

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

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	
Plaintiff-Counterdefendant,)	Civil Action No. 08-862-JJF
)	
v.)	
)	PUBLIC VERSION
FACEBOOK, INC., a Delaware corporation,)	
)	
Defendant-Counterclaimant.)	

**DECLARATION OF MICHAEL LEE IN SUPPORT OF
LEADER TECHNOLOGIES, INC.'S OPPOSITION TO FACEBOOK INC.'S
DAUBERT MOTIONS TO EXCLUDE THE TESTIMONY OF LEADER'S EXPERTS
GIOVANNI VIGNA, JAMES HERBSLEB AND RUSSELL PARR**

OF COUNSEL:

Paul J. André
Lisa Kobialka
KING & SPALDING, LLP
333 Twin Dolphin Drive
Suite 400
Redwood Shores, California 94065-6109
(650) 590-7100

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Philip A. Rovner (#3215)
Jonathan A. Choa (#5319)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com
jchoa@potteranderson.com

*Attorneys for Plaintiff and Counterdefendant
Leader Technologies, Inc.*

I, Michael Lee, hereby declare:

1. I am an attorney with the law firm King & Spalding LLP, counsel of record for Plaintiff Leader Technologies, Inc. ("Leader"). I have personal knowledge of the facts set forth in this declaration and can testify competently to those facts.
2. Attached hereto as Exhibit 1 is a true and correct copy of Facebook's Statement of Rights and Responsibilities bearing bates numbers LTI 157155 - 57.
3. Attached hereto as Exhibit 2 is a true and correct copy of Facebook's Privacy Policy bearing bates numbers LTI 15158 - 61.
4. Attached hereto as Exhibit 3 is a true and correct copy of Expert Report of Saul Greenberg, Ph. D., served on April 8, 2010.
5. Attached hereto as Exhibit 4 is a true and correct copy of Expert Report of James Patrick Hughes, served on April 8, 2010.
6. Attached hereto as Exhibit 5 is a true and correct copy of Expert Report of Christopher J. Bokhart, served on April 22, 2010.
7. Attached hereto as Exhibit 6 is a true and correct copy of pages 53-54, 73-74, 210, and 214 from the deposition transcript of Christopher J. Bokhart, taken on May 4, 2010.
8. Attached hereto as Exhibit 7 is a true and correct copy of Expert Report of Michael Kearns, Ph.D., served on April 22, 2010.
9. Attached hereto as Exhibit 8 is a true and correct copy of corrected Exhibit 1 to the Expert Report of Russell L. Parr, CFA, ASA.
10. Attached hereto as Exhibit 9 is a true and correct copy of a document entitled Facebook Evolutionaries: An in-depth look at our audience, bates numbered FB 00121155-82.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this 27th day of May 2010, at Redwood Shores, California.



Michael Lee

EXHIBIT 1



This agreement was written in English (US). Please note that Section 16 contains certain changes to the general terms for users outside the United States.

Date of Last Revision: December 21, 2009

Statement of Rights and Responsibilities

This Statement of Rights and Responsibilities ("Statement") derives from the Facebook Principles, and governs our relationship with users and others who interact with Facebook. By using or accessing Facebook, you agree to this Statement.

1. Privacy

Your privacy is very important to us. We designed our Privacy Policy to make important disclosures about how you can use Facebook to share with others and how we collect and can use your content and information. We encourage you to read the Privacy Policy, and to use it to help make informed decisions.

2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).
3. When you add an application and use Platform, your content and information is shared with the application. We require applications to respect your privacy settings, but your agreement with that application will control how the application can use the content and information you share. (To learn more about Platform, read our About Platform page.)
4. When you publish content or information using the "everyone" setting, it means that everyone, including people off of Facebook, will have access to that information and we may not have control over what they do with it.
5. We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

3. Safety

We do our best to keep Facebook safe, but we cannot guarantee it. We need your help to do that, which includes the following commitments:

1. You will not send or otherwise post unauthorized commercial communications (such as spam) on Facebook.
2. You will not collect users' content or information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without our permission.
3. You will not engage in unlawful multi-level marketing, such as a pyramid scheme, on Facebook.
4. You will not upload viruses or other malicious code.
5. You will not solicit login information or access an account belonging to someone else.
6. You will not bully, intimidate, or harass any user.
7. You will not post content that is hateful, threatening, pornographic, or that contains nudity or graphic or gratuitous violence.
8. You will not develop or operate a third party application containing, or advertise or otherwise market alcohol-related or other mature content without appropriate age-based restrictions.
9. You will not offer any contest, giveaway, or sweepstakes ("promotion") on Facebook without our prior written consent. If we consent, you take full responsibility for the promotion, and will follow our Promotions Guidelines and all applicable laws.
10. You will not use Facebook to do anything unlawful, misleading, malicious, or discriminatory.
11. You will not do anything that could disable, overburden, or impair the proper working of Facebook, such as a denial of service attack.
12. You will not facilitate or encourage any violations of this Statement.

4. Registration and Account Security

Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:

1. You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.
2. You will not use your personal profile for your own commercial gain (such as selling your status update to an advertiser).
3. You will not use Facebook if you are under 13.
4. You will not use Facebook if you are a convicted sex offender.
5. You will keep your contact information accurate and up-to-date.
6. You will not share your password, let anyone else access your account, or do anything else that might jeopardize the security of your account.
7. You will not transfer your account to anyone without first getting our written permission.
8. If you select a username for your account we reserve the right to remove or reclaim it if we believe appropriate (such as when a trademark owner complains about a username that does not closely relate to a user's actual name).

5. Protecting Other People's Rights

We respect other people's rights, and expect you to do the same.

1. You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.
2. We can remove any content or information you post on Facebook if we believe that it violates this Statement.
3. We will provide you with tools to help you protect your intellectual property rights. To learn more, visit our How to Report Claims of Intellectual Property Infringement page.
4. If we remove your content for infringing someone else's copyright, and you believe we removed it by mistake, we will provide you with an opportunity to appeal.
5. If you repeatedly infringe other people's intellectual property rights, we will disable your account when appropriate.
6. You will not use our copyrights or trademarks (including Facebook, the Facebook and F Logos, FB, Face, Poke, Wall and 32665), or any confusingly similar marks, without our written permission.
7. If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.
8. You will not post anyone's identification documents or sensitive financial information on Facebook.
9. You will not send email invitations to non-users without their consent.

6. Mobile

1. We currently provide our mobile services for free, but please be aware that your carrier's normal rates and fees, such as text messaging fees, will still apply.
2. In the event you change or deactivate your mobile telephone number, you will update your account information on Facebook within 48 hours to ensure that your messages are not sent to the person who acquires your old number.

7. Payments

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If you make a payment on Facebook or use Facebook Credits, you agree to our Payments Terms.

8. Special Provisions Applicable to Share Links

If you include our Share Link button on your website, the following additional terms apply to you:

1. We give you permission to use Facebook's Share Link button so that users can post links or content from your website on Facebook.
2. You give us permission to use such links and content on Facebook.
3. You will not place a Share Link button on any page containing content that would violate this Statement if posted on Facebook.

