were unaware that the
7 patent issued, we're not going to be able to show
8 willfulness. But if we can show that prior to
9 that they were using technology that they knew
10 was about to be patented, then they can't really
11 claim they weren't on notice.
12 THE COURT: What do you have to say?
13 MS. KEYES: Yes, Your Honor.
14 Quickly as to the matter of what
15 Mr. Boyle refers to as the best evidence,
16 Facebook has made available to Leader
17 Technologies since September 2009 its full
18 source code which is its most valuable corporate
19 asset. It has been continuously available.
20 And yet Leader Technologies' attorneys
21 have only come to view that source code six
22 times. Their expert has only come to view it
23 twice.
24 And so in terms of the best evidence out
25 there, this is the best evidence as tested and

1 judged by the Delaware court that's hearing the
2 underlying litigation. That court has actually
3 stated that the source code is the best available
4 evidence for a Plaintiff in a case such as this.
5 So Leader's failure to take advantage of
6 the best evidence that is available belies their
7 request for subpoenas -- excuse me, depositions
8 in this particular instance.
9 Furthermore, with regard to willful
10 infringement, the individuals in question -- or
11 excuse me, rather, Facebook has already provided
12 through interrogatory response a statement that
13 it has never heard of Leader Technologies, it has
14 never heard of Michael McKibben who is the
15 inventor of the patent at issue, and it has never
16 heard of the '761 patent before the filing of the
17 complaint in this action.
18 Furthermore, Mark Zuckerberg who is the
19 founder and CEO of Facebook has provided a
20 declaration that he has never heard of Leader
21 Technologies, Michael McKibben or the '761
22 patent.
23 And if the Court would like, we'd be
24 more than happy to provide declarations on behalf
25 of Messrs. Baloun, Dawson-Haggerty and

1 Ramakrishnan to the same effect. All of them
2 have attested to us that they have never heard of
3 Leader Technologies, nor Michael McKibben, nor
4 the '761 patent. Such declarations should
5 entirely alleviate Leader Technologies' concern
6 that these persons might have information
7 relevant to a claim of willful infringement.
8 THE COURT: Well, I take it, then, that
9 his assertion that if they did have knowledge
10 during the development of the various
11 applications in issue, Photos, Group, Falcon, if
12 they did have knowledge of a patent application
13 pending by Leader or this individual who's the
14 head guy at Leader, that that would be relevant
15 to willful infringement?
16 MS. KEYES: It would be tangentially
17 relevant, sir. The -- excuse me. Leader
18 Technologies has already taken the deposition of
19 Mr. Moskovitz who was the senior vice-president
20 of engineering and the supervisor of all of these
21 individual non-parties and they've also taken the
22 deposition of Mr. Adam D'Angelo who was the CTO
23 from the period October 2006 through May 2008.
24 Therefore, the entire period from the
25 founding of Facebook in 2004 through the period

1 through May 2008 has been testified to by former
2 employees of Facebook. So any information that
3 these individuals might have has already been
4 provided by their supervisors during the time of
5 their employment.
6 THE COURT: Mr. Boyle, apparently
7 Facebook and -- is it Zuckerman?
8 MS. KEYES: Mark Zuckerberg.
9 THE COURT: Zuckerberg have stated under
10 oath that they never -- that during the time
11 prior to the issuance of the patent they never --
12 in fact, even after the patent, they never heard
13 of Leader or this particular white paper or the
14 individual whose name you mentioned I have now
15 forgotten.
16 Do you have any information -- excuse
17 me, do you have any evidence that Baloun or
18 Dawson-Haggerty or Ramakrishnan knew about this
19 stuff or you just want to ask them?
20 MR. BOYLE: We just want to ask them,
21 Your Honor.
22 And, again, the supervisors may have
23 information about what their employers were
24 doing. But, for example, Ramakrishnan was the
25 vice-president of engineering who was said to

1 have been in charge of the design and rollout of
2 the architecture of Facebook. He would probably
3 have superior knowledge as to whether or not they
4 were utilizing ideas from other sources.
5 And even if they weren't, we would still
6 like to know where did they -- where do they come
7 up with these ideas and help us better understand
8 how this technology is working and how it's
9 functioning.
10 THE COURT: Wouldn't the source code
11 tell you that?
12 MR. BOYLE: To an extent if it was
13 properly annotated. But we would prefer to
14 hear from -- for example, from Dawson-Haggerty,
15 the gentleman who made it.
16 THE COURT: Why isn't this a fishing
17 expedition?
18 MR. BOYLE: In terms of just asking
19 these people?
20 THE COURT: Yeah.
21 MR. BOYLE:
22
REDACTED
23 We know
24 that Mr. Ramakrishnan was intimately involved
25 with all of his programmers. We know that our

