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.	)	
	)	
FACEBOOK, INC., a Delaware corporation,	)	**PUBLIC VERSION**
	)	
	)	
Defendant-Counterclaimant	)	
	)	

LEADER'S COUNTER-STATEMENT OF DISPUTED MATERIAL FACTS TO FACEBOOK'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF <u>INVALIDITY [MOTION NO. 1 OF 6]</u>

OF COUNSEL:

Paul J. André
Lisa Kobialka
KING & SPALDING LLP
333 Twin Dolphin Drive
Suite 400
Redwood Shores, CA 94065
(650) 590-0700

Dated: June 4, 2010
Public Version: June 11, 2010

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
Leader Technologies, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ii

I.   INTRODUCTION

This Counterstatement is made pursuant to the Court's standing Memorandum Order that allows a party opposing a Rule 56 summary judgment motion to file a Counterstatement certifying that genuine issues of material fact exist and setting out the material facts in dispute. This Counterstatement is filed in lieu of an answering brief in response to defendant Facebook, Inc.'s ("Facebook") motion for summary judgment of invalidity of claim 1, 4, 7, 21, 23, 25, 31, and 32 (D.I. 383) ("Motion") and supporting brief (D.I. 384) ("Brief"). Accordingly, Leader Technologies, Inc. ("Leader") certifies that there are genuine issues of material fact in dispute that preclude granting Facebook's motion under the standards set forth in Fed. R. Civ. P. 56. Leader reserves the right to later dispute any and all material facts identified by Facebook that are not specifically addressed herein.

In its Statement certifying that no genuine issues of material facts exist with regard to the facts argued in support of its motion, Facebook did not enumerate the facts it alleges to be undisputed. Accordingly, in this Counterstatement, Leader will identify the disputed facts that Facebook relies upon in its memorandum in support of this Motion. Because Facebook's Motion is based on these disputed issues of material fact, Facebook's Motion should be denied.

II.   COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS

1.   Facebook states that "[t]his motion presents a pure question of law and application of the Federal Circuit's decision in *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005)." D.I. 384 at 1. This fact is DISPUTED. Facebook's motion is not a pure question of law because it depends on genuine issues of material fact that are in dispute. Facebook's statement relies on a rehash of the opinion provided by its *non-infringement expert*, Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. Specifically, and using claim 1

as an example, Dr. Vigna opined that:
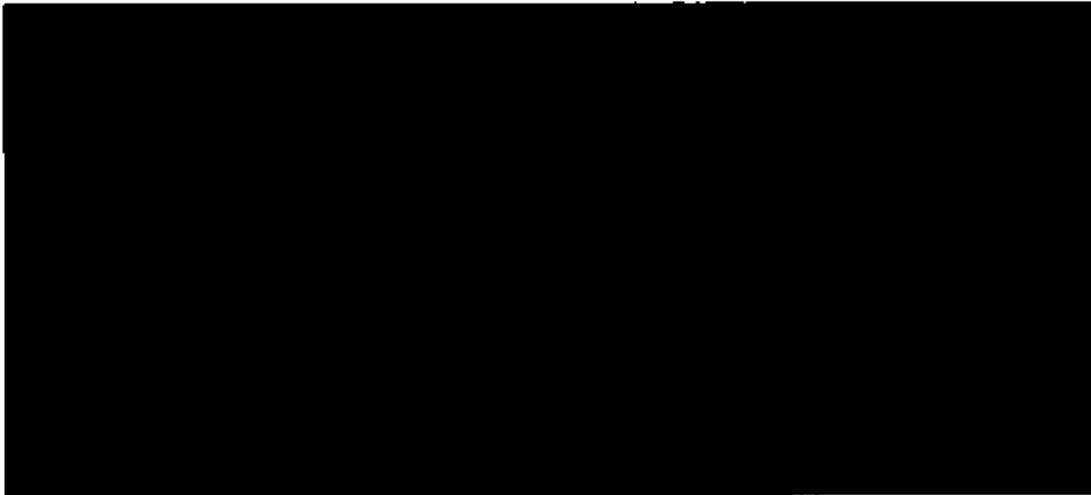
Vigna Report, ¶ 90.

Vigna Report, ¶ 91.

Vigna Report, ¶ 92.

[BLACK REDACTED BLOCK]
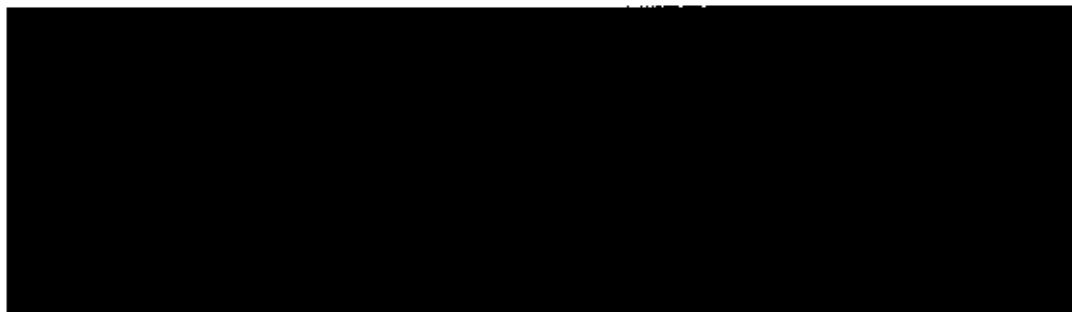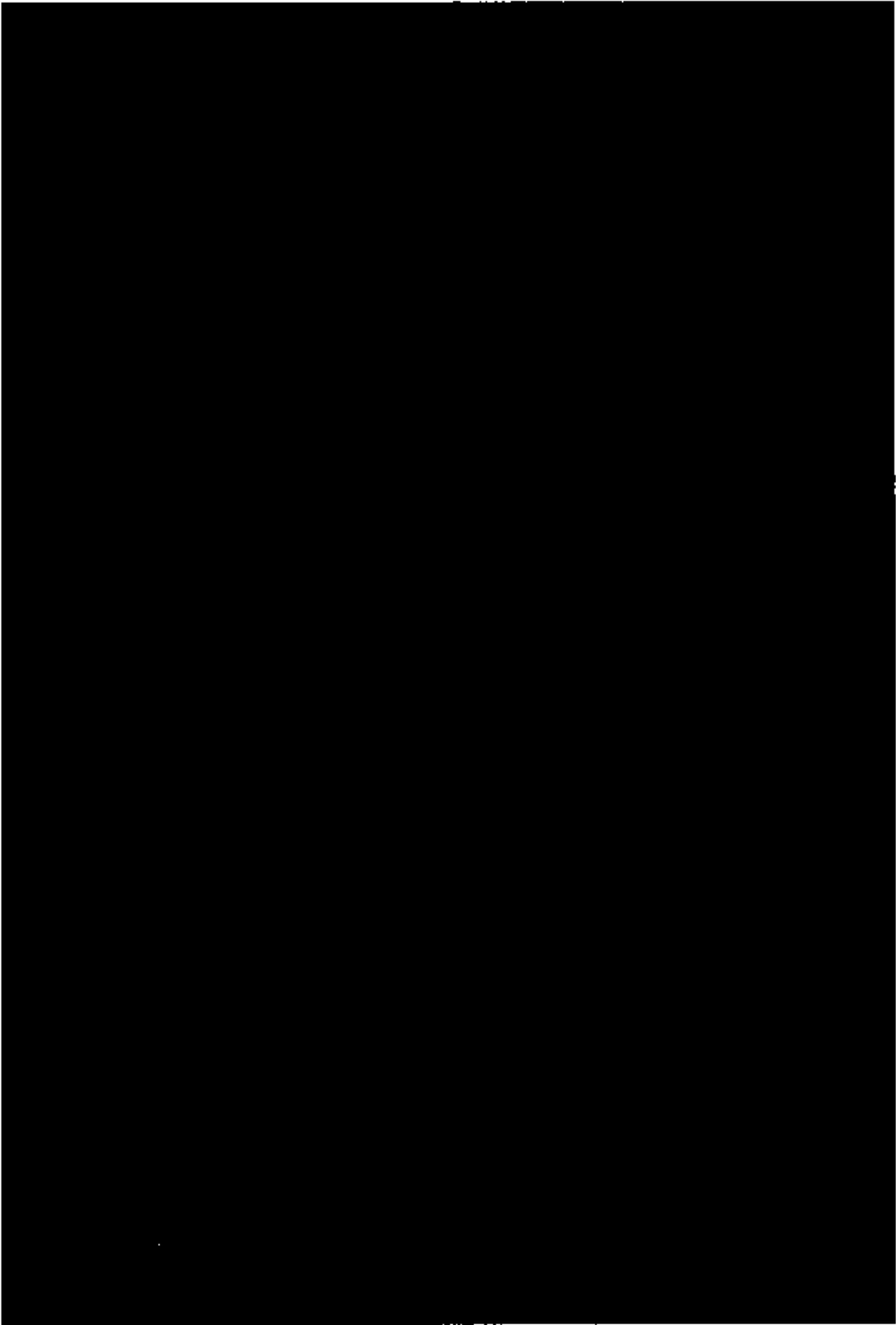
Vigna Report, ¶ 93.

Dr. Kearns attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna's opinion, that:
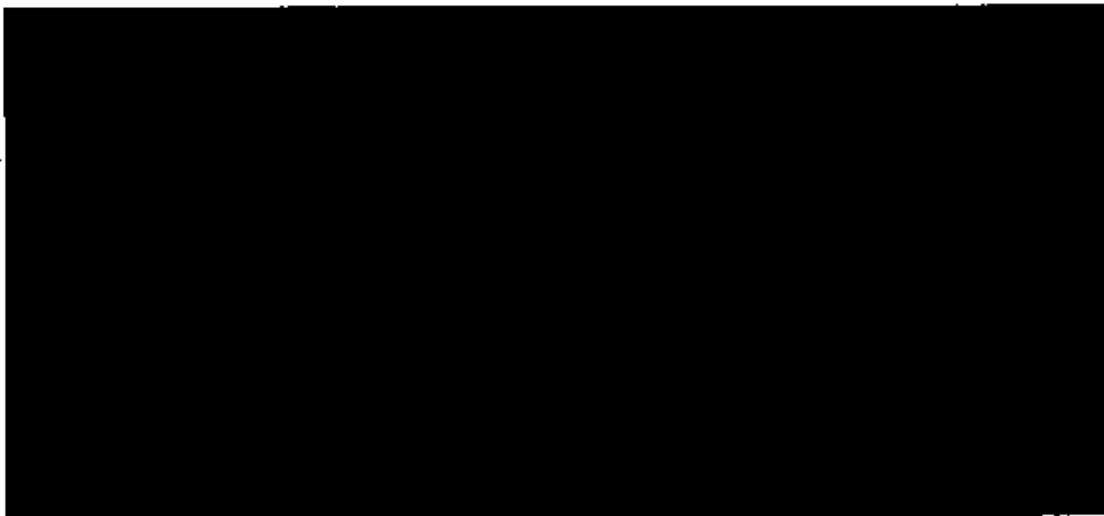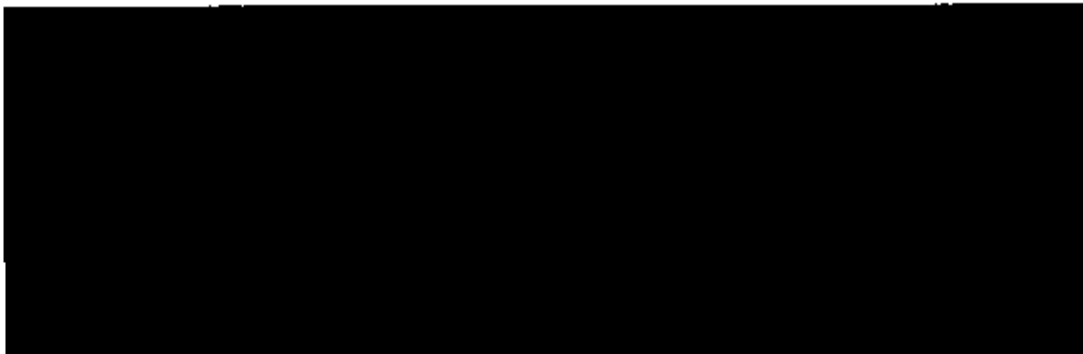
[BLACK REDACTED BLOCK]

Kearns Report, ¶ 67.

[BLACK REDACTED BLOCK]

Kearns Report, ¶ 69.

As shown from these excerpts from Leader's infringement expert, and Facebook's non-infringement expert, this is a hotly disputed issue and Facebook's motion is nothing more than a rehashing of its infringement position and is not a pure question of law.

2. Facebook states that "[c]laims 1, 21 and 23 of the '761 patent are impermissible

4

'hybrid' claims that both an apparatus and a method of using it, rendering them invalid under.

IPXL Holdings and 35 U.S.C. § 112 ¶ 2." D.I. 384 at 1. This fact is DISPUTED. The holding

of the court in *IPXL Holdings* was limited to declaring claims which indisputably included "both

a system and the method of using that system" as indefinite. *IPXl Holdings*, 430 F.3d at 1384.

The claim in question in *IPXL Holdings* was a clear example of claiming a system and a method

of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted
> transaction information comprises both a transaction type and transaction
> parameters associated with that transaction type, and the user uses the input
> means to either change the predicted transaction information or accept the
> displayed transaction type and transaction parameters.

Id., 430 F.3d at 1384 (citing '055 Patent, Col. 22, ll. 8-13)(emphasis added).

The claims of the '761 Patent do not present such as case. Claims 1, 21, and 23 do not

include a method step with the claim language, rather they describe functional limitations related

to an interactive system.

Claim 1 claim in part:

> a computer-implemented tracking component of the network-based system for
> tracking a change of the user from the first context to a second context of the
> network-based system and dynamically updating the stored metadata based on the
> change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring

the user to use the system, but includes a functional claim limitation. The user is included in

Claim 1 because the claim is directed to an interactive system which is designed to interact

dynamically in response to the user. To this end, the claim includes references to the user and

how the system is configured to react based on specific user actions. For example, the claim

includes a tracking component which performs a function of tracking the user as the user moves

5

... and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. Id. Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context ("for tracking a change of the user from the first context to a second context of the network-based system ...wherein the user accesses the data from the second context."). Id. The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999); *see also Microprocessor Enhancement Corp. v. Texas-Instruments Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008) ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As demonstrated, claim 1 includes a functional limitation, and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert. Dr. Vigna states in his report that:

Vigna Report, ¶ 90.

6
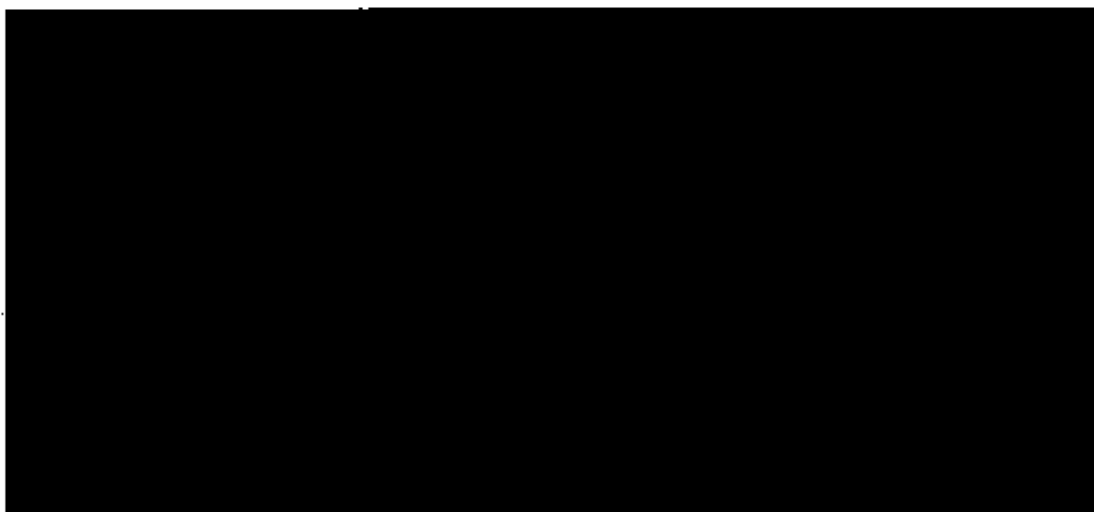
Vigna Report, ¶ 91.