9. Special Provisions Applicable to Developers/Operators of Applications and Websites

If you are a developer or operator of a Platform application or website, the following additional terms apply to you:

1. You are responsible for your application and its content and all uses you make of Platform. This includes ensuring your application or use of Platform meets our Developer Principles and Policies and our Advertising Guidelines.
2. Your access to and use of data you receive from Facebook, will be limited as follows:
 1. You will only request data you need to operate your application.
 2. You will only use the data you receive for your application, and will only use it in connection with Facebook.
 3. You will have a privacy policy or otherwise make it clear to users what user data you are going to use and how you will use, display, or share that data.
 4. You will not use, display, or share a user's data in a manner inconsistent with the user's privacy settings.
 5. You will delete all data you received from us relating to any user who deauthorizes, disconnects, or otherwise disassociates from your application unless otherwise permitted in our Developer Principles and Policies.
 6. You will delete all data you received from Facebook if we disable your application or ask you to do so.
 7. We can require you to update any data you have received from us.
 8. We can limit your access to data.
 9. You will not transfer the data you receive from us (or enable that data to be transferred) without our prior consent.
3. You will not give us information that you independently collect from a user or a user's content without that user's consent.
4. You will make it easy for users to remove or disconnect from your application.
5. You will make it easy for users to contact you. We can also share your email address with users.
6. You will provide customer support for your application.
7. You will not show third party ads or web search boxes on Facebook user profiles or Pages.
8. We give you all rights necessary to use the code, APIs (along with all data received), or tools we provide to you, but only in connection with your application.
9. You will not sell, transfer, or sublicense our code, APIs, or tools to anyone.
10. You will not misrepresent your relationship with Facebook to others.
11. You may use the logos we make available to developers or issue a press release or other public statement so long as you follow our Developer Principles and Policies.
12. We can issue a press release describing our relationship with you.
13. You will comply with all applicable laws. In particular you will (if applicable):
 1. have a policy for removing infringing content and terminating repeat infringers that complies with the Digital Millennium Copyright Act.
 2. comply with the Video Privacy Protection Act ("VPPA"), and will obtain any opt-in consent necessary from users so that user data subject to the VPPA may be shared on Facebook. You represent that any disclosure to us will not be incidental to the ordinary course of your business.
14. We do not guarantee that Platform will always be free.
15. You give us all rights necessary to enable your application to work with Facebook, including the right to incorporate content you provide to us into streams, profiles, and user action stories.
16. You give us the right to link to or frame your application and place content, including ads, around your application.
17. We can analyze your application, content, and data for any purpose, including commercial (such as for targeting the delivery of advertisements and indexing content for search).
18. To ensure your application is safe for users, we can audit it.
19. We can create applications that offer similar features and services to, or otherwise compete with, your application.

10. About Advertisements on Facebook

Our goal is to deliver ads that are not only valuable to advertisers, but also valuable to you. In order to do that, you agree to the following:

1. You can use your privacy settings to limit how your name and profile picture may be associated with commercial or sponsored content served by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.
2. We do not give your content or information to advertisers without your consent.
3. You understand that we may not always identify paid services and communications as such.

11. Special Provisions Applicable to Advertisers

You can target your specific audience by buying ads on Facebook or our publisher network. The following additional terms apply to you if you place an order through our online advertising portal ("Order"):

1. When you place an Order, you will tell us the type of advertising you want to buy, the amount you want to spend, and your bid. If we accept your Order, we will deliver your ads as inventory becomes available.
2. You will pay for your Orders in accordance with our Payments Terms. The amount you owe will be calculated based on our tracking mechanisms.
3. Your ads will comply with our Advertising Guidelines.
4. We will determine the size, placement, and positioning of your ads.
5. We do not guarantee the activity that your ads will receive, such as the number of clicks you will get.
6. We cannot control how people interact with your ads, and are not responsible for click fraud or other improper actions that affect the cost of running ads. We do, however, have systems to detect and filter certain suspicious activity, learn more here.
7. You can cancel your Order at any time through our online portal, but it may take up to 24 hours before the ad stops running.
8. Our license to run your ad will end when we have completed your Order. You understand, however, that if users have interacted with your ads, your ads may remain until the users delete it.
9. We can use your ads and related content and information for marketing or promotional purposes.
10. You will not issue any press release or make public statements about your relationship with Facebook without written permission.
11. We may reject or remove any ad for any reason.

If you are placing ads on someone else's behalf, we need to make sure you have permission to place those ads, including the following:

12. You warrant that you have the legal authority to bind the advertiser to this Statement.
13. You agree that if the advertiser you represent violates this Statement, we may hold you responsible for that violation.

12. Special Provisions Applicable to Pages

1. Pages are special profiles that may only be used to promote a business or other commercial, political, or charitable organization or endeavor (including non-profit organizations, political campaigns, bands, and celebrities).
2. You may only administer a Facebook Page if you are an authorized representative of the subject of the Page.
3. Pages can only post content and information under the "everyone" setting.
4. When you publish content or information to your Page we have no obligation to distribute your content or information to users.
5. If you use a Fan Box widget off of our site to promote your Page, others will be able to copy and place the widget elsewhere.
6. You may not place a Fan Box widget in an advertisement.
7. If you collect user information on your Page, Section 9 of this Statement also applies to you.
8. If you display advertising on your Page, Section 11 of this Statement also applies to you.
9. You may not establish terms beyond those set forth in this Statement to govern the posting of content by users on a Page you administer, except you may disclose the types of content you will remove from your Page and grounds for which you may ban a user from accessing the Page.
10. You will restrict access to your Page in order to comply with all applicable laws. For example, if your Page includes content not suitable for minors, you will use your Page to block minors from accessing your Page.

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13. Amendments

1. We can change this Statement if we provide you notice (by posting the change on the Facebook Site Governance Page) and an opportunity to comment. To get notice of any future changes to this Statement, visit our Facebook Site Governance Page and become a fan.
2. For changes to sections 7, 8, 9, and 11 (sections relating to payments, application developers, website operators, and advertisers), we will give you a minimum of three days notice. For all other changes we will give you a minimum of seven days notice. All such comments must be made on the Facebook Site Governance Page.
3. If more than 7,000 users comment on the proposed change, we will also give you the opportunity to participate in a vote in which you will be provided alternatives. The vote shall be binding on us if more than 30% of all active registered users as of the date of the notice vote.
4. We can make changes for legal or administrative reasons upon notice without opportunity to comment.

14. Termination

If you violate the letter or spirit of this Statement, or otherwise create possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account. You may also delete your account or disable your application at any time. In all such cases, this Statement shall terminate, but the following provisions will still apply: 2.2, 2.4, 3-5, 8.2, 9.1-9.3, 9.9, 9.10, 9.13, 9.15.1, 9.18, 10.3, 11.2, 11.5, 11.6, 11.9, 11.9, 11.12, 11.13, and 14-18.

15. Disputes

1. You will resolve any claim, cause of action or dispute ("claim") you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.
2. If anyone brings a claim against us related to your actions, content or information on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim.
3. WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING FACEBOOK "AS IS" WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL BE SAFE OR SECURE. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES. IF YOU ARE A CALIFORNIA RESIDENT, YOU WAIVE CALIFORNIA CIVIL CODE §1542, WHICH SAYS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." WE WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, FACEBOOK'S LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

16. Special Provisions Applicable to Users Outside the United States

We strive to create a global community with consistent standards for everyone, but we also strive to respect local laws. The following provisions apply to users outside the United States:

1. You consent to having your personal data transferred to and processed in the United States.
2. If you are located in a country embargoed by the United States, or are on the U.S. Treasury Department's list of Specially Designated Nationals you will not engage in commercial activities on Facebook (such as advertising or payments) or operate a Platform application or website.
3. Certain specific terms that apply only for German users are available here.

17. Definitions

1. By "Facebook" we mean the features and services we make available, including through (a) our website at www.facebook.com and any other Facebook branded or co-branded websites (including sub-domains, international versions, widgets, and mobile versions); (b) our Platform; and (c) other media, software (such as a toolbar), devices, or networks now existing or later developed.
2. By "us," "we" and "our" we mean Facebook, Inc., or if you are outside of the United States, Facebook Ireland Limited.
3. By "Platform" we mean a set of APIs and services that enable applications, developers, operators or services, including Connect and RSS feeds, to retrieve data from Facebook or provide data to us.
4. By "information" we mean facts and other information about you, including actions you take.
5. By "content" we mean anything you post on Facebook that would not be included in the definition of "information."
6. By "data" we mean content and information that third parties can retrieve from Facebook or provide to Facebook through Platform.
7. By "post" we mean post on Facebook or otherwise make available to us (such as by using an application).
8. By "use" we mean use, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.
9. By "active registered user" we mean a user who has logged into Facebook at least once in the previous 30 days.
10. By "application" we mean any application or website (including Connect sites) that uses or accesses Platform, as well as anything else that receives data.

18. Other

1. This Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements.
2. If any portion of this Statement is found to be unenforceable, the remaining portion will remain in full force and effect.
3. If we fail to enforce any of this Statement, it will not be considered a waiver.
4. Any amendment to or waiver of this Statement must be made in writing and signed by us.
5. You will not transfer any of your rights or obligations under this Statement to anyone else without our consent.
6. All of our rights and obligations under this Statement are freely assignable by us in connection with a merger, acquisition, or sale of assets, or by operation of law or otherwise.
7. Nothing in this Statement shall prevent us from complying with the law.
8. This Statement does not confer any third party beneficiary rights.

