

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

LEADER TECHNOLOGIES, INC., a
Delaware corporation,

Plaintiff and Counterdefendant,

v.

FACEBOOK, INC., a Delaware
corporation,

Defendant and Counterclaimant.

Civil Action No. 1:08-cv-00862-JJF

PUBLIC VERSION

**FACEBOOK INC.'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE
NO. 7 REGARDING REFERENCES TO A POTENTIAL INJUNCTION**

OF COUNSEL:

Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Jeffrey T. Norberg (*pro hac vice*)
Melissa H. Keyes (*pro hac vice*)
Elizabeth L. Stmeshkin (*pro hac vice*)
COOLEY GODWARD KRONISH LLP
5 Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155

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BLANK ROME LLP

Steven L. Caponi (DE Bar #3484)
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464

*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*

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FOR THE DISTRICT OF DELAWARE

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)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-JJF
)	
v.)	CONFIDENTIAL
)	FILED UNDER SEAL
FACEBOOK, INC.,)	
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Steven L. Caponi (DE Bar #3484)
BLANK ROME LLP
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464

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Jeffrey T. Norberg (*pro hac vice*)
Melissa H. Keyes (*pro hac vice*)
Elizabeth L. Stameshkin (*pro hac vice*)
COOLEY LLP
3000 El Camino Real
5 Palo Alto Square, 4th Floor
Palo Alto, CA 94306

Dated: May 27, 2010

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The jury in this case will be considering evidence relating to all of the underlying facts that would be used by the Court in determining whether or not a permanent injunction is appropriate. In connection with a reasonable royalty analysis in this case, for example, the jury is expected to hear testimony about whether or not the parties are competitors, the extent of the patentee's willingness to enter into a license agreement with third parties, and the duration of a hypothetical potential license with Facebook. *See Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified and aff'd*, *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971). That LTI is seeking a permanent injunction is relevant to these factors, as it sheds light on the royalty analysis under the *Georgia-Pacific* framework. *Id.* at 1120. For instance, a reasonable royalty predicated solely on past damages (*e.g.*, because the plaintiff seeks a going-forward permanent injunction) may warrant a royalty rate different from that appropriate in a situation where the plaintiff seeks a royalty rate applicable throughout the entire term of the patent. LTI's preference for a permanent injunction over post-judgment damages is certainly relevant to the reasonable royalty analysis. *See, e.g., THK Am., Inc. v. NSK, Ltd.*, 917 F. Supp. 563, 571-72 (N.D. Ill. 1996) (denying patentee's motion *in limine* to exclude mention of injunctive relief, noting relevance to damages issues). Moreover, because the jury will invariably be hearing all of the evidence relevant to permanent injunction issues as part of the damages analysis, the Court could also seek the guidance of an advisory verdict under Fed. R. Civ. P. 39(c).

The basic premise of LTI's argument is that it would be unfairly prejudicial if the jury, whom LTI speculates could include users of Facebook, learns that LTI is seeking an injunction in this litigation. LTI's argument is based on the wishful thinking that its infringement claims against Facebook threaten essential features of the website. But they do not.

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Redacted

The premise of LTI's argument, that the relevance "is substantially outweighed by the danger of unfair prejudice," Fed. R. Evid. 403, has no basis in fact. The case law in this circuit is clear that Rule 403 favors admissibility such that facts "should be excluded under Rule 403 only sparingly." *Blancha v Raymark Indus.*, 972 F.2d 507, 516 (3d Cir. 1992). LTI has failed to explain how the fact that it seeks an injunction would be prejudicial. The status of a potential juror as a Facebook user does not rise to the level of emotionally charged material or a highly charged public issue that typically provides the basis for exclusion to prevent a decision on an improper basis. *See* Fed. R. Evid. 403 Advisory Committee Notes.

LTI cites a number of cases in its motion, but those cases provide no detailed analysis of the issue whatsoever. Three of the cases LTI cites merely reference a court's order granting a motion *in limine* to preclude reference to a potential injunction, without discussing the basis for it. *See Ciena Corp. v. Corvis Corp.*, 352 F. Supp. 2d 526, 529 (D. Del. 2005); *Arthrocare Corp. v. Smith & Nephew, Inc.*, No. Civ. A. 01-504-SLR, 2003 WL 1905636, at *1 (D. Del. April 14, 2003); *Richards Mfg. Co. v. Thomas & Betts Corp.*, No. Civ. A. 01-4677-SRC, 2005 WL 6043427, at *1 (D.N.J. Oct. 31, 2005); *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 831 F. Supp. 1516 (D. Col. 1993). One of the cases cited by LTI, in fact, granted the motion simply because it was unopposed. *Arthrocare Corp.*, at *1.

Alternatively, Facebook respectfully requests the Court deny LTI's motion as premature and defer any decision until trial. This is a preferable practice here to account for "countervailing considerations, especially with respect to . . . rulings under Rule 403 which [if] made pre-trial [would be] without the benefit of the flavor of the record

developed at trial.” *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev’d sub nom. on other grounds, Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

For the foregoing reasons Facebook respectfully requests this Court deny LTI’s motion *in limine* to exclude references to a potential injunction.

Dated: May 27, 2010

By: /s/ Steven L. Caponi
Steven L. Caponi (DE Bar No. 3484)
BLANK ROME LLP
1201 Market Street
Wilmington, DE 19801
Phone: (302) 425-6400
Fax: (302) 425-6464

*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*

Of Counsel:

Heidi L. Keefe
Mark R. Weinstein
Jeffrey T. Norberg
Melissa H. Keyes
Elizabeth L. Stameshkin
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
Phone: (650) 843-5000
Fax: (650) 857-9663