Vigna Report, ¶ 92.

Vigna Report, ¶ 93.

Additionally, Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." '761 Patent, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions configured to perform an action in response to certain user interactions. This does not require a user to perform an action as a claim step; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. Dr. Vigna states that:
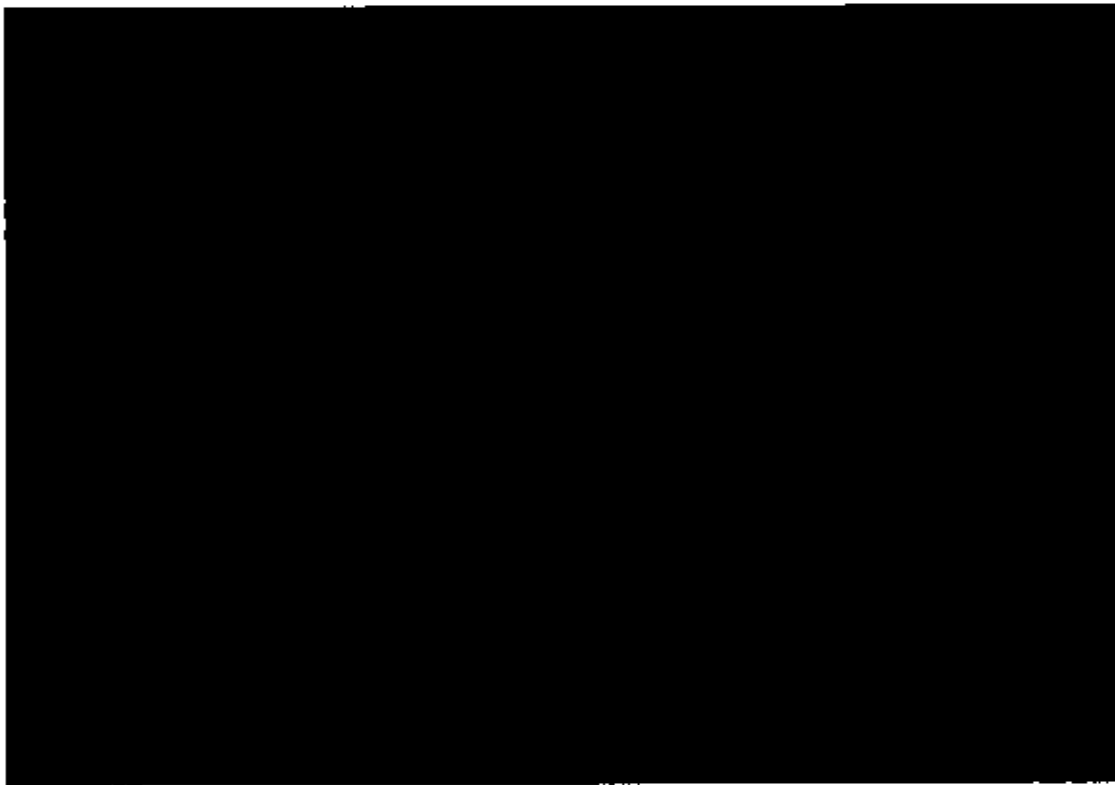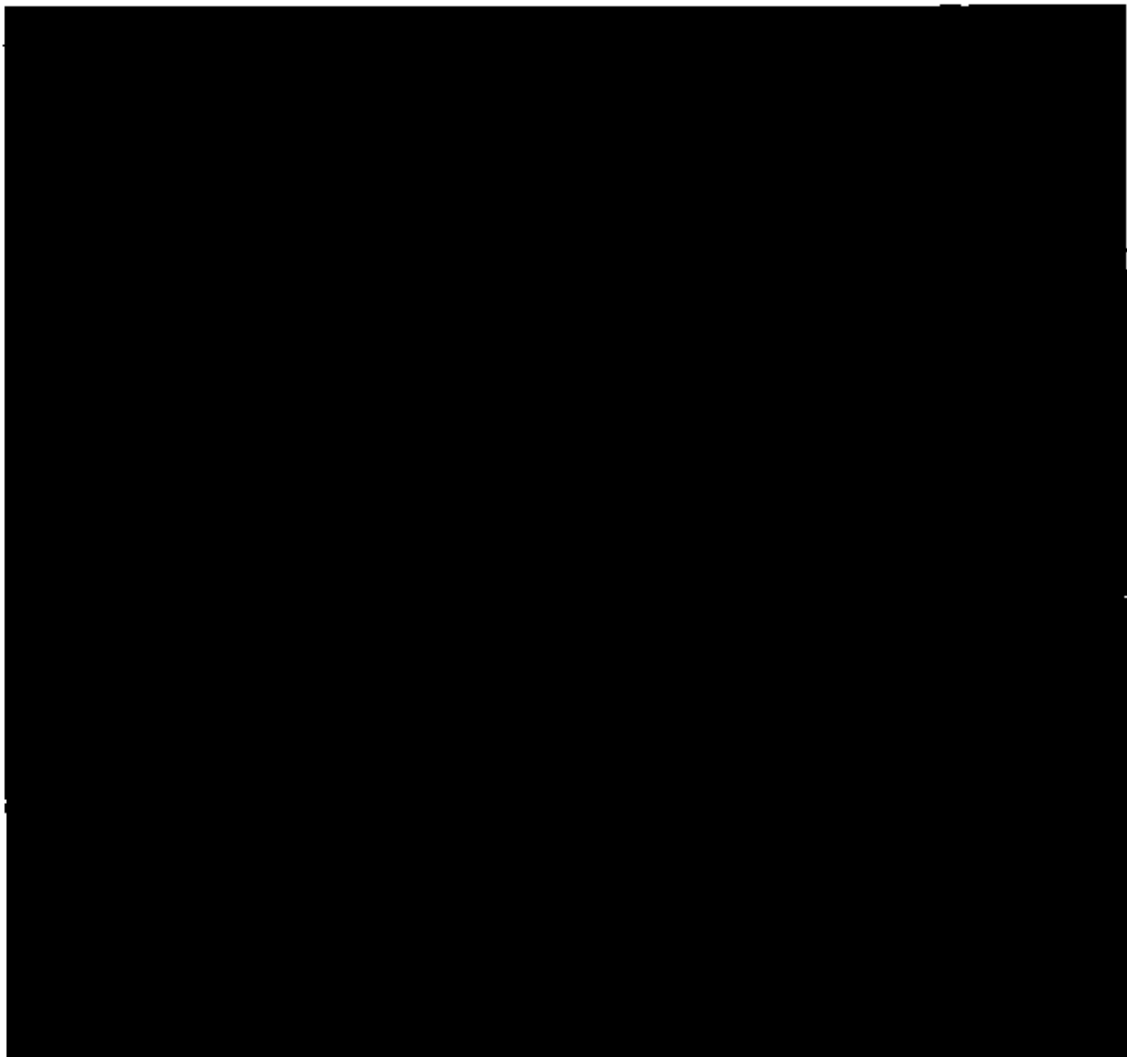
Vigna Report, ¶ 262.

Vigna Report, ¶ 263.

9

Vigna Report, ¶ 264

10

Claim 23 also includes acceptable functional language which is similar to that found in claim 1. Claim 23 claims in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end, the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. Dr. Vigna states that:

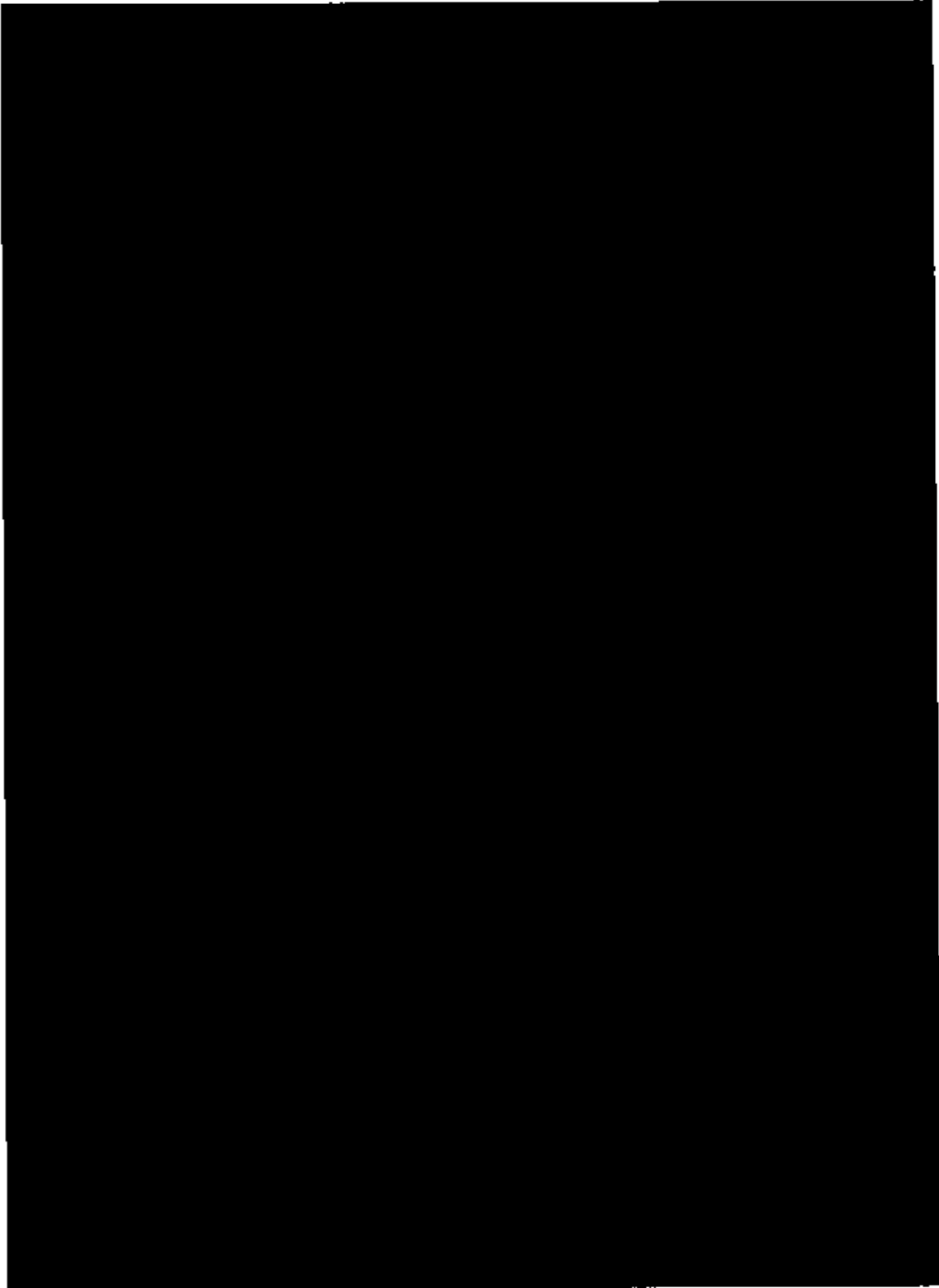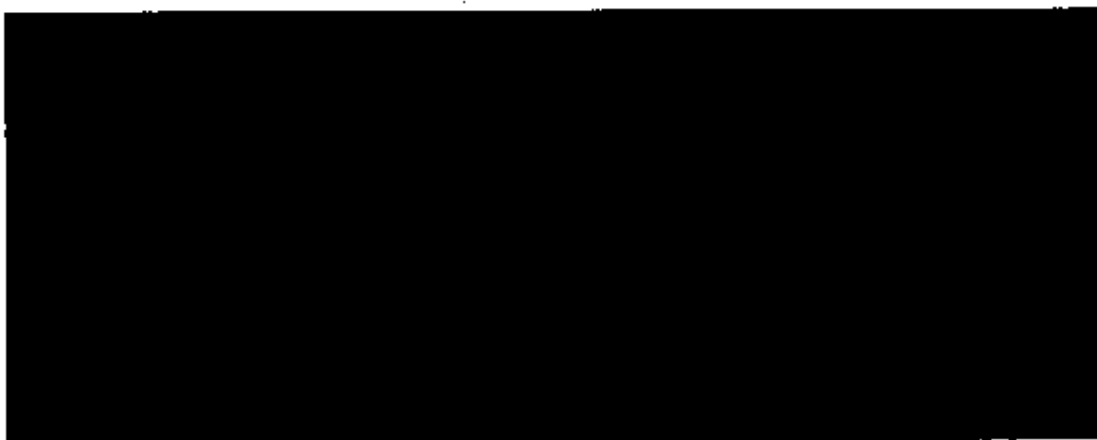Vigna Report, ¶ 317.