You may also want to review the following documents:

Privacy Policy: The Privacy Policy is designed to help you understand how we collect and use information.

Payment Terms: These additional terms apply to all payments made on or through Facebook.

About Platform: This page helps you better understand what happens when you add a third-party application or use Facebook Connect, including how they may access and use your data.

Developer Principles and Policies: These guidelines outline the policies that apply to applications, including Connect sites.

Advertising Guidelines: These guidelines outline the policies that apply to advertisements placed on Facebook.

Promotions Guidelines: These guidelines outline the policies that apply if you have obtained written pre-approval from us to offer contests, sweepstakes, and other types of promotions on Facebook.

How to Report Claims of Intellectual Property Infringement

How to Appeal Claims of Copyright Infringement

To access the Statement of Rights and Responsibilities in several different languages, please use the following links:

French translation (Français)

Italian translation (Italiano)

German translation (Deutsch)

Spanish translation (Español)

EXHIBIT 2



Facebook's Privacy Policy

Date of last revision: December 9, 2009.

We want to earn your trust by being transparent about how Facebook works. You should read this policy in its entirety, but should pay particular attention to these four highlights:

- Facebook is designed to make it easy for you to share your information with anyone you want. You decide how much information you feel comfortable sharing on Facebook and you control how it is distributed through your privacy settings. You should review the default privacy settings and change them if necessary to reflect your preferences. You should also consider your settings whenever you share information.
- Facebook is not just a website. It is also a service for sharing your information on Facebook-enhanced applications and websites. You can control how you share information with those third-party applications and websites through your application settings and you can learn more about how information is shared with them on our About Platform page. You can also limit how your friends share your information with applications through your privacy settings.
- Certain categories of information such as your name, profile photo, list of friends and pages you are a fan of, gender, geographic region, and networks you belong to are considered publicly available to everyone, including Facebook-enhanced applications, and therefore do not have privacy settings. You can, however, limit the ability of others to find this information through search using your search privacy settings.
- Facebook is a free service supported primarily by advertising. We will not share your information with advertisers without your consent. We allow advertisers to select characteristics of users they want to show their advertisements to and we use the information we have collected to serve those advertisements.

This policy contains eight sections, and you can jump to each by selecting the links below:

1. Introduction
2. Information We Receive
3. Information You Share With Third Parties
4. How We Use Your Information
5. How We Share Information
6. How You Can View, Change, or Remove Information
7. How We Protect Information
8. Other Terms

1. Introduction

Questions. If you have any questions or concerns about our privacy policy, contact our privacy team through this help page. You may also contact us by mail at 1601 S. California Avenue, Palo Alto, CA 94304.

TRUSTe Program. Facebook is a certified licensee of the TRUSTe Privacy Seal Program. This means that our privacy policy and practices have been reviewed by TRUSTe, an independent organization focused on reviewing privacy and security policies and practices, for compliance with its strict program requirements. This privacy policy covers the website www.facebook.com. The TRUSTe program covers only information that is collected through this Web site, and does not cover other information, such as information that may be collected through software downloaded from Facebook.

If you have any complaints about our policy or practices please let us know through this help page. If you are not satisfied with our response, you can contact TRUSTe.



Safe Harbor. Facebook also adheres to the Safe Harbor framework developed by the U.S. Department of Commerce and the European Union. As part of our participation in the Safe Harbor, we agree to resolve all disputes you have with us in connection with our policies and practices through TRUSTe. To view our certification, visit the U.S. Department of Commerce's Safe Harbor Web site.

Scope. This privacy policy covers all of Facebook. It does not, however, apply to entities that Facebook does not own or control, such as Facebook-enhanced applications and websites. By using or accessing Facebook, you agree to our privacy practices outlined here.

No information from children under age 13. If you are under age 13, please do not attempt to register for Facebook or provide any personal information about yourself to us. If we learn that we have collected personal information from a child under age 13, we will delete that information as quickly as possible. If you believe that we might have any information from a child under age 13, please contact us through this help page.

Parental participation. We strongly recommend that minors 13 years of age or older ask their parents for permission before sending any information about themselves to anyone over the Internet and we encourage parents to teach their children about safe internet use practices. Materials to help parents talk to their children about safe internet use can be found on this help page.

2. Information We Receive

Information you provide to us:

Personal information. When you sign up for Facebook you provide us with your name, email, gender, and birth date. During the registration process we give you the opportunity to provide

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additional profile information, such as where you went to school and where you work, and to add a picture of yourself, to help your friends connect with you. In some cases we may ask for additional information for security reasons or to provide specific services to you. Once you register you can visit your profile at any time to add or remove personal information about yourself. You can add basic information about yourself, such as information about your hometown, family, relationships, and your political and religious views. You can also add other information about yourself including your activities, interests, contact information, as well as more information about your education and job history.

Content. One of the primary reasons people use Facebook is to share content with others. Examples include when you update your status, upload or take a photo, upload or record a video, share a link, create an event or a group, make a comment, write something on someone's Wall, write a note, or send someone a message. If you do not want us to store metadata associated with content you share on Facebook (such as photos), please remove the metadata before uploading the content.

Transactional Information. We may retain the details of transactions or payments you make on Facebook. However, we will only keep your payment source account number with your consent.

Friend Information. We offer contact importer tools to help you upload your friends' addresses so that you can find your friends on Facebook, and invite your contacts who do not have Facebook accounts to join. If you do not want us to store this information, visit this help page. If you give us your password to retrieve those contacts, we will not store your password after you have uploaded your contacts' information.

Location Information. When you share your location with others or add a location to something you post, we treat that like any other content you post (for example, it is subject to your privacy settings). If we offer a service that supports this type of location sharing we will present you with an opt-in choice of whether you want to participate.

Information we collect when you interact with Facebook:

Site activity information. We keep track of the actions you take on Facebook, such as adding a friend, becoming a fan of a Facebook Page, joining a group or an event, creating a photo album, sending a gift, poking another user, indicating you "like" a post, attending an event, or authorizing an application. In some cases you are also taking an action when you provide information or content to us. For example, if you share a video, in addition to storing the actual content you uploaded, we might log the fact you shared it.

Access Device and Browser Information. When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, location, and IP address, as well as the pages you visit.

Cookie Information. We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

Information we receive from third parties:

Facebook Platform and Facebook Connect. We do not own or operate the applications that you use through Facebook Platform (such as games and utilities) or the websites that you interact with through Facebook Connect. We refer to them as "Facebook-enhanced" applications and websites because they use our Platform to provide you with social features. Whenever you authorize a Facebook-enhanced application or website, we will receive information from them, including information about actions you take. In some cases, in order to personalize the process of connecting, we may receive a limited amount of information even before you authorize the application or website.

Information from other websites. We may institute programs with advertising partners and other websites in which they share information with us:

- We may ask advertisers to tell us how our users responded to the ads we showed them (and for comparison purposes, how other users who didn't see the ads acted on their site). This data sharing, commonly known as "conversion tracking," helps us measure our advertising effectiveness and improve the quality of the advertisements you see.

- We may receive information about whether or not you've seen or interacted with certain ads on other sites in order to measure the effectiveness of those ads.

If in any of these cases we receive data that we do not already have, we will "anonymize" it within 180 days, meaning we will stop associating the information with any particular user. If we institute these programs, we will only use the information in the ways we explain in the "How We Use Your Information" section below.

Information from other users. We may collect information about you from other Facebook users, such as when a friend tags you in a photo or video, provides friend details, or indicates a relationship with you. You can limit who can see that you have been tagged in a photo or video - which we refer to as photos or videos "of me" - in your privacy settings.

3. Information You Share With Third Parties

We take steps to ensure that others use information that you share on Facebook in a manner consistent with your privacy settings, but we cannot guarantee that they will follow our rules. Read the following section to learn more about how you can protect yourself when you share information with third parties.

Sharing information on Facebook. We designed our privacy settings to enable you to control how you share your information on Facebook. You should review the default privacy settings to make sure they reflect your preferences. Here are some specific things to remember:

- You can control the visibility of most of the information you share on Facebook through the privacy settings you select.