1 other deponent was -- a Mr. Baloun, he wrote a
2 book and claims to have been one of the earliest
3 engineers who knows who wrote everything and how
4 they wrote it.
5 These individuals seem to be just closer
6 to the actual facts than these supervisors did.
7 And so we would like to ask them questions.
8 THE COURT: Okay. Is there anything
9 else? That's what I wanted to ask about.
10 MR. BOYLE: And other than just the
11 procedural grounds.
12 THE COURT: Right. I understand your
13 argument. And the fact that one of these fellows
14 was a day or two late I don't think -- I mean, I
15 think that that's a shortcoming that I could
16 forgive. So I'm not going to rule on a
17 procedural basis. I'm more interested in the
18 merits and whether or not you've shown good
19 reason for why you want to take these depositions
20 and get these documents.
21 Anything you want to say?
22 MS. KEYES: I believe our position is
23 well stated in our motion -- moving papers. I'd
24 just like to respond quickly to two points that
25 Mr. Boyle has just made with regard to

1 Mr. Dawson-Haggerty.

2 He was an intern at Facebook for just

3 one month.

4 THE COURT: Maybe he was really smart,

5 though.

6 MS. KEYES: I'm sure he was very smart,

7 but nevertheless he was an intern. He was only

8 there for one month. So the amount of testimony

9 he would have would be very limited and at best

10 tangentially relevant.

11 And with regard to Mr. Baloun and his

12 book, Leader Technologies -- this is a public

13 record book. You know, Leader Technologies has

14 this book and they've not been able to cite to a

15 single reference inside that book that would

16 indicate that Mr. Baloun has superior reference

17 to any other individual and certainly not

18 superior information to the source code.

19 And every -- every fact in this case or,

20 rather, I should say every individual who has

21 personal knowledge has personal knowledge of the

22 source code and the source code is the facts that

23 they are looking for in this case. The source

24 code is the best source of evidence.

25 THE COURT: Is the matter submitted?

1 MR. BOYLE: Your Honor, one thing.
2 THE COURT: Sure. Go ahead.
3 I've got to give her the last word now.
4 It's her motion.
5 MR. BOYLE: Yes.
6 THE COURT: So go ahead.
7 MR. BOYLE: The source code is important
8 to show infringement, but there are other issues
9 in this case. There's a question of validity and
10 when validity is brought up there's secondary
11 factors such as, you know, did they -- for
12 example, in making Groups did they succeed or
13 fail? I mean, what was their success rate? What
14 is the failure rate? Was there a demand in the
15 industry for this piece of software? Was it
16 commercially viable immediately?
17 I mean, there's a lot of information we
18 can get from these other -- these witnesses that
19 may know things that these other gentlemen that
20 they have referred us to don't know.
21
22 **REDACTED**
23
24 So I again would say that there's a
25 heavy burden to be met to deny discovery and they

1 just haven't met it.

2 MS. KEYES: With regard to the secondary

3 consideration, all of that testimony will be

4 provided by our marketing individual -- or,

5 rather, our person designated as 30(b)(6)

6 witnesses on marketing and financials.

7 The Facebook success is well known in

8 the industry. It's public information. There is

9 nothing that these individuals could provide

10 above and beyond that they were all employed by

11 Facebook between four and six years ago, which is

12 a significant amount of time ago.

13 That's all.

14 THE COURT: Okay. I thought you were

15 about to say something more.

16 Is the matter submitted?

17 MR. BOYLE: Yes, Your Honor.

18 THE COURT: Okay. You'll get an order.

19 Thank you.

20 MR. BOYLE: Thank you.

21 MS. KEYES: Thank you.

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Peter Torreano, a Certified Shorthand

4 Reporter for the State of California, do hereby

5 certify:

6 That the foregoing transcript is a full,

7 true and correct transcript, to the best of my

8 ability, of the official audiotaped sound

9 recording provided to me by the United States

10 District Court, Northern District of California,

11 of the proceedings had in Leader Technologies,

12 Inc. v. Facebook, Inc., Case No.

13 C-10-80028-JW/HRL, dated March 2, 2010.

14 I further certify that I am neither

15 counsel for, related to, nor employed by any of

16 the parties to the action in which this hearing

17 was taken, and further that I am not financially

18 nor otherwise interested in the outcome of the

19 action.

20

21

22 /s/

23 ______________________________

24 PETER TORREANO, CSR
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