Vigna Report, ¶ 318.
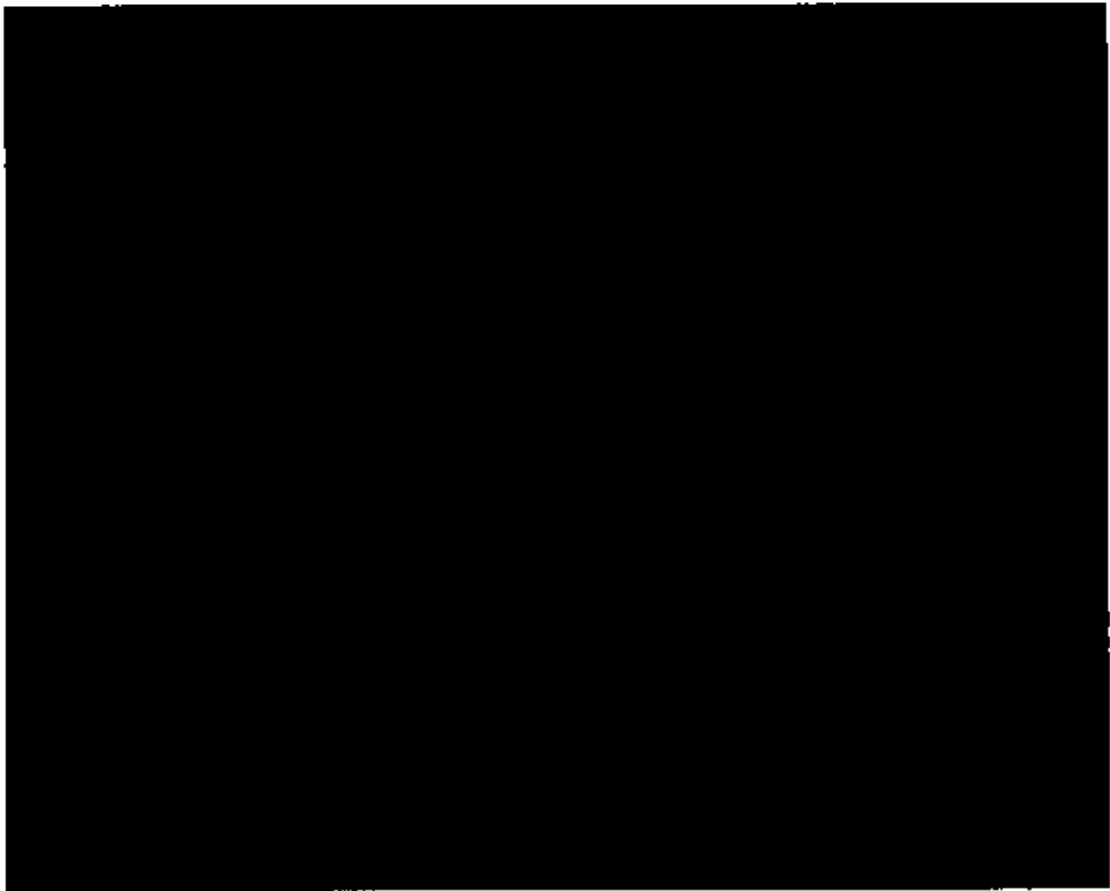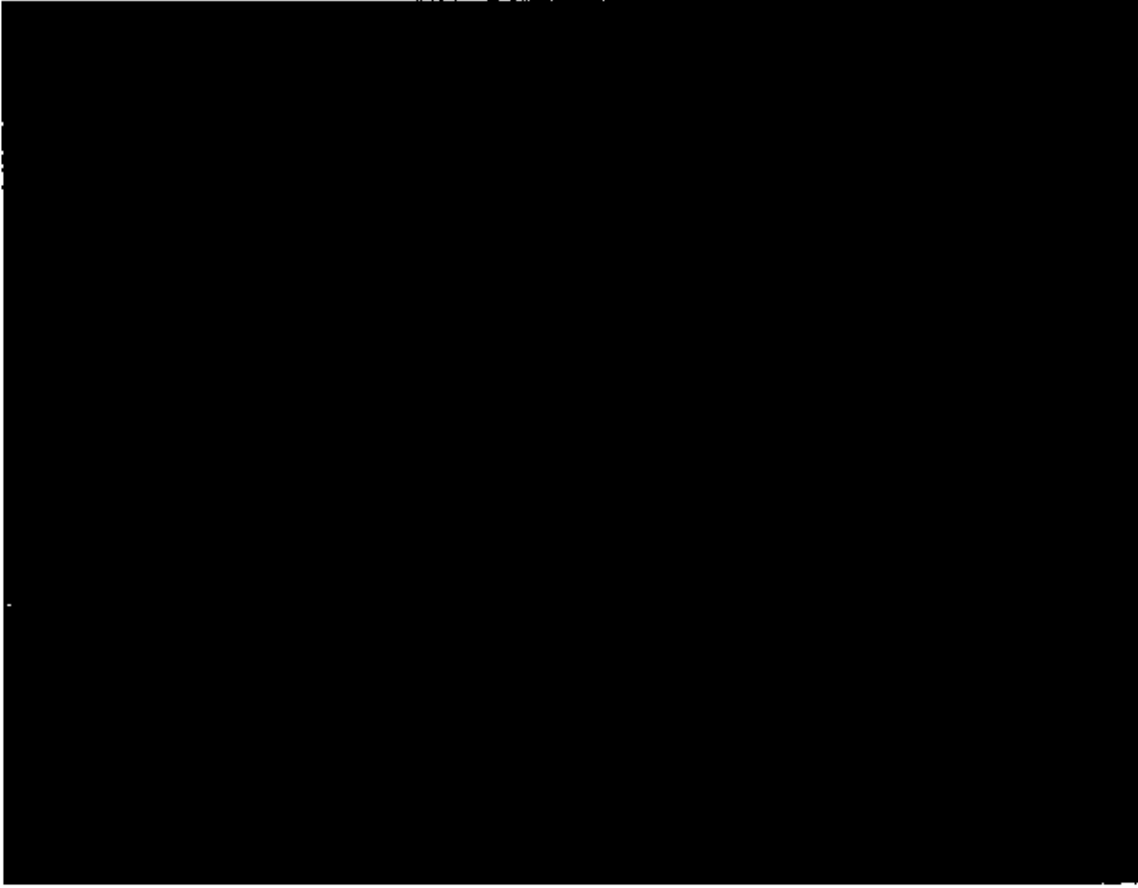
Vigna Report, ¶ 319.

Furthermore, in almost all cases in which *IPXL Holdings* has been raised with an attempt

to invalidate claims for indefiniteness, the ruling court has found that the claim limitation is a

functional limitation and therefore found not invalid. *Ricoh Co., Ltd. v. Katun, Corp.*, 486 F.

Supp. 2d 395, 402 (D.N.J. 2007); *see also, e.g., Yodlee, Inc. v. CashEdge, Inc.*, No. 05-01550,

2006 WL 3456610, at *3-5 (N.D. Cal. Nov. 29, 2006); *Toshiba Corp. v. Juniper Networks, Inc.*,

No. 03-1035, 2006 WL 1788479, at *2-5 (D. Del. June 28, 2006); *Collegenet, Inc. v. XAP Corp.*,

442 F. Supp. 2d 1036, 1062-63 (D.Or. 2006); *Collaboration Props., Inc. v. Tandberg ASA*, No.

05-01940, 2006 WL 1752140, at *6-7 (N.D. Cal. June 23, 2006); *Sienna, LLC v. CVS Corp.*, No.

06-3364, 2007 WL 13102, at *7-8 (S.D.N.Y. Jan. 3, 2007). This is another such case where the

limitations are functional and valid. Facebook is attempting to circumvent the plain reading of

the claim as already construed by the Court and consider claim limitations to be considered

13

separate and divorced from the language of the rest of the claim to support its non-infringement argument. The language is directed to systems and instructions which track the user in response to the user's action, and in this case, the user moving from a first context to a second context and accessing the data created by the user in the first context.

Further supporting the position that these claims are not "hybrid" is the fact that the examiner specifically requested the limitation before permitting allowance. *See* Notice of Allowability, 08/30/2006 at 3, 11. It is inconceivable that a highly trained examiner would specifically require for allowance an amendment rendering the claims indefinite. The Examiner would have been well aware of this fact, as claims which mix statutory classes have been considered indefinite and subject to rejection by the Patent Office well before these claims were before the examiner in this specific case. *IPXL Holdings,* 430 F.3d at 1384, citing *Ex Parte Lyell*, 17 USPQ2d 1548, 1550 (1990)). Furthermore, this rule has been incorporated into the Manual of Patent Examining Procedure ("MPEP") since before the examination of the application of the '761 Patent. MPEP, § 2173.05(p)(II) ("A single claim which claims both an apparatus and the method steps of using the apparatus is indefinite under 35 U.S.C. 112, second paragraph.").

3.   Facebook states that "[i]n particular, claims 1 and 23 purport to cover both an apparatus or system for facilitating management of data and a method for using it (i.e., 'the user accesses the data from the second' context or workspace.)." D.I. 384 at 2. This fact is DISPUTED. Claims 1 and 23 cover additional element beyond what is stated. For example, claim 1 includes a context component for capturing context information and a tracking component for tracking the change in access of the user. And, claim 23 includes a computer-implemented context component for computer-implemented capturing context data and a

14

tracking component for tracking the change in access of the user. More specifically, claims 1

and 23 respectively cover:

> 1. A computer-implemented network-based system that facilitates management of
> data, comprising:
> a computer-implemented context component of the network-based system for
> capturing context information associated with user-defined data created by user
> interaction of a user in a first context of the network-based system, the context
> component dynamically storing the context information in metadata associated
> with the user-defined data, the user-defined data and metadata stored on a storage
> component of the network-based system; and
> a computer-implemented tracking component of the network-based system for
> tracking a change of the user from the first context to a second context of the
> network-based system and dynamically updating the stored metadata based on the
> change, wherein the user accesses the data from the second context.

'761 Patent, Col. 20, l. 63 - Col. 21, l. 12.

> 23. A computer-implemented system that facilitates management of data,
> comprising:
> a computer-implemented context component of a web-based server for defining a
> first user workspace of the web-based server, assigning one or more applications
> to the first user workspace, capturing context data associated with user interaction
> of a user while in the first user workspace, and for dynamically storing the context
> data as metadata on a storage component of the web-based server, which metadata
> is dynamically associated with data created in the first user workspace; and
> a computer-implemented tracking component of the web-based server for tracking
> change information associated with a change in access of the user from the first
> user workspace to a second user workspace, and dynamically storing the change
> information on the storage component as part of the metadata, wherein the user
> accesses the data from the second user workspace.

Id., Col. 23, ll. 20-37.

Furthermore, claims 1 and 23 do not include a method step with the claim language,

rather they describe functional limitations related to an interactive system.

> Claim 1 claim in part:

> a computer-implemented tracking component of the network-based system for
> tracking a change of the user from the first context to a second context of the
> network-based system and dynamically updating the stored metadata based on the
> change, wherein the user accesses the data from the second context.

Id., Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. '761 Patent, Col. 21, ll 7-12. Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context ("for tracking a change of the user from the first context to a second context of the network-based system ... wherein the user accesses the data from the second context."). Id. The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As demonstrated, claim 1 includes a functional limitation, and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 23 also includes acceptable functional language which is similar to that found in claim 1. Claim 23 claims in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change

16

information on the storage component as part of the metadata, wherein the user
accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it
recites a functional claim limitation. The user is included in Claim 23 because the claim is
directed to an interactive system which interacts dynamically with the user while the user is
using the system. To this end, the tracking component claimed is configured to perform the
function of tracking the user and dynamically updating the stored metadata responsive to when
the user accesses the data from a second user workspace. This is demonstrated by the claim
language which recites that the tracking component is "for tracking change information
associated with a change in access of the user from the first user workspace to a second user
workspace" and "wherein the user accesses the data from the second user workspace." The
functional nature of this claim limitation can be seen from the analysis of Leader's infringement
expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with
an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are
functional and the claims valid. *See supra* at 12-13. Further supporting the position that these
claims are valid and do not include a system and a step for using it is that the examiner
specifically requested the limitation before permitting allowance and would not request a
limitation contrary to the MPEP. *See supra* at 13.

4.   Facebook states that "[c]laim 21 purports to cover both a computer readable
medium (such as a DVD) and method of using it (i.e., 'the user employs the application and data
from the second user workspace.')." D.I. 384 at 1. This fact is DISPUTED to the extent that
Facebook purports that the claims cover anything contrary to their language. The claim covers

17

computer-readable medium which manages data by using context and tracking user movement.

Specifically, claim 21 covers:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising: creating data related to user interaction of a user within a user workspace of a web-based computing platform using an application; dynamically associating metadata with the data, the data and metadata stored on the web-based computing platform, the metadata includes information related to the user of the user workspace, to the data, to the application and to the user workspace; tracking movement of the user from the user workspace to a second user workspace of the web-based computing platform; dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace; and indexing the data created in the user workspace such that a plurality of different users can access the data via the metadata from a corresponding plurality of different user workspaces.

'761 Patent, Col. 22, ll. 46-67.

Furthermore, claim 21 does not include a method step with the claim language, rather it

describes functional limitations related to an interactive system. Claim 21 recites a proper claim

limitation. Facebook's position that this includes a method step performed by the user ignores

the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

Id., Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which

includes computer-executable instructions for a method of managing data. This claim is directed

to instructions which act interactively with the user. The computer-executable instruction is able

to perform the function of "dynamically associating the data and the application with the second

user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and

18

system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions configured to perform an action in response to certain user interactions. This does not require a user to perform an action as a claim step; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13.

5.   Facebook states that "[t]he Federal Circuit in *IPXL Holdings* has squarely held that these hybrid claims are invalid because they are "not sufficient precise to provide competitors with an accurate determination of the 'metes and bounds' of [the] protection involved." D.I. 384 at 1. This fact is DISPUTED. *IPXL Holdings* does not define Facebook's so-called "hybrid" claims and does not state that they are insufficient and carte blanche invalid as indefinite. The holding of the court in *IPXL Holdings* was limited to declaring claims which indisputably included "both a system and the method of using that system" as indefinite. 430 F.3d at 1384. The claim at issue in *IPXL Holdings* was a clear example of claim including a system and a method step of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the user uses the input means to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.

Id., 430 F.3d at 1384 (citing '055 Patent, Col. 22, ll. 8-13)(emphasis added).

19

6.　　Facebook states that "[c]laims 1, 21 and 23 (and all of their asserted dependent claims) are therefore invalid." D.I. 384 at 1. This fact is DISPUTED. The holding of the court in *IPXL Holdings* was limited to declaring claims which indisputably included "both a system and the method of using that system" as indefinite. 430 F.3d at 1384. The claim in question in *IPXL Holdings* was a clear example of claiming a system and a method of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the user uses the input means to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.

Id., 430 F.3d at 1384 (citing '055 Patent, Col. 22, ll. 8-13)(emphasis added).

The claims of the '761 Patent do not present such as case. Under *IPXL Holdings*, a claim must indisputably mix an apparatus and a method of using the apparatus in one claim. *Id.* Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 claim in part:

> a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim

includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context ("for tracking a change of the user from the first context to a second context of the network-based system …wherein the user accesses the data from the second context."). *Id.* The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.,* 191 F.3d at 1363; *see also Microprocessor Enhancement,* 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As demonstrated, claim 1 includes a functional limitation, and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Additionally, Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
>
> …
>
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed

to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions configured to perform an action in response to certain user interactions. This does not require a user to perform an action as a claim step; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Claim 23 also includes acceptable functional language which is similar to that found in claim 1. Claim 23 claims in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end, the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information

22

associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

7.   Facebook states that "[t]his pure question of law is particularly suitable to summary judgment." D.I. 384 at 1. This fact is DISPUTED. Facebook's motion is not a pure question of law because it depends on material issue of disputed fact. This statement relies on a rehash of the opinion provided by its *non-infringement expert*, Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. For example, Dr. Vigna opined on the infringement of claim 1. See *supra* at 3-4. Facebook's non-infringement expert attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna opinion, that:

23

[BLACK REDACTED BLOCK]

Kearns Report, ¶ 67.

[BLACK REDACTED BLOCK]
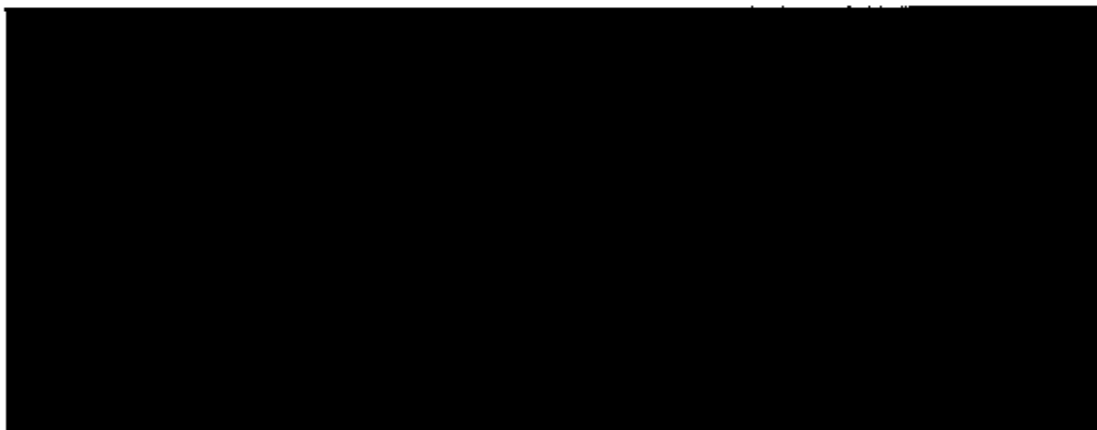
Kearns Report, ¶ 69.

As shown from these excerpts from Leader's infringement expert, and Facebook's non-infringement expert, this is a hotly disputed issue and Facebook's motion is nothing more than a rehashing of its infringement position and is not a pure question of law.