- Certain categories of information such as your name, profile photo, list of friends and pages you are a fan of, gender, geographic region, and networks you belong to are considered publicly available, and therefore do not have privacy settings. You can limit the ability of others to find this information on third party search engines through your search privacy settings.

- Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit.

- Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users.

- You understand that information might be re-shared or copied by other users.

- Certain types of communications that you send to other users cannot be removed, such as messages.

- When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings.

- If you use an external source to publish information to Facebook (such as a mobile application or a Connect site), you should check the privacy setting for that post, as it is set by that external source.

"Everyone" Privacy Setting. Information set to "everyone" is publicly available information, may be accessed by everyone on the Internet (including people not logged into Facebook), is subject to indexing by third party search engines, may be associated with you outside of Facebook (such as when you visit other sites on the internet), and may be imported and exported by us and others without privacy limitations. The default privacy setting for certain types of information you post on Facebook is set to "everyone." You can review and change the default settings in your privacy settings. If you delete "everyone" content that you posted on Facebook, we will remove it from your Facebook profile, but have no control over its use outside of Facebook.

Facebook Platform. As mentioned above, we do not own or operate Facebook-enhanced applications or websites. That means that when you visit Facebook-enhanced applications and websites you are making your Facebook information available to someone other than Facebook. To help those applications and sites operate, they receive publicly available information automatically when you visit them, and additional information when you formally authorize or connect your Facebook account with them. You can learn more details about which information the operators of those applications and websites can access on our About Platform page. Prior to allowing them to access any information about you, we require them to agree to terms that limit their use of your information (which you can read about in Section 9 of our Statement of Rights and Responsibilities) and we use technical measures to ensure that they only obtain authorized information. We also give you tools to control how your information is shared with them:

[You can choose to opt-out of Facebook Platform and Facebook Connect altogether through your privacy settings] (We will remove this sentence in the next revision to our Privacy Policy as the product has changed)

- You can block specific applications from accessing your information by visiting your application settings or the application's "About" page

- You can use your privacy settings to limit which of your information is available to "everyone" (by default, every application and website, including those you have not connected with, can access "everyone" and other publicly available content)

- You can use your application settings to limit which of your information your friends can make available to applications and websites

- We may make information about the location of your computer or access device and your age available to Facebook –enhanced applications and websites in order to help them implement appropriate security measures and control the distribution of age-appropriate content.

You should always review the policies of third party applications and websites to make sure you are comfortable with the ways in which they use information you share with them. We do not guarantee that they will follow our rules. If you find an application or website that violates our rules, you should report the violation to us on this help page and we will take action as necessary.

Exporting Information. You (and those you make your information available to) may use tools like RSS feeds, mobile phone address books, or copy and paste functions, to capture and export information from Facebook, including your information and information about you.

Advertisements. Sometimes the advertisers who present ads on Facebook use technological methods to measure the effectiveness of their ads and to personalize advertising content. You may opt-out of the placement of cookies by many of these advertisers here. You may also use your browser cookie settings to limit or prevent the placement of cookies by advertising networks.

Links. When you click on links on Facebook you may leave our site. We are not responsible for the privacy practices of other sites, and we encourage you to read their privacy statements.

4. How We Use Your Information

We use the information we collect to try to provide a safe, efficient, and customized experience. Here are some of the details on how we do that:

To manage the service. We use the information we collect to provide our services and features to you, to measure and improve those services and features, and to provide you with customer support. We use the information to prevent potentially illegal activities, and to enforce our Statement of Rights and Responsibilities. For example, we ask for your date of birth to verify that you are over age 13 and so that we can better limit your access to content and advertisements that are not age appropriate. We also use a variety of technological systems to detect and address anomalous activity and screen content to prevent abuse such as spam. These efforts may on occasion result in a temporary or permanent suspension or termination of some functions for some users.

To contact you. We may contact you with service-related announcements from time to time. You may opt out of all communications except essential updates on your account notifications page. We may include content you see on Facebook in the emails we send to you.

To serve personalized advertising to you. We don't share your information with advertisers without your consent. (An example of consent would be if you asked us to provide your shipping address to an advertiser to receive a free sample.) We allow advertisers to choose the characteristics of users who will see their advertisements and we may use any of the non-personally identifiable attributes we have collected (including information you may have decided not to show to other users, such as your birth year or other sensitive personal information or preferences) to select the appropriate audience for those advertisements. For example, we might use your interest in soccer to show you ads for soccer equipment, but we do not tell the soccer equipment company who you are. You can see the criteria advertisers may select by visiting our advertising page. Even though we do not share your information with advertisers without your consent, when you click on or otherwise interact with an advertisement there is a possibility that the advertiser may place a cookie in your browser and note that it meets the criteria they selected.

To serve social ads. We occasionally pair advertisements we serve with relevant information we have about you and your friends to make advertisements more interesting and more tailored to you and your friends. For example, if you become a fan of a Page, we may display your name and profile photo next to an advertisement for that Page that is displayed to your friends. We only share the personally identifiable information visible in the social ad with the friend who can see the ad. You can opt out of having your information used in social ads on this help page.

To supplement your profile. We may use information about you that we collect from other Facebook users to supplement your profile (such as when you are tagged in a photo or mentioned in a status update). In such cases we generally allow you to direct how that information is shared in your privacy settings or give you the ability to remove the content (such as allowing you to remove a photo tag of you) or limit its visibility on Facebook.

To make suggestions. We use your profile information, the addresses you import through our contact Importers, and other relevant information, to help you connect with your friends, including making suggestions to you and other users that you connect with on Facebook. If you want to limit your visibility in suggestions we make to other people, you can adjust your search visibility privacy setting, as you will only be visible in our suggestions to the extent you choose to be visible in public search listings. You may also block specific individual users from being suggested to you and you from being suggested to them.

Downloadable Software. Certain downloadable software applications and applets that we offer, such as our browser toolbars and photo uploaders, transmit data to us. We may not make a formal disclosure if we believe our collection of and use of the information is the obvious purpose of the application, such as the fact that we receive photos when you use our photo uploader. If we believe it is not obvious that we are collecting or using such information, we will make a disclosure to you the first time you provide the information to us so that you can decide whether you want to use that feature.

Memorializing Accounts. If we are notified that a user is deceased, we may memorialize the user's account. In such cases we restrict profile access to confirmed friends, and allow friends and family to write on the user's Wall in remembrance. We may close an account if we receive a formal request from the user's next of kin or other proper legal request to do so.

5. How We Share Information

Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that you can use to restrict other users from accessing your information. We share your information with third parties when we believe the sharing is permitted by you, reasonably necessary to offer our services, or when legally required to do so. For example:

When you make a payment. When you enter into transactions with others or make payments on Facebook, we will only share transaction information with those third parties necessary to complete the transaction and will require those third parties to agree to respect the privacy of your information.

When you invite a friend to join. When you ask us to invite a friend to join Facebook, we will send your friend a message on your behalf using your name. We may also send up to two reminders to them in your name. If your friend does not want us to keep their information, we will remove it at their request on this help page.

When you choose to share your information with marketers. You may choose to share information with marketers or electronic commerce providers that are not associated with Facebook through on-site offers. This is entirely at your discretion and we will not provide your information to these marketers without your consent.

To help your friends find you. By default, we make certain information you have posted to your profile available in search results on Facebook to help your friends find you. However, you can control who has access to this information, as well as who can find you in searches, through your privacy settings. We also partner with email and instant messaging providers to help their users identify which of their contacts are Facebook users, so that we can promote Facebook to those users.

To give search engines access to publicly available information. We generally limit search engines' access to our site. We may allow them to access information set to the "everyone" setting and your public search listing (but you can turn off your public search listing in your privacy settings).

To help improve or promote our service. Sometimes we share aggregated information with third parties to help improve or promote our service. But we only do so in such a way that no individual user can be identified or linked to any specific action or information.

To provide you with services. We may provide information to service providers that help us bring you the services we offer. For example, we may use third parties to help host our website, send out email updates about Facebook, remove repetitive information from our user lists, process payments, or provide search results or links (including sponsored links). These service providers may have access to your personal information for use for a limited time, but when this occurs we implement reasonable contractual and technical protections to limit their use of that information to helping us provide the service.

To advertise our services. We may ask advertisers outside of Facebook to display ads promoting our services. We may ask them to deliver those ads based on the presence of a cookie, but in doing so will not share any other information with the advertiser.

To offer joint services. We may provide services jointly with other companies, such as the classifieds service in the Facebook Marketplace. If you use these services, we may share your information to facilitate that service. However, we will identify the partner and present the joint service provider's privacy policy to you before you use that service.

To respond to legal requests and prevent harm. We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law. This may include respecting requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law under the local laws in that jurisdiction, apply to users from that jurisdiction, and are consistent with generally accepted international standards. We may also share information when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to prevent imminent bodily harm, or to protect ourselves and you from people violating our Statement of Rights and Responsibilities. This may include sharing information with other companies, lawyers, courts or other government entities.

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Facebook Beacon. [We have announced a settlement of a lawsuit related to the Beacon product: the Beacon product will be discontinued and this language removed from the privacy policy upon approval of a settlement by the court.] Facebook Beacon is a means of sharing actions you have taken on third party sites, such as when you make a purchase or post a review, with your friends on Facebook. In order to provide you as a Facebook user with clear disclosure of the activity information being collected on third party sites and potentially shared with your friends on Facebook, we collect certain information from that site and present it to you after you have completed an action on that site. You have the choice to have us discard that information, or to share it with your friends. To learn more about the operation of the service, we encourage you to read the tutorial here. To opt out of the service altogether, click here. Like many other websites that interact with third party sites, we may receive some information even if you are logged out from Facebook, or that pertains to non-Facebook users, from those sites in conjunction with the technical operation of the system. In cases where we receive information from Beacon sites on users that are not logged in, or on non-Facebook users, we do not attempt to associate it with individual Facebook accounts and will discard it.

Transfer in the Event of Sale or Change of Control. If the ownership of all or substantially all of our business changes, we may transfer your information to the new owner so that the service can continue to operate. In such a case, your information would remain subject to the promises made in any pre-existing Privacy Policy.

6. How You Can View, Change, or Remove Information

Viewing and editing your profile. You may change or delete your profile information at any time by going to your profile page and clicking "Edit My Profile." Information will be updated immediately. While you cannot delete your date of birth, you can use the setting on the info tab of your profile information page to hide all or part of it from other users.

Delete uploaded contacts. If you use our contact importer to upload addresses, you can later delete the list on this help page.

Deactivating or deleting your account. If you want to stop using your account you may deactivate it or delete it. When you deactivate an account, no user will be able to see it, but it will not be deleted. We save your profile information (friends, photos, interests, etc.) in case you later decide to reactivate your account. Many users deactivate their accounts for temporary reasons and in doing so are asking us to maintain their information until they return to Facebook. You will still have the ability to reactivate your account and restore your profile in its entirety. When you delete an account, it is permanently deleted. You should only delete your account if you are certain you never want to reactivate it. You may deactivate your account on your account settings page or delete your account on this help page.

Limitations on removal. Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users. However, your name will no longer be associated with that information on Facebook. (For example, if you post something to another user's profile, and then you delete your account, that post may remain, but be attributed to an "Anonymous Facebook User.") Additionally, we may retain certain information to prevent identity theft and other misconduct even if deletion has been requested.

Backup copies. Removed and deleted information may persist in backup copies for up to 90 days, but will not be available to others.

Non-user contact information. If a user provides your email address to us, and you are not a Facebook user but you want us to delete your address, you can do so on this help page. However, that request will only apply to addresses we have at the time of the request and not to any addresses that users provide to us later.

7. How We Protect Information

We do our best to keep your information secure, but we need your help. For more detailed information about staying safe on Facebook, visit the Facebook Security Page.

Steps we take to keep your information secure. We keep your account information on a secured server behind a firewall. When you enter sensitive information (such as credit card numbers and passwords), we encrypt that information using secure socket layer technology (SSL). We also use automated and social measures to enhance security, such as analyzing account behavior for fraudulent or otherwise anomalous behavior, may limit use of site features in response to possible signs of abuse, may remove inappropriate content or links to illegal content, and may suspend or disable accounts for violations of our Statement of Rights and Responsibilities.

Risks inherent in sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that no security measures are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available. We are not responsible for third party circumvention of any privacy settings or security measures on Facebook. You can reduce these risks by using common sense security practices such as choosing a strong password, using different passwords for different services, and using up to date antivirus software.

Report Violations. You should report any security violations to us on this help page.

8. Other Terms

Changes. We may change this Privacy Policy pursuant to the procedures outlined in the Facebook Statement of Rights and Responsibilities. Unless stated otherwise, our current privacy policy applies to all information that we have about you and your account. If we make changes to this Privacy Policy we will notify you by publication here and on the Facebook Site Governance Page. You can make sure that you receive notice directly by becoming a fan of the Facebook Site Governance Page.

Consent to Collection and Processing in the United States. By using Facebook, you consent to having your personal data transferred to and processed in the United States.

Defined Terms. "Us," "we," "our," "Platform" and "Facebook" mean the same as they do in the Statement of Rights and Responsibilities. "Information" and "content" are used more generally and interchangeably here than in the Statement of Rights and Responsibilities unless otherwise limited by the context.

Helpful links

- Statement of Rights and Responsibilities
- Facebook Site Governance Page
- application settings
- privacy settings
- account notifications page
- help page for complaints about our privacy policies or practices
- help page to report use by a child under age 13
- help page with info to help parents talk to children about safe Internet use
- deleting an account
- reporting a deceased user
- reporting an impostor
- reporting abusive content
- reporting a compromised account
- requesting deletion of data for non-user
- removing Friend Finder contacts
- reporting and blocking third-party applications
- general explanation of third-party applications and how they access data

EXHIBIT 3

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 4

I. INTRODUCTION

I have been asked to render an opinion as to whether certain information that was not disclosed to the examiner during prosecution of U.S. Patent No. 7,139,761 would have been material to the patentability of the claims. In particular, I have been asked to evaluate whether the following information would have been considered material to the patentability of claim 1¹ of U.S. Patent No. 7,139,761 had it been disclosed to the United States Patent and Trademark Office:

- Published thesis by Matthew Bianco entitled “An Interface for the Visualization and Manipulation of Asynchronous Collaborative Work within the DISCIPLE System,” dated January, 2000 (“Bianco thesis”);²
- “Lifestreams” project conducted prior to 2000 at Yale University by a team of researchers headed by Professor David Gelernter, and the commercialization of that project as the “Lifestream Office” product;
- Collaborative Virtual Workspace computing environment developed by The MITRE Corporation prior to 2000 (the “CVW system”); and
- iManage Document Management System (“DMS”), as it existed prior to December 2002.

I believe these facts and references are highly material to the patentability of claim 1 for the reasons provided below. My opinion is based on my own personal knowledge and experience. I am being paid at a billing rate of \$250 an hour for the time it takes me to perform this analysis and to testify.

II. QUALIFICATIONS

I earned a Bachelor of Science degree in Materials Science & Engineering, specializing in Electrical Engineering Materials, from Northwestern University. I also earned a Master of Science degree in Applied Biomedical Engineering from Johns Hopkins University and am currently a Juris Doctor candidate at The George Washington University Law School, from which I will graduate in May 2010.

¹ Because independent claims 9, 17, 21, 22 and 23 are very similar to claim 1 and address the same subject matter, my analysis of claim 1 applies equally to these other independent claims.

² Attached as Exhibit D.

I worked as a patent examiner at the U.S. Patent and Trademark Office (“USPTO”) from August of 2002 until May of 2009, and as a Primary Patent Examiner from October of 2008 until May of 2009. As a Primary Patent Examiner, I was granted authority to examine patent applications and to independently grant or deny patent rights in any art. My authorization also extended to the examination performed by junior examiners reporting to me. During my time at the USPTO, I examined over 500 patent applications and instructed examiners in the USPTO Training Academy on legal topics and USPTO procedures. I achieved 110% of my examination goals each year and earned five consecutive “outstanding” year-end performance ratings. After leaving the Patent Office, I was allowed to waive sitting for the patent agent examination. I have been a registered Patent Agent since August, 2009. Recently I authored an article entitled “Patent Law Through Patent Administration: The First Patent Superintendent’s Creation of Reissue Practice and Law,” which appeared in the Federal Circuit Bar Journal in June of 2009.³

III. PROCEDURE

In connection with this report, I analyzed the following:

- U.S. Patent No 7,139,761;
- Application No. 10/732,744 and its prosecution history;
- Provisional Application No. 60/432,255;
- All claim construction briefing and the Markman Order issued in this litigation;
- All of the prior art considered by the U.S. Patent and Trademark Office during the prosecution of Application No. 10/732,744;⁴
- Bianco thesis, which includes a description of the Lifestreams project and Lifestreams Office;

³ A copy of my curriculum vitae is attached as Exhibit A.