8.   Facebook states that "[t]here is no genuine issue as to any material fact because the language of the asserted claims - the only evidence relevant to this motion - is undisputed." D.I. 384 at 1. This fact is DISPUTED. Facebook's motion relates to material issues of fact because it is a rehash of the opinion provided by its *non-infringement expert*, Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. Dr. Vigna opined on the infringement of claim 1. *See supra* at 3-4. Facebook's non-infringement expert attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna opinion, that:
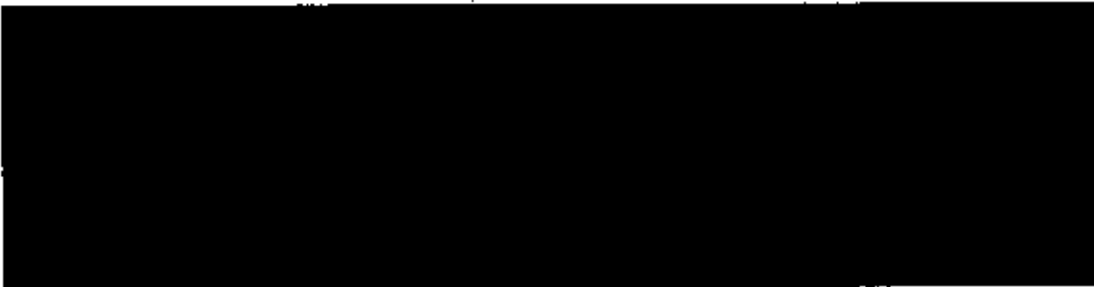
[BLACK REDACTED BLOCK]

24

Kearns Report, ¶ 67.

Kearns Report, ¶ 69.

9.   Facebook asserts that "The sole issue is whether claims 1, 21 and 23 incorporate a

method step directed to using the claimed apparatus or structure, and therefore impermissibly

'recite[] both a system and the method for using that system.'" D.I. 384 at 1. This fact is

DISPUTED. The holding of the court in *IPXL Holdings* was limited to declaring claims which

indisputably included "both a system and the method of using that system" as indefinite. 430

F.3d at 1384. The claim in question in *IPXL Holdings* was a clear example of claiming a system

and a method of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted
> transaction information comprises both a transaction type and transaction
> parameters associated with that transaction type, and the user uses the input
> means to either change the predicted transaction information or accept the
> displayed transaction type and transaction parameters.

Id., 430 F.3d at 1384 (citing '055 Patent, Col. 22, ll. 8-13)(emphasis added).

The claims of the '761 Patent do not present such as case. Under *IPXL Holdings*, a claim

must indisputably mix an apparatus and a method of using the apparatus in one claim. *Id.* at

25

1384. Claims 1, 21, and 23 do not include method step in the claim language, rather they describe functional limitations related to an interactive system.

> Claim 1 states in part that:

> a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. '761 Patent, Col. 21, ll 7-12. Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system ...wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a

functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." '761 Patent, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Claim 23 includes functional language similar to that found in claim 1. Claim 23 claims in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end, the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

10.   Facebook states that "U.S. Patent No. 7,139,761, entitled 'Dynamic Association

28

of Electronically Stored Information with Iterative Workflow Changes,' purports to disclose a

data management tool for use in 'communications, organization, information processing, and

data storage.'" D.I. 384 at 2. This fact is DISPUTED to the extent that Facebook purports to

limit the'761 Patent to only "a data management tool" related to "a data management tool for use

in 'communication, organization, information processing, and data storage.'" Id. The '761

Patent includes a disclosure for a broad and complete system for data management and

organization by leveraging context and tracking user movement. As stated in the '761 Patent and

the expert reports of Dr. Vigna and Dr. Herbsleb, the '761 Patent discloses:

> A data management tool. The tool is a unified, horizontal system for
> communications, organization, information processing, and data storage. The tool
> operates seamlessly with existing platforms, and is a common workflow layer that
> is automated with a scalable, relational database. The tool uses one or both of a
> relational and object database engine that facilitates at least many-to-many
> relationships among data elements. The highest contextual assumption is that
> there exists an entity that consists of one or more users. The data storage model
> first assumes that files are associated with the user. Thus, data generated by
> applications is associated with an individual, group of individuals, and topical
> content and not simply with a folder, as in traditional systems.

'761 Patent, Abstract.

> The present invention disclosed and claimed herein, in one aspect thereof, is a
> data management tool that is a unified, horizontal system for communications,
> organization, information processing, and data storage. The tool installs on
> existing platforms, and is a common workflow layer that is automated with a
> scalable, relational database. The tool includes a relational database engine that
> facilitates many-to-many relationships among data elements, in addition to, one-
> to-many and many-to-many relationships.

'761 Patent, Col. 3, ll. 15-24.

> The data management tool includes a novel architecture where the highest
> contextual assumption is that there exists an entity that consists of one or more
> users. The data storage model first assumes that files are associated with the user.
> Thus, data generated by applications is associated with an individual, group of
> individuals, and topical content, and not simply with a folder, as in traditional
> systems.

'761 Patent, Col. 3, ll. 25-31.

> When a user logs in to the system that employs the tool, the user enters into a
> personal workspace environment. This workspace is called a board, and is

associated with a user context. From within this board, the tool makes accessible to the user a suite of applications for creating and manipulating data. Any user operating within any board has access to the suite of applications associated with that board, and can obtain access to any data in any form (e.g., documents and files) created by the applications and to which he or she has permission. Moreover, thereafter, the user can then move to shared workspaces (or boards), and access the same data or other data.

'761 Patent, Col. 3, ll. 32-43.

Data created within the board is immediately associated with the user, the user's permission level, the current workspace, any other desired workspace that the user designates, and the application. This association is captured in a form of metadata and tagged to the data being created. The metadata automatically captures the context in which the data was created as the data is being created. Additionally, the data content is indexed to facilitate searching for the content in a number of different ways in the future by the user or other users. This tagging process is universal, in that, the data model allows for any binary data (e.g., files), as well as any set of definable data to be accepted into the system. The system is not restricted to processing e-mail, faxes, calendar events, meetings, phone calls, etc., that are included in the bundled system, but can also accommodate whatever data the user chooses to use. The system is also universal insofar as its user interaction can be through a browser that is pervasively employed for use with conventional operating systems.

'761 Patent, Col. 3, ll. 44-62.

In that the tool supports multiple users, there can be multiple boards. Two or more boards (or workspace environments) can be grouped as a collection of boards, also called a web. Boards can exist in any number of different webs. The association of webs and boards is stored in a table. As a user creates a context, or moves from one context to at least one other context, the data created and applications used previously by the user automatically follows the user to the next context. The change in user context is captured dynamically. All files and groups of files can be associated with any other file in the system, allowing a system user the flexibility in determining dynamic associations.

'761 Patent, Col. 3, l. 63 - Col. 4, l. 7.

In addition to the macro view provided by webs and boards, the user can also create the more familiar hierarchical folders within any board. These are virtual folders, and nothing is physically stored in these folders.

'761 Patent, Col. 4, ll. 8-11.

In another aspect of the present invention, the tool provides the seamless facilitation, collection, compilation, and distribution of data.

'761 Patent, Col. 4, ll. 12-14.

In yet another aspect of the present invention, the tool provides links to enterprise leadership priorities.

'761 Patent, Col. 4, ll. 15-16.

In still another aspect of the present invention, the tool performs communications tasks while simultaneously reminding the user of his/her individual work priorities.

'761 Patent, Col. 4, ll. 17-19.

In another aspect thereof, the tool automatically stores contextual information relating to an item of communication and utilizes that contextual information in performance of communication tasks.

'761 Patent, Col. 4, ll. 20-23.

In yet another aspect thereof, the tool integrates two or more different applications such as telephony, unified messaging, decision support, document management, portals, chat, collaboration, search, vote, relationship management, calendar, personal information management, profiling, directory management, executive information systems, dashboards, cockpits, tasking, meeting, conferencing, etc., into a common application.

'761 Patent, Col. 4, ll. 24-31.

In another aspect thereof, the tool provides a structure for defining relationships between complex collections of data.

'761 Patent, Col. 4, ll. 32-33.

In still another aspect of the present invention, the tool provides a process for automating workflow between multiple entities.

'761 Patent, Col. 4, ll. 34-36.

Vigna Report, ¶ 21.

The '761 Patent discloses an online collaboration tool that facilitates efficient communication, organization, and content sharing between users and allows multiple users to share and use electronically stored content over a network.

Herbsleb Report, ¶ 16.

The online collaboration tool described in the '761 Patent addresses the problems with traditional systems. The technology of the '761 Patent uses a server that hosts the online collaboration tool and is connected through the internet to the user's computer, typically running a web browser. The '761 Patent describes a technology where the user can upload content over the Internet, through the web browser on the user's computer, to the online collaboration tool. The online collaboration tool of the '761 Patent automatically associates context information with the content. This is described as being performed by a context component residing on the server, which associates the content with context information, relating to the context in which this content was created. This context information is stored as metadata and associated with newly created content. In this manner it provides valuable context to the content. This information is then stored on the back-end server in a database or other data storage means.

Herbsleb Report, ¶ 17.

The online collaboration tool described in the '761 Patent also automatically tracks user actions within different environments on the online collaboration tool using a tracking component. For example, the user may move from their home page to the home page of a friend or coworker. The tracking component tracks the user's movement and automatically captures the user's actions where the user accesses or employs their previously uploaded content from this new context. The metadata associated with the data is then updated based on how content is used in the new context and what actions are taken. The type of user actions the tracking component captures includes identification of the user who performed the action, the time the action was taken, and context in which the action was taken.

Herbsleb Report, ¶ 18.

The online collaboration tool described in the '761 Patent thereby automatically captures information about user content and leverages this information to allow effective collaboration. For example, the user content can be efficiently shared and used by many people using the online collaboration tool. The information about the user content can be used to avoid requiring multiple versions of a file, allowing a file to be uploaded once and accessed from multiple locations, by multiple users, in multiple contexts. Furthermore, a user can provide content in one context and have that content associated with multiple other contexts. This allows the user to use the content in different contexts and not have to re-upload content in the other contexts. The information can also be leveraged to allow users to easily search for particular files based on the captured metadata.

Herbsleb Report, ¶ 19.

32

The highest contextual assumption of the online collaboration tool is that there exists an entity of one or more users and that the data storage model assumes that the content is associated with the user. Thus, metadata is created when a user creates an account, and that metadata gets constantly updated based on the content the user uploads, or actions the user takes.

Herbsleb Report, ¶ 20.

11.   Facebook states that "[t]he patent specification states that the invention relates to 'structures and methods for creating relationships between users, applications, files, and folders.'" D.I. 384 at 2. This fact is DISPUTED to the extent that Facebook purports to limit the '761 Patent to only "structures and methods for creating relationships between users, application, files and folder." '761 Patent. The '761 Patent includes a broad disclosure for information and data management, and how data management can be accomplished by utilization of context information or data and tracking the user. *See supra* at 29-32.

12.   Facebook states that "[c]laims 1 and 23 are apparatus claims, and claim 21 covers a computer readable medium." D.I. 384 at 2. This fact is DISPUTED to the extent that Facebook is attempting to mischaracterize the substance of claims 1, 21, and 23. Claims 1 and 23 are directed at a computer-implemented network-based system and a computer-implemented system, respectively. Claim 21 is directed to a computer-readable medium for storing computer instructions. These claims include using context and tracking user movement.

Claim 1 covers:

1. A computer-implemented network-based system that facilitates management of data, comprising:
a computer-implemented context component of the network-based system for capturing context information associated with user-defined data created by user interaction of a user in a first context of the network-based system, the context component dynamically storing the context information in metadata associated with the user-defined data, the user-defined data and metadata stored on a storage component of the network-based system; and
a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the

33

network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 20, l. 63 - Col. 21, l. 12.

Claim 23 covers:

> 23. A computer-implemented system that facilitates management of data, comprising:
> a computer-implemented context component of a web-based server for defining a first user workspace of the web-based server, assigning one or more applications to the first user workspace, capturing context data associated with user interaction of a user while in the first user workspace, and for dynamically storing the context data as metadata on a storage component of the web-based server, which metadata is dynamically associated with data created in the first user workspace; and
> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 20-37.

Claim 21 covers:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising: creating data related to user interaction of a user within a user workspace of a web-based computing platform using an application; dynamically associating metadata with the data, the data and metadata stored on the web-based computing platform, the metadata includes information related to the user of the user workspace, to the data, to the application and to the user workspace; tracking movement of the user from the user workspace to a second user workspace of the web-based computing platform; dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace; and indexing the data created in the user workspace such that a plurality of different users can access the data via the metadata from a corresponding plurality of different user workspaces.

'761 Patent, Col. 22, ll. 46-67.

13.   Facebook states that "This motion concerns claims 1, 21 and 23 and all asserted claims that depend from them." D.I. 384 at 2. This fact is DISPUTED. Facebook's motion does not cite a proper basis for dismissal of claims 1, 21, and 23 because the claims are not indefinite under 35 U.S.C. §112, ¶ 2. Because the independent claims are definite and Facebook provided

34

no separate argument regarding the dependent claims, Facebook's motion does not concern the

claims depending from claims 1, 21 and 23. The holding of the court in *IPXL Holdings* was

limited to declaring claims which indisputably included "both a system and the method of using

that system" as indefinite. 430 F.3d at 1384. The claim in question in *IPXL Holdings* was a

clear example of claiming a system and a method of using that same system, with the claim at

issue stating:

> The system of claim 2 [including an input means] wherein the predicted
> transaction information comprises both a transaction type and transaction
> parameters associated with that transaction type, and the user uses the input
> means to either change the predicted transaction information or accept the
> displayed transaction type and transaction parameters.

Id., 430 F.3d at 1384 (citing '055 Patent, Col. 22, ll. 8-13).

The claims of the '761 Patent do not present such as case. Under IPXL Holdings, a claim

must indisputably mix an apparatus and a method of using the apparatus in one claim. Id.

Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe

functional limitations related to an interactive system.

Claim 1 states in part that:

> a computer-implemented tracking component of the network-based system for
> tracking a change of the user from the first context to a second context of the
> network-based system and dynamically updating the stored metadata based on the
> change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring

the user to use the system, but includes a functional claim limitation. The user is included in

Claim 1 because the claim is directed to an interactive system which is designed to interact

dynamically in response to the user. To this end, the claim includes references to the user and

how the system is configured to react based on specific user actions. For example, the claim

includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system …wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> …
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able

to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1. Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user

37

workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

14.   Facebook states that "[a]s explained below, those claims are invalid 'hybrid' claims because they purport to cover both an apparatus or computer medium and a method of using it." D.I. 384 at 2. This fact is DISPUTED. Facebook's motion is nothing more than a rehash of its non-infringement arguments, and is not an invalidity argument. Facebook's motion is a rehash of the opinion provided by its ***non-infringement expert***, Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. Specifically, and using claim 1 as an example Dr. Vigna opined that claim 1 is infringed by the Facebook Website. See *supra* at 3-4. Facebook's non-infringement expert attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna opinion regarding claim 1, that:

38
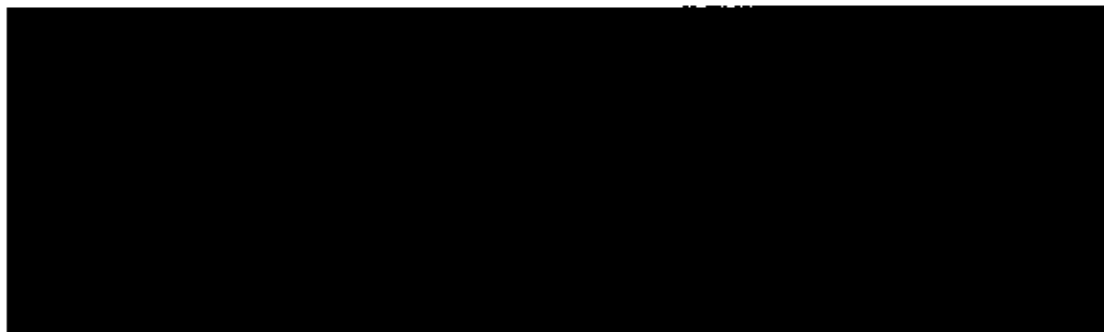
Kearns Report, ¶ 67.

Kearns Report, ¶ 69.