⁴ In the January 19, 2005 Information Disclosure Statement (“IDS”) from the prosecution history of Application No. 10/732,744, the applicant has listed as a piece of Non-Patent Literature an item called “International Written Opinion, PCT/US03/39421, mailed November 15, 2004.” I have attempted to locate this document, but was able to locate only the WIPO application (WO/2004/053658) documentation associated with Patent Cooperation Treaty Application No. PCT/US03/39421. Included in that application documentation is one “International Preliminary Examination Report” that has a different date from the International Written Opinion cited by Leader Technologies in their IDS. Facebook is seeking production of this document from Leader Technologies, and I reserve the right to supplement my report if and when that document is produced.

- Documents describing how the CVW reference worked in 1999;⁵
- *iManage DeskSite 6.0 User Reference Manual*, dated July 26, 2001;⁶
- Request for Inter Partes Reexamination submitted by Facebook, Inc. to the USPTO on November 13, 2009,⁷ which contains a claim chart comparing claims of U.S. Patent No. 7,139,761 to the *iManage DeskSite 6.0 User Reference Manual*; and
- Expert Report of Saul Greenberg, Ph.D in the instant litigation.⁸

I am very familiar with Patent Office guidelines and standards relating to an applicant's disclosure requirements and materiality, as they existed during the prosecution of U.S. Patent No. 7,139,761, as I was an examiner during the entire period of prosecution.

IV. BACKGROUND OF THE PATENT OFFICE PROCEDURE, EXAMINATION AND THE DUTY OF CANDOR

A. Patent Policy

A patent is the grant of a property right issued by the USPTO. It is a right to exclude others from making, using, selling or importing the invention without the inventor's consent. The government grants patent rights to foster innovation by allowing those with new and useful ideas to exclude others from practicing the invention for the term of the patent, typically twenty (20) years from its filing date. There are currently over seven million United States patents issued to inventors covering everything from the latest military and satellite technologies to processes for making complex pharmaceutical compounds.

Private enterprise drives our economy.. While our society abhors private monopolies, our legal system teaches that patents issue, not for private benefit, but for public good. The law grants the limited patent monopoly as an incentive to encourage innovation and the disclosure of new ideas. Indeed, without the incentive, innovators would hide their discoveries choosing to exploit them as trade secrets. However, in exchange for patent rights, the law requires the inventor to provide a full disclosure of the manner and making of the invention. Upon the

⁵ Attached as Exhibit E.

⁶ Attached as Exhibit F.

⁷ Attached as Exhibit G.

⁸ Confidential information was redacted from the copy of the report that I reviewed.

expiration of the term, the public is free to use and build on the invention for the benefit of the public.

The law also requires the applicant to sign a legal oath agreeing to abide by his “duty of candor and good faith” in his communications with and representations to the Patent Office. The applicant’s candor and good faith is particularly important during the prosecution of a patent because of the *ex parte* nature of the process: there is no zealous advocate for the position against patentability, as there is in litigation, and therefore the patent examiner necessarily must trust that the applicant is being candid and truthful. Compliance with this duty is essential to the viability of the patent system and, accordingly, failure to do so carries very serious consequences, as explained in detail below.

B. Patent Examination

To obtain a patent, an inventor first must present to the Patent Office the full description of his invention in a patent application, as well as a signed oath to abide by the duty of candor. A patent examiner employed by the Patent Office then examines the application and can either issue a patent, reject the application, or require additional information before making a decision.

A patent examiner is a quasi-judicial civil servant employed by the Patent Office tasked with reviewing patent applications. An examiner must be a United States citizen, hold at least a Bachelor’s degree in the physical sciences, life sciences, engineering disciplines, or computer science, and have a demonstrated level of expertise in patent law. Advanced academic degrees and relevant work experience in the appropriate technical area are common.

The key function of an examiner is to research relevant technologies and compare inventions and disclosures already in the public domain (known as “prior art”) with the alleged invention claimed in the patent application. The examiner also reviews the application for compliance with legal requirements, determines the scope of the protection claimed and communicates findings to the applicant and its agents as to the possible patentability of the invention. The exchange between inventor and the Patent Office examiner during this process is referred to as “patent prosecution.”

C. Standards For Granting Patents and Prior Art

An examiner will issue a patent only if the applicant can convince him that the claimed invention is (1) novel, (2) useful, and (3) non-obvious to someone generally skilled in the art. Critically, the novelty requirement precludes the grant of a patent on any invention that has been publicly disclosed or used either, a) more than one year prior to the filing of the patent application, or b) at any time before the date of invention by the inventor. Public disclosure may take the form of disclosure, use, sale or offer of sale of the disclosed invention before the one-year grace period preceding the application date, or manifest in the form of prior art (*e.g.*, patents, books, articles, programs, products, *etc.* that both pre-date the invention and disclose the invention). The existence of a single prior art reference or a combination of prior art references that renders the invention either not novel or obvious to someone of ordinary skill in the art prohibits the invention from being patentable.

D. The Duty of Candor

During patent prosecution, the examiner, the Patent Office, and the entire patent system rely on the inventor to provide a complete, honest and thorough picture of the state of the art and disclose everything the inventor and its agents are aware of that might bear on the patentability of the invention. The inventor must explain how the invention meets the patentability requirements, and must disclose all known potential prior art (including prior public disclosures or offers for sale) that might disclose the claimed invention or contain elements of the claims.

To foster complete communication between inventor and examiner, and to ease the burden on patent examiners, especially in areas that involve “young art,” federal law imposes the “duty of candor and good faith” on all who are associated with the filing and prosecution of the application. The duty is codified in the Code of Federal Regulations, 37 C.F.R. §1.56 and is known as “Rule 56.” Rule 56 states, in part:

- (a) A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the [Patent] Office is aware of and evaluates the teachings of all information material to patentability. Each

individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the [Patent] Office, which includes a duty to disclose to the [Patent] Office all information known to that individual to be material to patentability as defined in this section. The duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned. . . .

Rule 56 imposes this duty on: (1) each inventor named in the application; (2) each attorney or agent who prepares or prosecutes the application; and (3) every other person who is substantively involved in the preparation or prosecution of the application and who is associated with the inventor, with the assignee or with anyone to whom there is an obligation to assign the application. 37 C.F.R. §1.56(c). Under the rule, each of these individuals must disclose information known to them that is “material to patentability.”

Information is “material” when:

it is not cumulative to information already of record or being made of record in the application, and

- (1) It establishes, by itself or in combination with other information, a *prima facie* case of unpatentability of a claim; or
- (2) It refutes, or is inconsistent with, a position the applicant takes in:
 - (i) Opposing an argument of unpatentability relied on by the Office, or
 - (ii) Asserting an argument of patentability.

A *prima facie* case of unpatentability is established when the information compels a conclusion that a claim is unpatentable under the preponderance of evidence, burden-of-proof standard, giving each term in the claim its broadest reasonable construction consistent with the specification, and before any consideration is given to evidence which may be submitted in an attempt to establish a contrary conclusion of patentability.

37 C.F.R. § 1.56(b). Generally, information is material to the issue of patentability if it might have affected a decision of the examiner. Breach of this duty results in severe consequences, including unenforceability of any patent that might issue from the application. Rule 56 states: “no patent will be granted on an application in connection with which fraud on the Office was

practiced or attempted or the duty of disclosure was violated through bad faith or intentional misconduct.” 37 C.F.R. §1.56(a).