In regards to claim 21, Dr. Vigna states in his expert report regarding infringement that:

Vigna Report, ¶ 262.
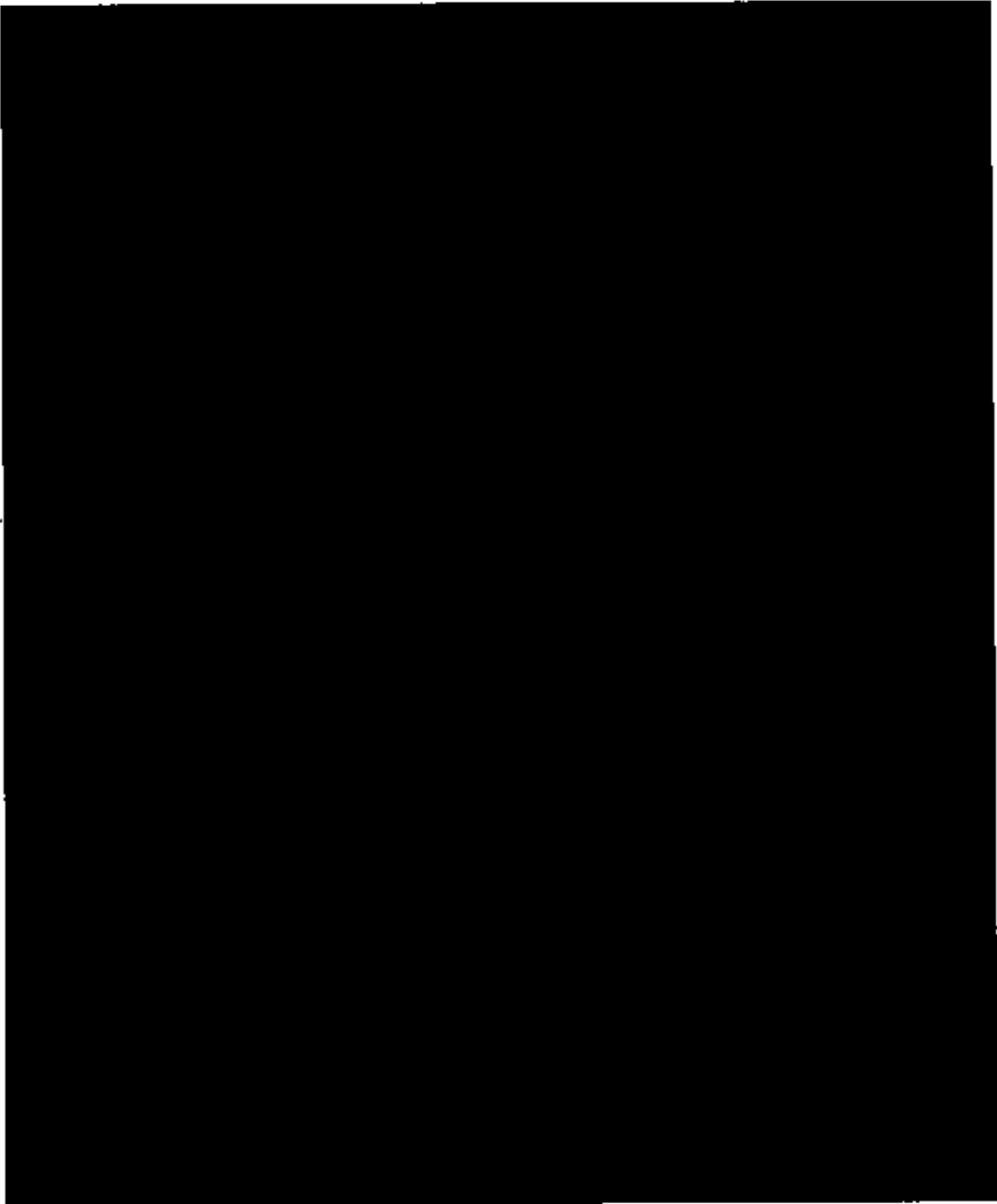
Vigna Report, ¶ 263.

Vigna Report, ¶ 264.

Dr. Kearns' response to this infringement argument was that:

[REDACTED]
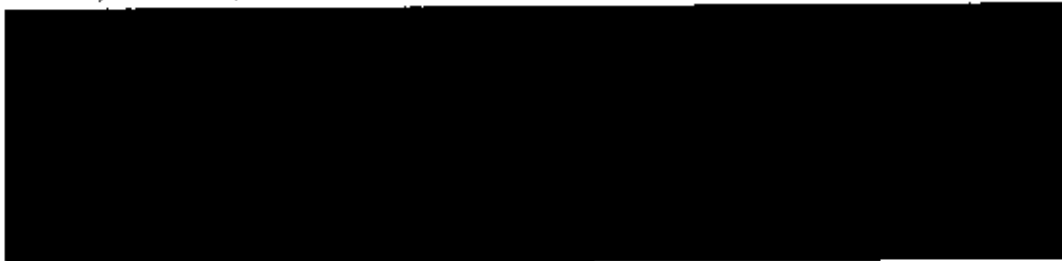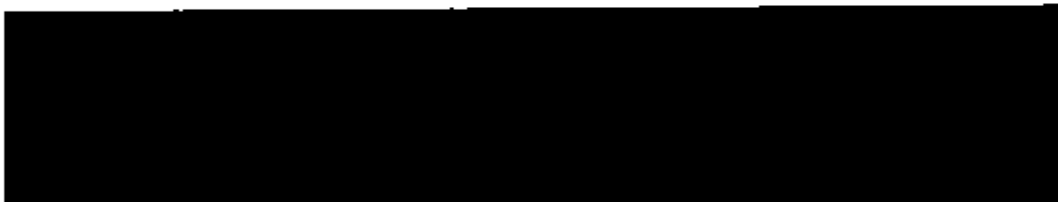
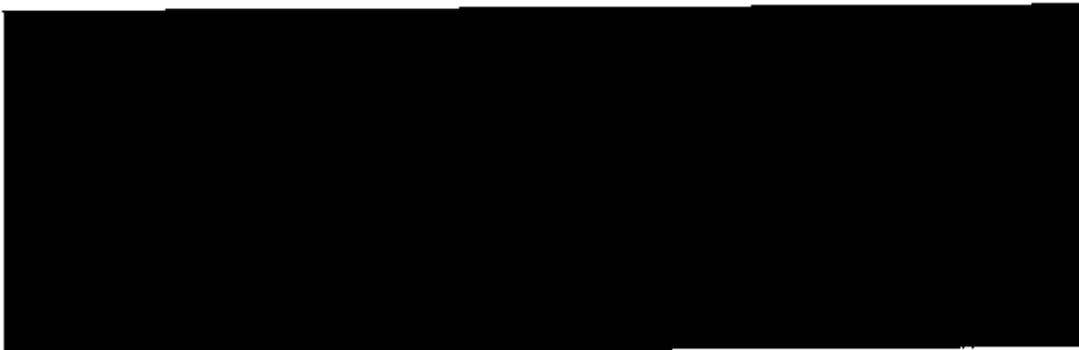Kearns Report, ¶ 119.

    In regards to claim 23, Dr. Vigna states in his expert report regarding infringement that:

[REDACTED]

Vigna Report, ¶ 317.

[REDACTED]

Vigna Report, ¶ 318.

[REDACTED]
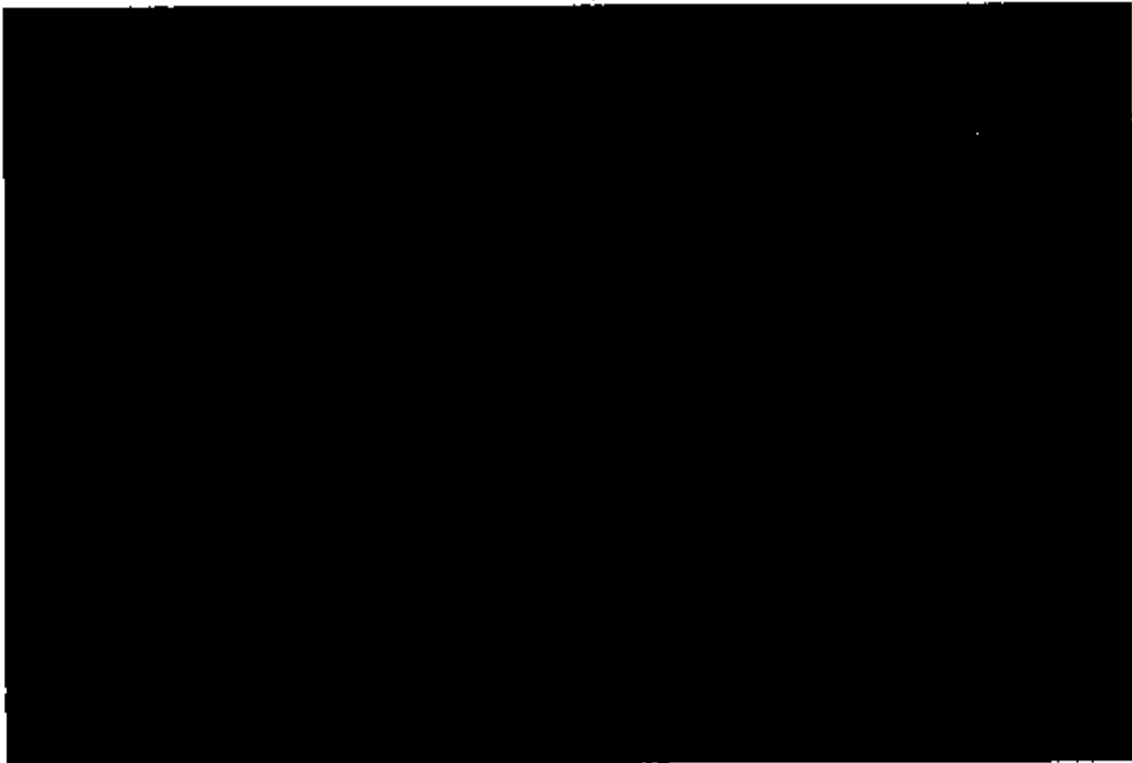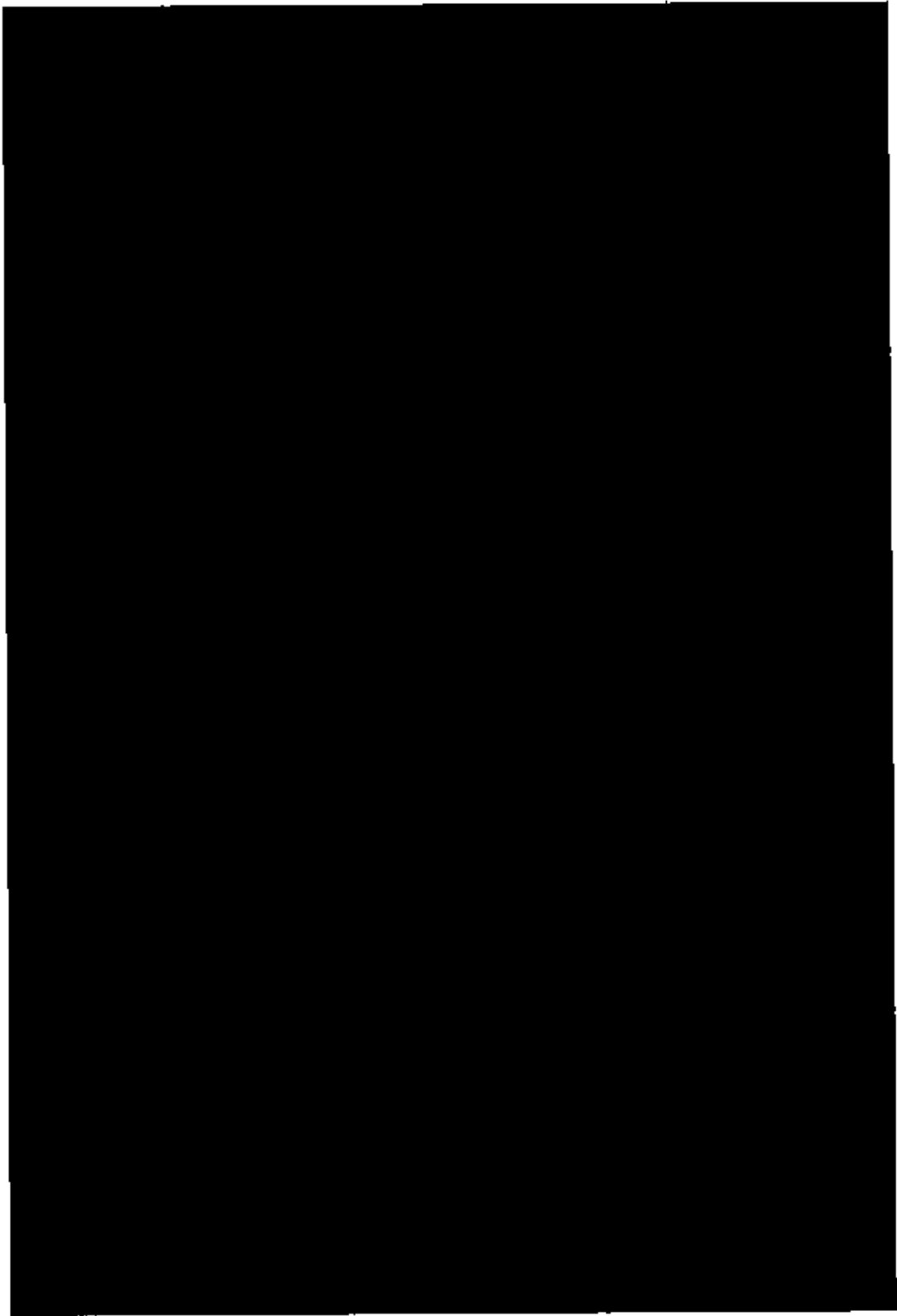
Vigna Report, ¶ 319.

Dr. Kearns' response to this infringement argument was that:
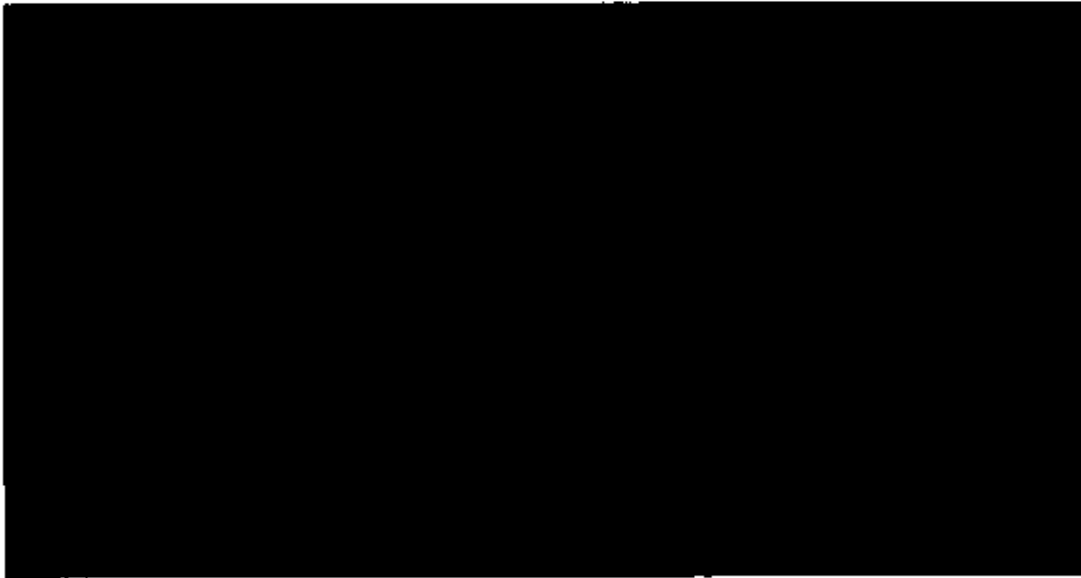
Kearns Report, ¶129.

Further supporting this position that this motion is simply a restatement of Facebook's non-infringement position is that Facebook's expert on invalidity, Dr. Greenberg, does not discuss the supposed hybrid nature of the claims of the '761 Patent. *See* Greenberg Report. Furthermore, Facebook's position that these claims are hybrid, and indefinite as a result, is disingenuous as Facebook has put forward considerable evidence to show that a person of ordinary skill in the art would understand the claim language, as shown from the invalidity expert report from Dr. Greenberg. *See id.* Dr. Greenberg was able to prepare an invalidity expert report applying several pieces of prior art to the claims without apparent problem. *See id.*

Moreover, Claims 1, 21, and 23 are not hybrid claims, are not indefinite, and do not purport cover either an apparatus or computer medium and a method of using it. Facebook states that claims 1, 21, and 23 are so called "hybrid claims," and as a result are indefinite. A claim is indefinite only if a person of skill in the art is not reasonably apprised of its scope. *IPXL Holdings,* 430 F.3d at 1383-84.

43

Under *IPXL Holdings*, a claim is only a hybrid if it indisputably mixes an apparatus and a method of using the apparatus in one claim. *Id.* Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system ... wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the

44

means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. Further demonstrating this is the analysis of Dr. Vigna in reference to this claim element. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 claims in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> …
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to be a hybrid claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case because the limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. In regards to claim 21, Dr. Vigna describes in his expert report the functional nature of this claim. *See supra* at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1.

Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

15. Facebook states that "Independent claims 1 and 23 each purport to describe an apparatus for facilitating management of data." This fact is DISPUTED to the extent that

46

Facebook is attempting to mischaracterize the substance of claims 1 and 23. Each of these

claims relate to a system which tracks a user and uses context to manage data.

Claim 1 covers:

1. A computer-implemented network-based system that facilitates management of data, comprising:
a computer-implemented context component of the network-based system for capturing context information associated with user-defined data created by user interaction of a user in a first context of the network-based system, the context component dynamically storing the context information in metadata associated with the user-defined data, the user-defined data and metadata stored on a storage component of the network-based system; and
a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 20, l. 63 - Col. 21, l. 12.

Claim 23 covers:

23. A computer-implemented system that facilitates management of data, comprising:
a computer-implemented context component of a web-based server for defining a first user workspace of the web-based server, assigning one or more applications to the first user workspace, capturing context data associated with user interaction of a user while in the first user workspace, and for dynamically storing the context data as metadata on a storage component of the web-based server, which metadata is dynamically associated with data created in the first user workspace; and
a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 20-37.

16.   Facebook states that "[e]ach of these claims requires structural requirements of

the claimed apparatus or system, while at the same time, reciting a method step that involves

using the apparatus/system." D.I. 384 at 2. This fact is DISPUTED. None of the claims of the

'761 Patent disclose a method step that involves using the apparatus/system. Claims 1 and 23 do

not include method step which must be performed by the user in the claim language, rather they

47

describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system ...wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.,* 191 F.3d at 1363; *see also Microprocessor Enhancement,* 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

48

Claim 23 also includes functional language which is similar to that found in claim 1.

Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

Furthermore, the sections of the claims referenced by Facebook are impossible to be read

49

in a manner where it would include use of the system by a user. For example, in claim 1 the statement "wherein the user accesses the data from the second context" does not require use of the system in the claim by the user because the claimed system does not include a mechanism for accessing the data, rather the claim is directed to a context component and a tracking component. '761 Patent, Col. 20, l. 63 - Col. 21, l. 12. This statement is also false for claim 23. The element "wherein the user accesses the data from the second user workspace" does not show use of the system in claim 23 because the system does not disclose a mechanism for accessing the data, rather it includes a context component and tracking component. *Id.*, Col. 23, ll. 20-37.

17.   Facebook states that "[c]laim 1 shown above recites an apparatus (a 'computer-implemented network-based system') that includes two components, *i.e.* a 'context component' and a 'tracking component.'" D.I. 384 at 3. This fact is DISPUTED to the extent Facebook mischaracterizes the language of claim 1 by summarizing the claim. Claim 1 is directed to a computer-implemented network-based system. Claim 1 states:

> 1. A computer-implemented network-based system that facilitates management of data, comprising:
> a computer-implemented context component of the network-based system for capturing context information associated with user-defined data created by user interaction of a user in a first context of the network-based system, the context component dynamically storing the context information in metadata associated with the user-defined data, the user-defined data and metadata stored on a storage component of the network-based system; and
> a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 20, l. 63 - Col. 21, l. 12.

18.   Facebook states that "[t]he claim concludes by reciting a method step that must be performed by the user of that system - 'the user accesses the data from the second context.'" D.I. 384 at 3. This fact is DISPUTED. Under *IPXL Holdings*, a claim must indisputably mix an

50

apparatus and a method of using the apparatus in one claim. 430 F.3d at 1384. Claim 1 does not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system …wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional

limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. See *supra* at 7-8.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

19.   Facebook states that "[c]laim 23 shares substantially the same problems ... Claim 23 similarly recites a 'system that facilitates management of data,' includes both a 'context component' and a 'tracking component,' and concludes with a method step that requires an explicit action by the user of the system ('the user accesses the data from the second user workspace')." D.I. 384 at 3-4. This fact is DISPUTED. Claims 1 and 23 do not include a method step with a system or apparatus claim. Claim 23 only includes functional language. Claim 23 claims in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when

52

the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

20. Facebook states that "[c]laim 23 has no material differences from claim 1 for the purposes of this motion." D.I. 384 at 4. This fact is DISPUTED to the extent that Facebook is attempting to mischaracterize the substance of claims 1 and 23. Claim 1 and claim 23 have different claim language. For example claim 1 relates to contexts, while claim 23 relates to workspaces and applications in those workspaces.

Claim 1 states:

1. A computer-implemented network-based system that facilitates management of data, comprising:
a computer-implemented context component of the network-based system for capturing context information associated with user-defined data created by user interaction of a user in a first context of the network-based system, the context component dynamically storing the context information in metadata associated with the user-defined data, the user-defined data and metadata stored on a storage component of the network-based system; and
a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 20, l. 63 - Col. 21, l. 12.

Claim 23 states:

23. A computer-implemented system that facilitates management of data, comprising:
a computer-implemented context component of a web-based server for defining a first user workspace of the web-based server, assigning one or more applications to the first user workspace, capturing context data associated with user interaction of a user while in the first user workspace, and for dynamically storing the context

53

data as metadata on a storage component of the web-based server, which metadata is dynamically associated with data created in the first user workspace; and a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 20-37.

21.   Facebook states that "[i]ndependent claim 21 purports to claim an article of

manufacture in the form of a 'computer-readable medium for storing computer-executable

instructions,' such as a CD-ROM or DVD disc, for managing data." D.I. 384 at 4. This fact is

DISPUTED. Leader disputes Facebook's allegations that claim 21 only applies to the computer-

readable medium of a CD-ROM or DVD disc. The claim does not call for a specific computer

readable medium, and any medium is covered. Claim 21 states:

> 21. A computer-readable medium for storing computer-executable instructions for
> a method of managing data, the method comprising: creating data related to user
> interaction of a user within a user workspace of a web-based computing platform
> using an application; dynamically associating metadata with the data, the data and
> metadata stored on the web-based computing platform, the metadata includes
> information related to the user of the user workspace, to the data, to the
> application and to the user workspace; tracking movement of the user from the
> user workspace to a second user workspace of the web-based computing platform;
> dynamically associating the data and the application with the second user
> workspace in the metadata such that the user employs the application and data
> from the second user workspace; and indexing the data created in the user
> workspace such that a plurality of different users can access the data via the
> metadata from a corresponding plurality of different user workspaces.

'761 Patent, Col. 22, ll. 46-67.

22.   Facebook states that "[j]ust like apparatus claims 1 and 23 described above, claim

21 does not merely cover a computer readable medium with executable instructions for

performing specific functions - it also claims a method step that must be performed by the user

of that medium." D.I. 384 at 4. This fact is DISPUTED. Under *IPXL Holdings*, a claim must

indisputably mix an apparatus and a method of using the apparatus in one claim. 430 F.3d at

1384. Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

23.   Facebook states that "[c]laim 21 shown above purports to claim 'a computer-readable medium' that includes executable instructions for performing the specific operations recited in the claim elements that follow." D.I. 384 at 4-5. This fact is DISPUTED. Leader

disputes the allegations that summarizes portions of claim 21 and thereby mischaracterizes the

claim. '761 Patent, Col. 22, ll. 46-67. Claim 21 states:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising: creating data related to user interaction of a user within a user workspace of a web-based computing platform using an application; dynamically associating metadata with the data, the data and metadata stored on the web-based computing platform, the metadata includes information related to the user of the user workspace, to the data, to the application and to the user workspace; tracking movement of the user from the user workspace to a second user workspace of the web-based computing platform; dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace; and indexing the data created in the user workspace such that a plurality of different users can access the data via the metadata from a corresponding plurality of different user workspaces.

Id.

    24.   Facebook states that "[t]he specification of the '761 patent identifies several

examples of acceptable computer-readable media, such as DVDs, CD-ROMs, magnetic

cassettes, magnetic tapes and other storage devices." D.I. 384 at 5. This fact is DISPUTED.

Leader disputes Facebook's allegations that computer-readable media only applies to the

computer-readable medium of a CD-ROM or DVD disc, magnetic cassettes, or magnetic tapes.

    25.   Facebook states that "[b]ut the claim impermissibly includes the requirement that

the user of that medium perform a specific act ('the user employs the application and data from

the second user workspace')." D.I. 384 at 5. This fact is DISPUTED. Claim 21 does not require

the user of a medium to perform a specific act. Claim 21 recites a proper claim limitation.

Facebook's position that this includes a method step performed by the user ignores the claim's

plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
>
> ...
>
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

56

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

26. Facebook states that "[c]laims 1, 21, and 23 are invalid because each claim improperly combines at least two statutory classes." D.I. 384 at 6. This fact is DISPUTED. The holding of the court in *IPXL Holdings* was limited to declaring claims which indisputably included "both a system and the method of using that system" as indefinite. 430 F.3d at 1384. The claim in question in *IPXL Holdings* was a clear example of claiming a system and a method of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the user uses the input means to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.

57

Id. (citing '055 Patent, Col. 22, ll. 8-13).

The claims of the '761 Patent do not present such as case. Under *IPXL Holdings*, a claim must indisputably mix an apparatus and a method of using the apparatus in one claim. 430 F.3d at 1384. Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. *Id.* ("for tracking a change of the user from the first context to a second context of the network-based system …wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also*

58

Microprocessor Enhancement, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data; the method comprising:
>
> ...
>
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim

59

limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1. Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a

60

limitation contrary to the MPEP. *See supra* at 13.

27.   Facebook states that "[i]n particular, claims 1 and 23 improperly recited both an apparatus and a method of user of the apparatus, while claim 21 recites both a computer-readable medium and a method of using it." D.I. 384 at 6. This fact is DISPUTED. The claims do not disclose a method of using the system in claims 1 and 23 or the computer-readable medium in claim 21. The holding of the court in *IPXL Holdings* was limited to declaring claims which indisputably included "both a system and the method of using that system" as indefinite. 430 F.3d at 1384. The claim in question in *IPXL Holdings* was a clear example of claiming a system and a method of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the user uses the input means to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.

Id. (citing '055 Patent, Col. 22, ll. 8-13).

The claims of the '761 Patent do not present such as case. Under *IPXL Holdings*, a claim must indisputably mix an apparatus and a method of using the apparatus in one claim. *Id.* Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

> a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in

Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. *Id.* ("for tracking a change of the user from the first context to a second context of the network-based system …wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
>
> …
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which

includes computer-executable instructions for a method of managing data. This claim is directed

to instructions which act interactively with the user. The computer-executable instruction is able

to perform the function of "dynamically associating the data and the application with the second

user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and

system claim, the element "such that the user employs the application and data from the second

user workspace" must be a method step requiring user action. However, this is not the case. The

limitation refers to the interactive function of the computer-executable instructions is configured

to perform an action in response to certain user interactions. This does not require a user to

perform an action; rather the computer-executable instruction must only be configured to operate

in such as manner when a user does perform such an action. The functional nature of this claim

limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra*

at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1.

Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking
> change information associated with a change in access of the user from the first
> user workspace to a second user workspace, and dynamically storing the change
> information on the storage component as part of the metadata, wherein the user
> accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it

recites a functional claim limitation. The user is included in Claim 23 because the claim is

directed to an interactive system which interacts dynamically with the user while the user is

using the system. To this end the tracking component claimed is configured to perform the

function of tracking the user and dynamically updating the stored metadata responsive to when

63

the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

Furthermore, the sections of the claims referenced by Facebook are impossible to be read in a manner where it would include use of the system by a user. For example, in claim 1 the statement "wherein the user accesses the data from the second context" does not require use of the system in the claim by the user because the claimed system does not include a mechanism for accessing the data, rather the claim is directed to a context component and a tracking component. '761 Patent, Col. 20, l. 63 - Col. 21, l. 12. This is also true with claim 21 which states "such that the user employs the application and data from the second user workspace." The computer readable medium is not being used by the user because there is not computer readable medium which would allow the user to employ the application and data. *Id.*, Col. 22, ll. 46-67. This statement is also false for claim 23. The element "wherein the user accesses the data from the second user workspace" does not show use of the system in claim 23 because the system does

64

not disclose a mechanism for accessing the data, rather it includes a context component and tracking component. *Id.*, Col. 23, ll. 20-37.

28.   Facebook states that "[c]laims 1, 21 and 23 are strikingly similar in structure to the claim found invalid in *IPXL Holding*." D.I. 384 at 8. This fact is DISPUTED. The claim found indefinite in *IPXL Holding* has no similarities to claims 1, 21 and 23 because the claim in *IPXL Holding* recited both a claim element and method of using that element. 430 F.3d at 1384. The claim in questions was a clear example of claiming a system and a method of using that same system, with the claim at issue stating:

> The system of claim 2 [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the user uses the input means to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.

Id. (citing '055 Patent, Col. 22, ll. 8-13).

29.   Facebook states that "[c]laims 1 and 23 of the '761 patent follow the common structure of reciting two apparatus components (i.e. a 'context component' and a 'tracking component'), followed by the step that 'the user accesses the data from the second context' (claim 1) or 'the user accesses the data from the second user workspace' (claim 23)." D.I. 384 at 8. This fact is DISPUTED. Claims 1 and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

> Claim 1 states in part that:

> a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system ...wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.,* 191 F.3d at 1363; *see also Microprocessor Enhancement,* 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 23 also includes functional language which is similar to that found in claim 1. Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

Additionally, the sections of the claims referenced by Facebook are impossible to be read in a manner where it would include use of the system by a user. For example, in claim 1 the statement "wherein the user accesses the data from the second context" does not require use of the system in the claim by the user because the claimed system does not include a mechanism for accessing the data, rather the claim is directed to a context component and a tracking component. '761 Patent, Col. 20, l. 63 - Col. 21, l. 12. This is also true with claim 21 which states "such that

the user employs the application and data from the second user workspace." The computer readable medium is not being used by the user because there is not computer readable medium which would allow the user to employ the application and data. '761 Patent, Col. 22, ll. 46-67. This statement is also false for claim 23. The element "wherein the user accesses the data from the second user workspace" does not show use of the system in claim 23 because the system does not disclose a mechanism for accessing the data, rather it includes a context component and tracking component. *Id.*, Col. 23, ll. 20-37.

30.   Facebook states that "[b]oth claims therefore improperly combine statutory classes by reciting a step that must be performed by the user of the earlier claimed apparatus." D.I. 384 at 8. This fact is DISPUTED. Claims 1 and 23 do not include method step which must be performed by the user in the claim language, rather they describe functional limitations related to an interactive system.

> Claim 1 states in part that:

> a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but includes a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the

68

data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. ("for tracking a change of the user from the first context to a second context of the network-based system …wherein the user accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. The functional element of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 7-8.