An application for a patent will not be considered complete and will not be fully examined by the Patent Office until the inventor signs an oath or declaration that includes a statement that the person making the oath or declaration acknowledges the duty to disclose all information known to the person to be material to patentability as defined in 37 C.F.R. § 1.56. During the prosecution of the application that resulted in U.S. Patent No. 7,139,761 the applicants each signed an oath acknowledging the duty and his commitment to abide by it. *See* Exhibit B. The Patent Office also provides a form that may be used when citing material prior art. During the prosecution of the application that resulted in U.S. Patent No. 7,139,761 the applicant submitted such a form (albeit incomplete). *See* Exhibit C.

E. Examiners’ Heightened Reliance on Applicants’ Candor when Assessing Software and Internet Art

During the period in which U.S. Patent No. 7,139,761 was being examined, the duty imposed by Rule 56 was critical to patent examiners scrutinizing software and internet patent applications. Examiners rely for their knowledge of the state of any art on databases supplied by the Patent Office, which consist primarily of previously issued patents. However, by 2002, a limited number of software and internet patents had been granted. Hence, at that time, patent examiners relied heavily upon inventors and applicants to disclose what they understood to be the state of the art.

V. MATERIALITY

A. Prior Public Demonstrations and Offers for Sale

Public demonstrations and offers for sale of the claimed invention in the United States more than one year prior to the application date of a patent can act as a complete bar to the patentability of any invention under 35 U.S.C. § 102(b). As such, these activities would certainly have been material during the timeframe in which Application No. 10/732,744 was being prosecuted. Application No. 10/732,744 was filed on December 11, 2003, making any public

demonstrations or offers for sale occurring before December 11, 2002 (the “priority date”) material to examination of the application.

The priority date of a patent application can be extended backward by the filing of a provisional patent application that discloses the same invention within the one year period preceding filing of the patent application. If the patent owner can successfully show that the provisional patent application discloses the same invention as the granted patent, then the patent may claim a priority date equal to one year preceding the filing of the provisional patent application. In this case, I understand that Leader Technologies, Inc. claims that its patent can claim a priority date of December 11, 2001 based upon Provisional Application No. 60/432,255, which was filed by on December 11, 2002.

I have reviewed both Application No. 10/732,744 and Provisional Application No. 60/432,255, and I believe that the two are sufficiently different that there is a substantial question as to whether U.S. Patent No. 7,139,761 can properly claim a priority date of December 11, 2001. As such, assuming that any prior public demonstrations or offers for sale had been of a product that practices the claims of the patent as issued, it is my opinion that such demonstrations and offers for sale taking place before December 11, 2002 would have been material to the patentability U.S. Patent No. 7,139,761, despite the existence of Provisional Application No. 60/432,255.

B. Prior Art

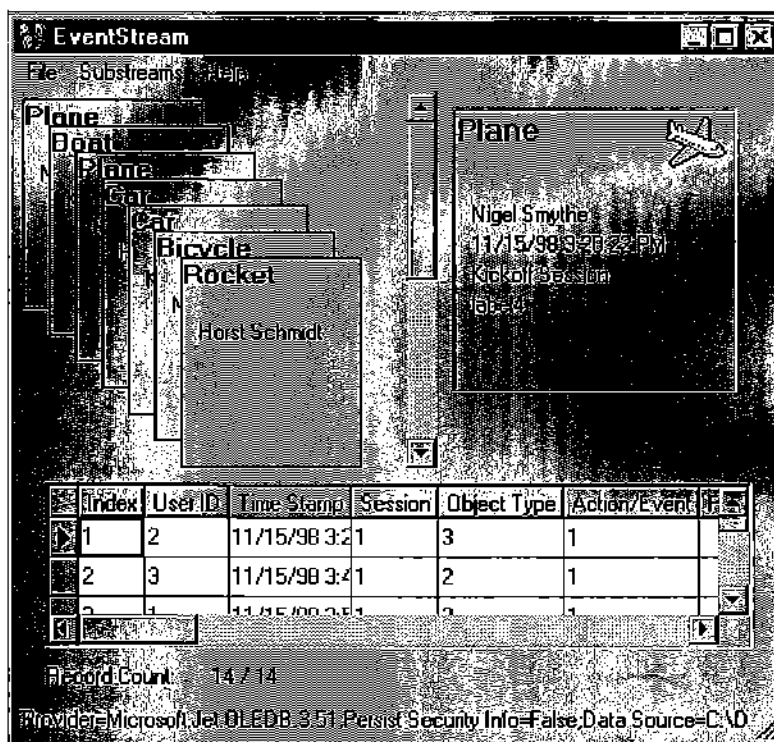
Claim 1 of U.S. Patent No. 7,139,761 is drawn to a “network-based system that facilitates management of data. . . .” The system captures and stores context information associated with user-defined data, tracks interaction of the user with data in different contexts, and captures and stores information about those interactions. In my opinion, any reference that discloses capturing and storing context information about a) data and b) user interaction with the data, would have been material to the patentability of claim 1 of U.S. Patent No. 7,139,761. The other independent claims of U.S. Patent No. 7,139,761 – claims 9, 17, 21, 22 and 23 – are very similar to claim 1, and therefore, the analysis I have done regarding claim 1 applies to them as well.

None of the prior art references considered during the examination of the application that resulted in U.S. Patent No. 7,139,761 disclose the system taught by the patent.⁹ In contrast to what was considered by the examiner, the Bianco reference, the Lifestreams project and Lifestreams Office and documents describing them, the CVW system and documents describing it, and iManage DMS (as it existed prior to December 2002) and documents describing it each disclose these features and are highly material to the patentability of the independent claims of U.S. Patent No. 7,139,761.

Bianco Thesis

The Bianco thesis describes a computing environment called “DISCIPLE,” which was “a real-time groupware environment that enables multiple participants in different locations to collaboratively access, manipulate, analyze, and evaluate multimedia data.” p. 3. The key to collaboration in the DISCIPLE system was the “EventStreams” interface, a series of visualization tools used to display the context of documents to the user. “The key to EventStreams’ ability to aid in the collaboration process is the fact that it can convey the context in which events occurred.” p. 38. In addition to retaining and displaying context information, DISCIPLE tracked all user interaction, which it termed “events,” with documents in the system. Every time an event occurred, the DISCIPLE system automatically communicated the occurrence to all other users of the system and recorded the event to a “history stream.” The history stream was an accumulated history of all events by all users in the system.

⁹ See *supra* note 4.

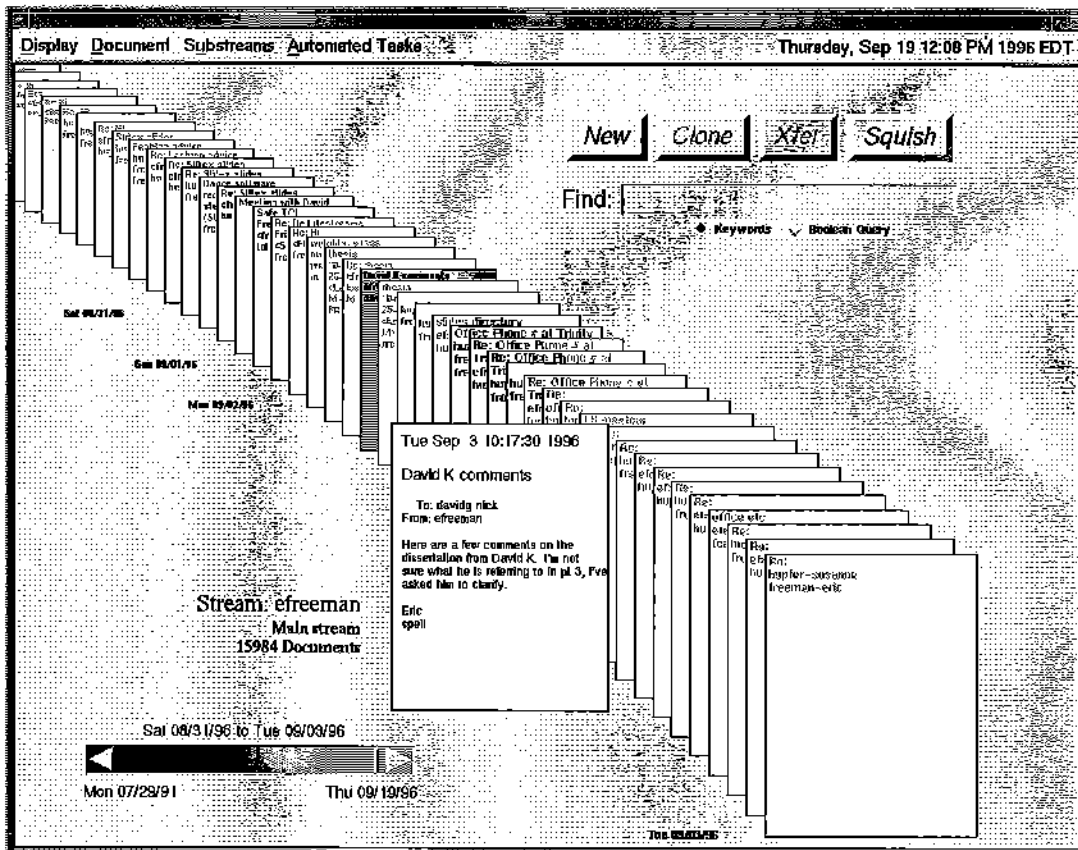


p. 22.