Claim 23 also includes functional language which is similar to that found in claim 1. Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information

69

associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

In addition, the sections of the claims referenced by Facebook are impossible to be read in a manner where it would include use of the system by a user. For example, in claim 1 the statement "wherein the user accesses the data from the second context" does not require use of the system in the claim by the user because the claimed system does not include a mechanism for accessing the data, rather the claim is directed to a context component and a tracking component. '761 Patent, Col. 20, l. 63 - Col. 21, l. 12. This is also true with claim 21 which states "such that the user employs the application and data from the second user workspace." The computer readable medium is not being used by the user because there is not computer readable medium which would allow the user to employ the application and data. *Id.*, Col. 22, ll. 46-67. This statement is also false for claim 23. The element "wherein the user accesses the data from the second user workspace" does not show use of the system in claim 23 because the system does not disclose a mechanism for accessing the data, rather it includes a context component and tracking component. *Id.*, Col. 23, ll. 20-37.

70

31.   Facebook states that "[c]laim 21 is similarly deficient because it claims both computer-readable medium and a step requiring the use of that medium." D.I. 384 at 8. This fact is DISPUTED. Claim 21 recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with

71

an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

32.   Facebook states that "That claim recites a 'computer-readable medium for storing computer-executable instructions' that perform certain operations, but also claims the step that 'the user employs the application and data from the second user workspace.'" D.I. 384 at 8. This fact is DISPUTED. Claim 21 recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured

72

to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. See *supra* at 9-10.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

33.   Facebook states that "This claim therefore also improperly combines statutory classes by reciting a step that must be performed by the user of the claimed computer readable medium." D.I. 384 at. 8. This fact is DISPUTED. Claim 21 recites a proper claim limitation and does not combine statutory classes. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
>
> ...
>
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able

73

to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to mix a method and system claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case. The limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 9-10.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.
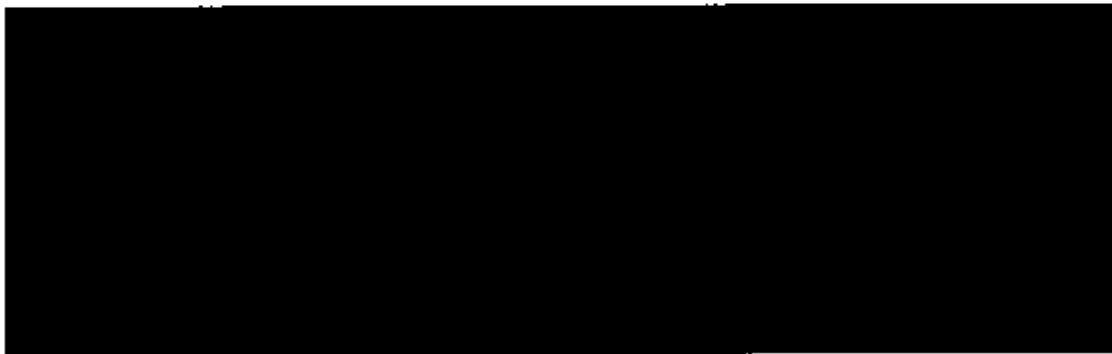
34. Facebook states that "[c]laims 1, 21 and 23 do not reasonably convey their scope to potential competitors because it is unclear what, if anything, would constitute infringement." D.I. 384 at 8. This fact is DISPUTED. Claims 1, 21 and 23 convey the scope of the claims and demonstrated by the ability of Facebook's invalidity expert to construe the claims for validity purposes. *See* Greenberg Report. Facebook's motion is nothing more than a rehash of its non-infringement arguments, and is not an invalidity argument. Facebook's motion is a rehash of the opinion provided by its **non-infringement expert**, Dr. Kearns, in rebuttal to the infringement

opinion of Dr. Vigna. Dr. Vigna opined that claim 1 of the '761 Patent was infringed by the Facebook Website. *See supra* at 3-4.

Facebook's non-infringement expert attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna opinion regarding claim 1, that:

Kearns Report, ¶ 67.

Kearns Report, ¶ 69.

In regards to claim 21, Dr. Vigna states in his expert report that the claim was infringed by the Facebook Website. See *supra* at 38-39. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶ 119.

In regards to claim 23, Dr. Vigna states in his expert report that the claim was infringed by the Facebook Website. *See supra* at 40-41. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶129.

Further supporting this position that this motion is simply a restatement of Facebook's non-infringement position is that Facebook's expert on invalidity, Dr. Greenberg, does not discuss the supposed hybrid nature of the claims of the '761 Patent. Furthermore, Facebook's position that these claims are hybrid, and indefinite as a result, is disingenuous as Facebook has put forward considerable evidence to show that a person of ordinary skill in the art would understand the claim language, as shown from the invalidity expert report from Dr. Greenberg. *See* Greenberg Report. Dr. Greenberg was able to prepare an invalidity expert report applying several pieces of prior art to the claims without apparent problem. *See id.*

Moreover, Claims 1, 21, and 23 are not hybrid claims, are not indefinite, and do not

purport cover either an apparatus or computer medium and a method of using it. Facebook states

that claims 1, 21, and 23 are so called "hybrid claims," and as a result are indefinite. A claim is

indefinite only if a person of skill in the art is not reasonably apprised of its scope. *IPXL*

Holdings, 430 F.3d at 1383-84.

Under *IPXL Holdings*, a claim is only a hybrid if it indisputably mixes an apparatus and a

method of using the apparatus in one claim. 430 F.3d at 1384. Claims 1, 21, and 23 do not

include a method step with the claim language, rather they describe functional limitations related

to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for
tracking a change of the user from the first context to a second context of the
network-based system and dynamically updating the stored metadata based on the
change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring

the user to use the system, but a functional claim limitation. The user is included in Claim 1

because the claim is directed to an interactive system which is designed to interact dynamically

in response to the user. To this end, the claim includes references to the user and how the system

is configured to react based on specific user actions. For example, the claim includes a tracking

component which performs a function of tracking the user as the user moves and dynamically

updating the stored metadata based on the change when the user accesses the data from a second

context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions

responsive to the user accessing the data from the second context. ("for tracking a change of the

user from the first context to a second context of the network-based system …wherein the user

accesses the data from the second context."). The claim does not require the user to perform any step or action, rather only requires a system which responds to user action. Courts have repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520 F.3d at 1375 ("Functional language may also be employed to limit the claims without using the means-plus-function format."). As a result, claim 1 includes a functional limitation and not a method step. Further demonstrating this is the analysis of Dr. Vigna in reference to this claim element. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this includes a method step performed by the user ignores the claim's plain language. Claim 21 states in part:

> 21. A computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to be a hybrid claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case because the limitation refers to the interactive function of the computer-executable instructions is

configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. In regards to claim 21, Dr. Vigna describes in his expert report the functional nature of this claim. See *supra* at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1. Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.
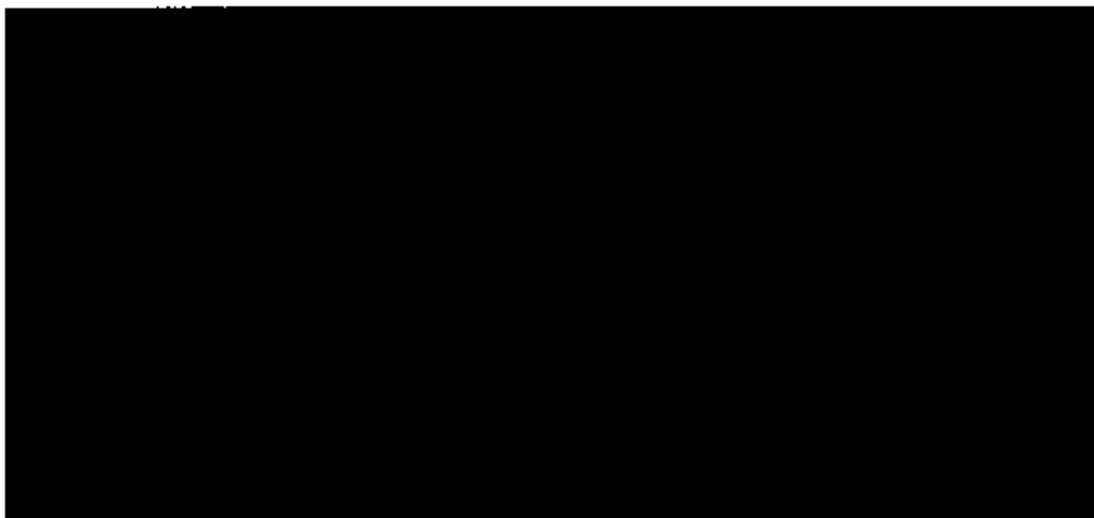
'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. See *supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. See *supra* at 12-13. Further supporting the position that these

79

claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

35. Facebook states that "[a]s with the claim rejected in *IPXL Holdings,* it is unclear whether claims 1, 21 and 23 are infringed by the mere making, using or selling of the claimed network-based system or computer readable medium, or if infringement occurs only when an end-user actually accesses the data from the second context or user workspace of such system or medium." D.I. 384 at 8-9. This fact is DISPUTED. These claims are readibly understood by a person of ordinary skill in the art. Facebook's motion is nothing more than a rehash of its non-infringement arguments, and is not an invalidity argument. Facebook's motion is a rehash of the opinion provided by its *non-infringement expert,* Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. Dr. Vigna opined that claim 1 was infringed by the Facebook Website. *See supra* at 3-4.

Facebook's non-infringement expert attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna opinion regarding claim 1, that:

Kearns Report, ¶ 67.

80

Kearns Report, ¶ 69.

In regards to claim 21, Dr. Vigna states in his expert report that the claim was infringed by the Facebook Website. *See supra* at 38-39. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶ 119.

In regards to claim 23, Dr. Vigna states in his expert report that the claim was infringed by the Facebook Website. *See supra* at 40-41. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶129.

Further supporting this position that this motion is simply a restatement of Facebook's non-infringement position is that Facebook's expert on invalidity, Dr. Greenberg, does not discuss the supposed hybrid nature of the claims of the '761 Patent. Furthermore, Facebook's position that these claims are hybrid, and indefinite as a result, is disingenuous as Facebook has put forward considerable evidence to show that a person of ordinary skill in the art would understand the claim language, as shown from the invalidity expert report from Dr. Greenberg. *See* Greenberg Report. Dr. Greenberg was able to prepare an invalidity expert report applying several pieces of prior art to the claims without apparent problem. *See id.*

Moreover, Claims 1, 21, and 23 are not hybrid claims, are not indefinite, and do not purport cover either an apparatus or computer medium and a method of using it. Facebook states that claims 1, 21, and 23 are so called "hybrid claims," and as a result are indefinite. A claim is indefinite only if a person of skill in the art is not reasonably apprised of its scope. *IPXL Holdings*, 430 F.3d at 1383-84.

Under *IPXL Holdings*, a claim is only a hybrid if it indisputably mixes an apparatus and a method of using the apparatus in one claim. 430 F.3d at 1384. Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring

the user to use the system, but a functional claim limitation. The user is included in Claim 1

because the claim is directed to an interactive system which is designed to interact dynamically

in response to the user. To this end, the claim includes references to the user and how the system

is configured to react based on specific user actions. For example, the claim includes a tracking

component which performs a function of tracking the user as the user moves and dynamically

updating the stored metadata based on the change when the user accesses the data from a second

context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions

responsive to the user accessing the data from the second context. ("for tracking a change of the

user from the first context to a second context of the network-based system …wherein the user

accesses the data from the second context."). The claim does not require the user to perform any

step or action, rather only requires a system which responds to user action. Courts have

repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-

function context. *See K-2 Corp.,* 191 F.3d at 1363; *see also Microprocessor Enhancement,* 520

F.3d at 1375.("Functional language may also be employed to limit the claims without using the

means-plus-function format."). As a result, claim 1 includes a functional limitation and not a

method step. Further demonstrating this is the analysis of Dr. Vigna in reference to this claim

element. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this

includes a method step performed by the user ignores the claim's plain language. Claim 21

states in part:

> 21. A computer-readable medium for storing computer-executable instructions for
> a method of managing data, the method comprising:

83

> dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which includes computer-executable instructions for a method of managing data. This claim is directed to instructions which act interactively with the user. The computer-executable instruction is able to perform the function of "dynamically associating the data and the application with the second user workspace in the metadata." *Id.,* Col. 22, ll. 61-62. In order for this to be a hybrid claim, the element "such that the user employs the application and data from the second user workspace" must be a method step requiring user action. However, this is not the case because the limitation refers to the interactive function of the computer-executable instructions is configured to perform an action in response to certain user interactions. This does not require a user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. In regards to claim 21, Dr. Vigna describes in his expert report the functional nature of this claim. *See supra* at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1.

Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.
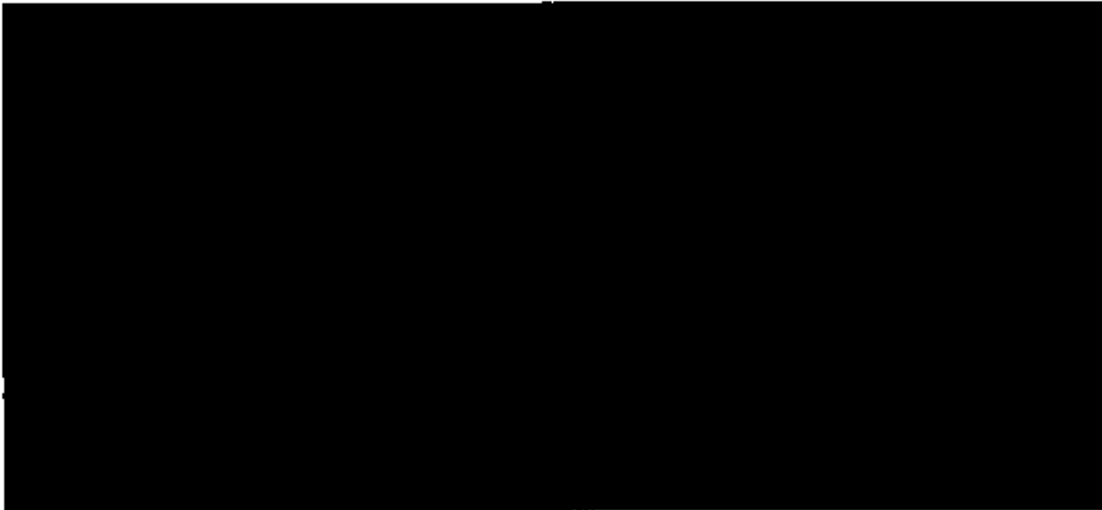
'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is

directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.
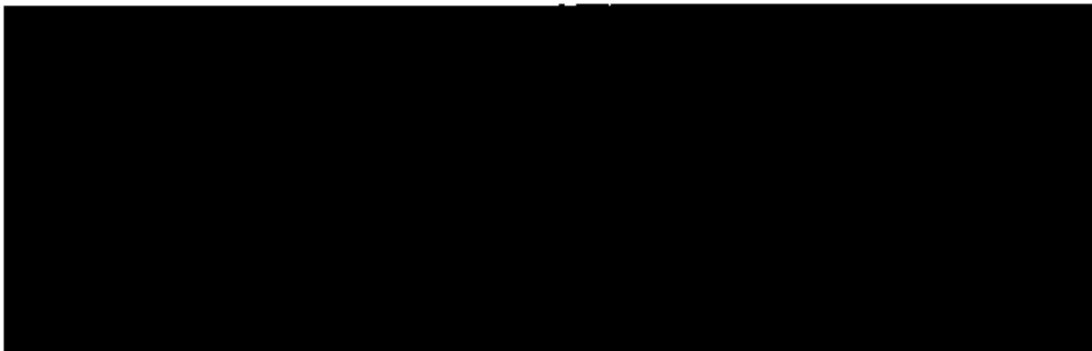
Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

36.   Facebook states that "[a]s in *IPXL Holdings*, because of the combination of two separate statutory classes of invention within a single claim, a manufacturer or seller of the apparatus or computer-readable medium of claims 1, 21 or 23 of the '761 patent 'would not know from the claim whether it might also be liable for contributory infringement because a buyer or user of the apparatus later performs the claimed method of using the apparatus.'" D.I. 384 at 9. This fact is DISPUTED. The claims do not require the user to perform any action to be infringed. Facebook's Motion is nothing more than a rehash of its non-infringement arguments, and is not an invalidity argument. Facebook's Motion is a rehash of the opinion provided by its

non-infringement expert, Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. Dr.

Vigna opinioned that Claim 1 was infringed by the Facebook Website. See *supra* at 3-4.

Facebook's non-infringement expert attempted to rebut Leader's infringement position with the

same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an

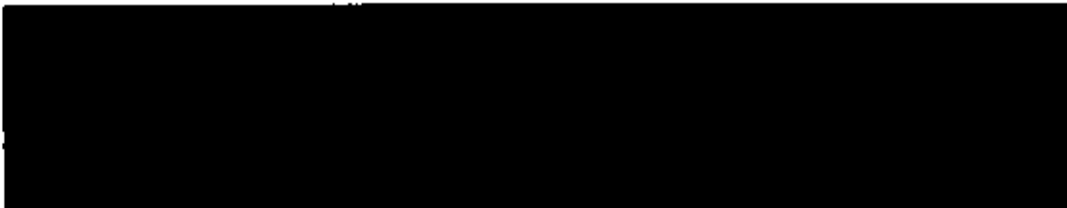attempt to rebut Dr. Vigna opinion regarding claim 1, that:

Kearns Report, ¶ 67.

Kearns Report, ¶ 69.

In regards to claim 21, Dr. Vigna states in his expert report that the claim was infringed.

See *supra* at 38-39. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶ 119.

In regards to claim 23, Dr. Vigna states in his expert report that the claim was infringed. See *supra* at 40-41. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶ 129.

Further supporting this position that this motion is simply a restatement of Facebook's non-infringement position is that Facebook's expert on invalidity, Dr. Greenberg, does not discuss the supposed hybrid nature of the claims of the '761 Patent. Furthermore, Facebook's position that these claims are hybrid, and indefinite as a result, is disingenuous as Facebook has put forward considerable evidence to show that a person of ordinary skill in the art would understand the claim language, as shown from the invalidity expert report from Dr. Greenberg. *See* Greenberg Report. Dr. Greenberg was able to prepare an invalidity expert report applying several pieces of prior art to the claims without apparent problem. *See id.*

Moreover, Claims 1, 21, and 23 are not hybrid claims, are not indefinite, and do not

87

purport cover either an apparatus or computer medium and a method of using it. Facebook states that claims 1, 21, and 23 are so called "hybrid claims," and as a result are indefinite. A claim is indefinite only if a person of skill in the art is not reasonably apprised of its scope. *IPXL Holdings*, 430 F.3d at 1383-84.

Under *IPXL Holdings*, a claim is only a hybrid if it indisputably mixes an apparatus and a method of using the apparatus in one claim. 430 F.3d at 1384. Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. *Id.* ("for tracking a change of the user from the first context to a second context of the network-based system ... wherein the user accesses the data from the second context."). The claim does not require the user to perform

any step or action, rather only requires a system which responds to user action. Courts have

repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-

function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520

F.3d at 1375 ("Functional language may also be employed to limit the claims without using the

means-plus-function format."). As a result, claim 1 includes a functional limitation and not a

method step. Further demonstrating this is the analysis of Dr. Vigna in reference to this claim

element. *See supra* at 7-8.

Claim 21 similarly recites a proper claim limitation. Facebook's position that this

includes a method step performed by the user ignores the claim's plain language. Claim 21

states in part:

> 21. A computer-readable medium for storing computer-executable instructions for
> a method of managing data, the method comprising:
> ...
> dynamically associating the data and the application with the second user
> workspace in the metadata such that the user employs the application and data
> from the second user workspace.

'761 Patent, Col. 22, ll. 46-63.

As can be seen by the claim, Claim 21 is directed to a computer readable medium which

includes computer-executable instructions for a method of managing data. This claim is directed

to instructions which act interactively with the user. The computer-executable instruction is able

to perform the function of "dynamically associating the data and the application with the second

user workspace in the metadata." *Id.*, Col. 22, ll. 61-62. In order for this to be a hybrid claim,

the element "such that the user employs the application and data from the second user

workspace" must be a method step requiring user action. However, this is not the case because

the limitation refers to the interactive function of the computer-executable instructions is

configured to perform an action in response to certain user interactions. This does not require a

user to perform an action; rather the computer-executable instruction must only be configured to operate in such as manner when a user does perform such an action. In regards to claim 21, Dr. Vigna describes in his expert report the functional nature of this claim. *See supra* at 9-10.

Claim 23 also includes functional language which is similar to that found in claim 1.

Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace, and dynamically storing the change information on the storage component as part of the metadata, wherein the user accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it recites a functional claim limitation. The user is included in Claim 23 because the claim is directed to an interactive system which interacts dynamically with the user while the user is using the system. To this end the tracking component claimed is configured to perform the function of tracking the user and dynamically updating the stored metadata responsive to when the user accesses the data from a second user workspace. This is demonstrated by the claim language which recites that the tracking component is "for tracking change information associated with a change in access of the user from the first user workspace to a second user workspace" and "wherein the user accesses the data from the second user workspace." The functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner

90

specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

37.   Facebook states that "[c]laims 4, 7, 25, 31 and 32 are therefore indefinite for the same reasons as claims 1 and 23 discussed above." D.I. 384 at 9. This fact is DISPUTED. The claims do not require the user to perform any action to be infringed. Facebook's motion is nothing more than a rehash of its non-infringement arguments, and is not an invalidity argument. Furthermore, because claims 1 and 23 are not indefinite, claims dependant there from are not indefinite. Facebook's motion is a rehash of the opinion provided by its *non-infringement expert*, Dr. Kearns, in rebuttal to the infringement opinion of Dr. Vigna. Specifically, and using claim 1 as an example Dr. Vigna opined that the claim was infringed by the Facebook Website. *See supra* at 3-4. Facebook's non-infringement expert attempted to rebut Leader's infringement position with the same arguments which are made in Facebook's Brief. Dr. Kearns stated in his report in an attempt to rebut Dr. Vigna opinion regarding claim 1, that:
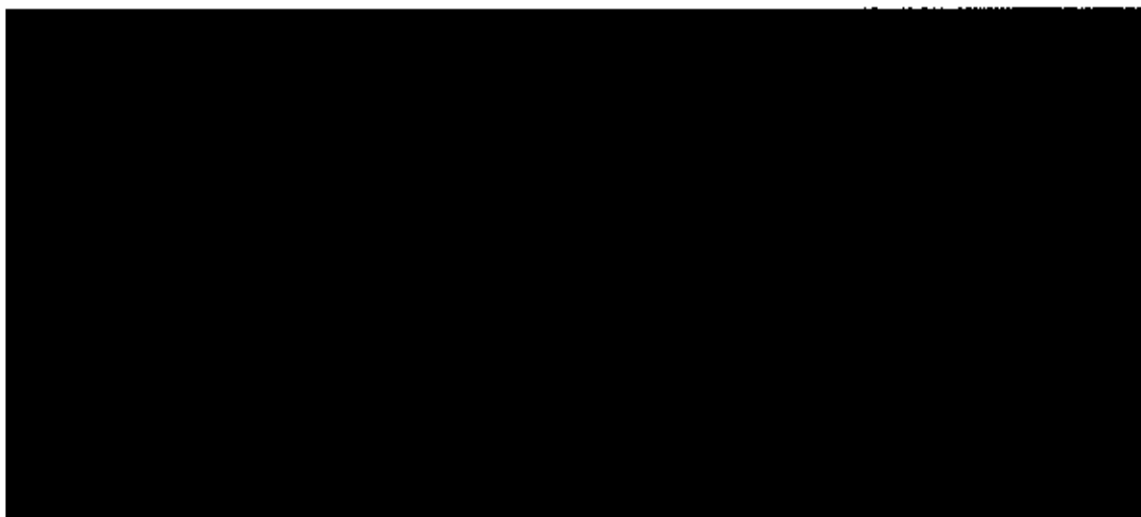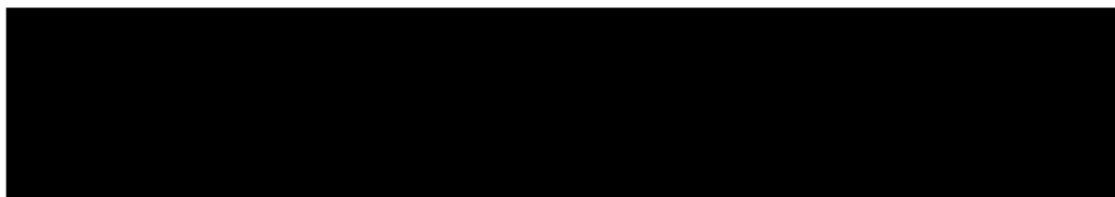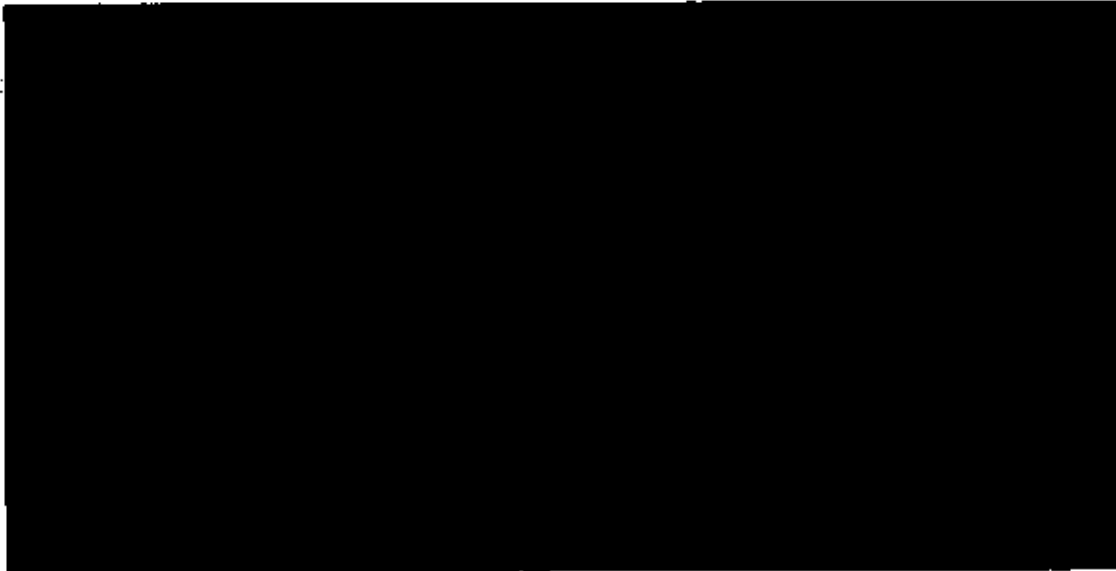

Kearns Report, ¶ 67.

Kearns Report, ¶ 69.

In regards to claim 23, Dr. Vigna states in his expert report that the claim was infringed by the Facebook Website. <u>See</u> *supra* at 11-12. Dr. Kearns' response to this infringement argument was that:

Kearns Report, ¶ 129.

Further supporting this position that this motion is simply a restatement of Facebook's non-infringement position is that Facebook's expert on invalidity, Dr. Greenberg, does not discuss the supposed hybrid nature of the claims of the '761 Patent. Furthermore, Facebook's position that these claims are hybrid, and indefinite as a result, is disingenuous as Facebook has put forward considerable evidence to show that a person of ordinary skill in the art would understand the claim language, as shown from the invalidity expert report from Dr. Greenberg. *See* Greenberg Report. Dr. Greenberg was able to prepare an invalidity expert report applying several pieces of prior art to the claims without apparent problem. *See id.*

Moreover, Claims 1, 21, and 23 are not hybrid claims, are not indefinite, and do not purport cover either an apparatus or computer medium and a method of using it. Facebook states that claims 1, 21, and 23 are so called "hybrid claims," and as a result are indefinite. A claim is indefinite only if a person of skill in the art is not reasonably apprised of its scope. *IPXL Holdings*, 430 F.3d at 1383-84.

Under *IPXL Holdings*, a claim is only a hybrid if it indisputably mixes an apparatus and a method of using the apparatus in one claim. 430 F.3d at 1384. Claims 1, 21, and 23 do not include a method step with the claim language, rather they describe functional limitations related to an interactive system.

Claim 1 states in part that:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

'761 Patent, Col. 21, ll. 7-12.

Contrary to Facebook's assertion, Claim 1 does not include a method limitation requiring the user to use the system, but a functional claim limitation. The user is included in Claim 1 because the claim is directed to an interactive system which is designed to interact dynamically in response to the user. To this end, the claim includes references to the user and how the system is configured to react based on specific user actions. For example, the claim includes a tracking component which performs a function of tracking the user as the user moves and dynamically updating the stored metadata based on the change when the user accesses the data from a second context. *Id.* Claim 1 only requires a system which, when in use, performs certain actions responsive to the user accessing the data from the second context. *Id.* ("for tracking a change of the user from the first context to a second context of the network-based system ...wherein the

user accesses the data from the second context."). The claim does not require the user to perform

any step or action, rather only requires a system which responds to user action. Courts have

repeatedly found these sorts of functional claim limitations acceptable outside of a means-plus-

function context. *See K-2 Corp.*, 191 F.3d at 1363; *see also Microprocessor Enhancement*, 520

F.3d at 1375 ("Functional language may also be employed to limit the claims without using the

means-plus-function format."). As a result, claim 1 includes a functional limitation and not a

method step. Further demonstrating this is the analysis of Dr. Vigna in reference to this claim

element. *See supra* at 7-8.

Claim 23 also includes functional language which is similar to that found in claim 1.

Claim 23 states in part:

> a computer-implemented tracking component of the web-based server for tracking
> change information associated with a change in access of the user from the first
> user workspace to a second user workspace, and dynamically storing the change
> information on the storage component as part of the metadata, wherein the user
> accesses the data from the second user workspace.

'761 Patent, Col. 23, ll. 31-37.

Contrary to Facebook's assertion, Claim 23 does not include a method limitation; rather it

recites a functional claim limitation. The user is included in Claim 23 because the claim is

directed to an interactive system which interacts dynamically with the user while the user is

using the system. To this end the tracking component claimed is configured to perform the

function of tracking the user and dynamically updating the stored metadata responsive to when

the user accesses the data from a second user workspace. This is demonstrated by the claim

language which recites that the tracking component is "for tracking change information

associated with a change in access of the user from the first user workspace to a second user

workspace" and "wherein the user accesses the data from the second user workspace." The

functional nature of this claim limitation can be seen from the analysis of Leader's infringement expert, Dr. Vigna. *See supra* at 11-12.

Furthermore, and similar to almost all cases in which *IPXL Holdings* has been raised with an attempt to invalidate claims for indefiniteness, the limitations at issue in the '761 Patent are functional and the claims valid. *See supra* at 12-13. Further supporting the position that these claims are valid and do not include a system and a step for using it is that the examiner specifically requested the limitation before permitting allowance and would not request a limitation contrary to the MPEP. *See supra* at 13.

III. CONCLUSION

For the reasons noted above, Facebook's motion for summary judgment of invalidity based on indefiniteness is based on disputed issues of material fact, and should be denied.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

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

Dated: June 4, 2010
969396

By: /s/ Philip A. Rovner
       Philip A. Rovner (#3215)
       Jonathan A. Choa (#5319)
       Hercules Plaza
       P.O. Box 951
       Wilmington, DE 19899
       (302) 984-6000
       provner@potteranderson.com
       jchoa@potteranderson.com

Attorneys for Plaintiff
Leader Technologies, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on June 11, 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 11, 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