In my opinion, the Bianco thesis, and the DISCIPLÉ system described therein, disclose capturing and storing context information (“the context of documents,” history stream) about both data itself (documents) and interaction with the data (events). Because the thesis was published nearly four years before the filing date of Application No. 10/732,744, I would consider it material to the patentability of the U.S. Patent No. 7,139,761.

Lifestreams Project and Lifestreams Office

The Lifestreams project is described in the Bianco thesis as a source of inspiration for the DISCIPLÉ system. The project sought to create an alternative to traditional desktop operating systems which, instead of organizing documents in files and folders, organized documents by the order in which the user interacts with them. The “streams” of time-ordered documents could be divided into “substreams,” which were collections of time-ordered documents meeting a specified criteria. Whether in a “main stream” or “substream,” the Lifestreams interface allowed the user to see an accumulated history of all actions he has taken with documents in the system.



p. 9.

The Lifestreams project was commercialized by Professor Gelernter and his fellow researchers in a product called "Lifestream Office," a browser-based document management system. According to the Bianco thesis, this product differed from traditional document management software in that documents could be "indexed, searched and retrieved based on their attributes and contents, not by a filename and location in a hierarchical directory tree." p. 11. In addition, Lifestream Office featured the ability to "track[] updates and keep[] an historical record of activities" and "create views on the fly, which are updated dynamically whenever new activity takes place." p. 12.

In my opinion, the Lifestreams project and the Lifestream Office product disclose capturing and storing context information (substream criteria, date and time of interaction) about both data itself (documents) and interaction with the data (activities). Because the Bianco thesis,

in which the Lifestreams system and Lifestream Office are described, was published nearly four years before the filing date of Application No. 10/732,744, and because the Lifestreams project and Lifestream Office were developed prior to 2000, I would consider them material to the patentability of the U.S. Patent No. 7,139,761.

CVW System

The CVW system was a prototype collaborative computing environment that organized documents into virtual “rooms.” These rooms “provide[] a context for communication and document sharing. . . . Users can place documents of different types into a room, allowing anyone else in that room to read the document or view information about the document (such as creator, description, creation date, modification date, last modified by).” p. 1. A single document in the CVW system can exist in a number of different rooms. Among the information collected about each document was tracking data, i.e., information about who has edited the document and when.

In my opinion, the CVW system and documents describing it disclose capturing and storing context information (“information about the document,” tracking data) about both data itself (documents) and interaction with the data (e.g., editing a document). Because the CVW system was developed and documents about the system were published on the Internet prior to 2000, I would consider it material to the patentability of the U.S. Patent No. 7,139,761.

iManage DMS

iManage DMS, as it existed as of July 26, 2001, was a suite of tools for managing documents on an enterprise-wide basis. The iManage system organized documents – and allowed searching for and retrieval of documents – on the basis of certain attributes, collectively termed “profile information.” Profile information included such data as Author, Operator, Type, Class Client, Matter, and Last User. In addition to storing attributes about each document, the iManage system also provided a Document History feature that tracked and stored information about user interactions with the documents. This information included “User, Application, Activity, Date-Time, Duration, Pages Printed, Location and Comments.” Chapter 5, p. 141.

In my opinion, iManage DMS and documents describing it disclose capturing and storing context information (profile information, history) about both data itself (documents) and interaction with the data (e.g., accessing a document). Because iManage DMS was publicly available and sold in the United States prior to December 2002, I would consider it material to the patentability of the U.S. Patent No. 7,139,761.

VI. CONCLUSION

As stated above, it is my opinion that the demonstrations and offers for sale of the claimed invention more than one year prior to the filing date of Application No. 10/732,744 would certainly have been material to the patentability of U.S. Patent No. 7,139,761. In addition, it is my opinion that the Bianco thesis – and the DISCIPLE system, the Lifestreams project and Lifestreams Office product described therein – the CVW system, and iManage DMS are all highly material to the patentability of the independent claims of U.S. Patent No 7,139,761. It is also my opinion that none of the prior art references considered during the examination of the application that resulted in U.S. Patent No. 7,139,761 disclose the system taught by the patent.¹⁰ As such, without these documents, the examiner was left with an incomplete view of the scope of the prior art while comparing what was being claimed to what was already in the public domain.

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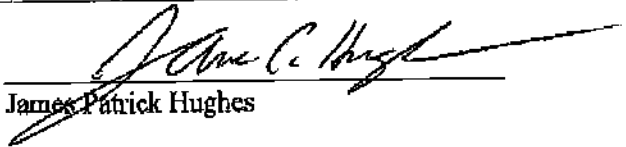
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¹⁰ See *supra* note 3.

Furthermore, as a patent examiner during the entire period during which Application No. 10/732,744 was being examined by the USPTO, I had authority to examine this application. If I had been assigned examination of Application No. 10/732,744, I would have considered these documents and systems highly material and I would have used these materials to reject at least all independent claims of the patent.

Date: April 8, 2010


James Patrick Hughes

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action. My business address is 3000 El Camino Real, Five Palo Alto Square, Palo Alto, CA 94306.

On April 8, 2010, I served the following document:

EXPERT REPORT OF JAMES PATRICK HUGHES

on the interested parties in this action follows:

<p><u>BY E-MAIL:</u></p> <p>Paul J. Andre, Esq. Lisa Kobialka, Esq. James Hannah, Esq. King & Spalding 333 Twin Dolphin Drive, Suite 400 Redwood Shores, CA 94065</p> <p>pandre@kslaw.com lkobialka@kslaw.com jhannah@kslaw.com</p>	<p><u>BY E-MAIL:</u></p> <p>Philip A. Rovner, Esq. Potter Anderson & Corroon LLP P.O. Box 951 Wilmington, DE 19899-0951</p> <p>provner@potteranderson.com</p>
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[XX] BY ELECTRONIC MAIL: I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the parties listed above.

I declare that I am employed in the office of a member of the bar of this Court at whose directions the service was made. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 8, 2010 at Palo Alto, California.

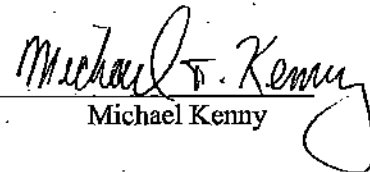

Michael Kenny

EXHIBIT 5

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 6

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 7

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 8

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 9

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

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

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on June 3, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

BY CM-ECF AND E-MAIL

Thomas P. Preston, Esq.
Steven L. Caponi, Esq.
Blank Rome LLP
1201 Market Street
Wilmington, DE 19801
Preston-T@blankrome.com
caponi@blankrome.com

I hereby certify that on June 3, 2010 I have sent by E-mail the foregoing document to the following non-registered participants:

Heidi L. Keefe, Esq.
Mark R. Weinstein, Esq.
Jeffrey Norberg, Esq.
Melissa H. Keyes, Esq.
Cooley LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
hkeefe@cooley.com
mweinstein@cooley.com
jnorberg@cooley.com
mkeyes@cooley.com

/s/ Philip A. Rovner _____
Philip A. Rovner (#3215)
Potter Anderson & Corroon LLP
Hercules Plaza
P. O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com