

[Dockets.Justia.com](http://Dockets.Justia.com)

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	1
II. COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS .....	1
III. CONCLUSION .....	34

## **TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b>CASES</b>	
<i>American Patent Development Corp. v. Movielink, LLC</i> , 637 F. Supp. 2d 224 (D. Del. 2009) .....	Passim
<b>STATUTES AND RULES</b>	
35 U.S.C. § 271 .....	2
Fed.R. Civ. P. 56.....	1

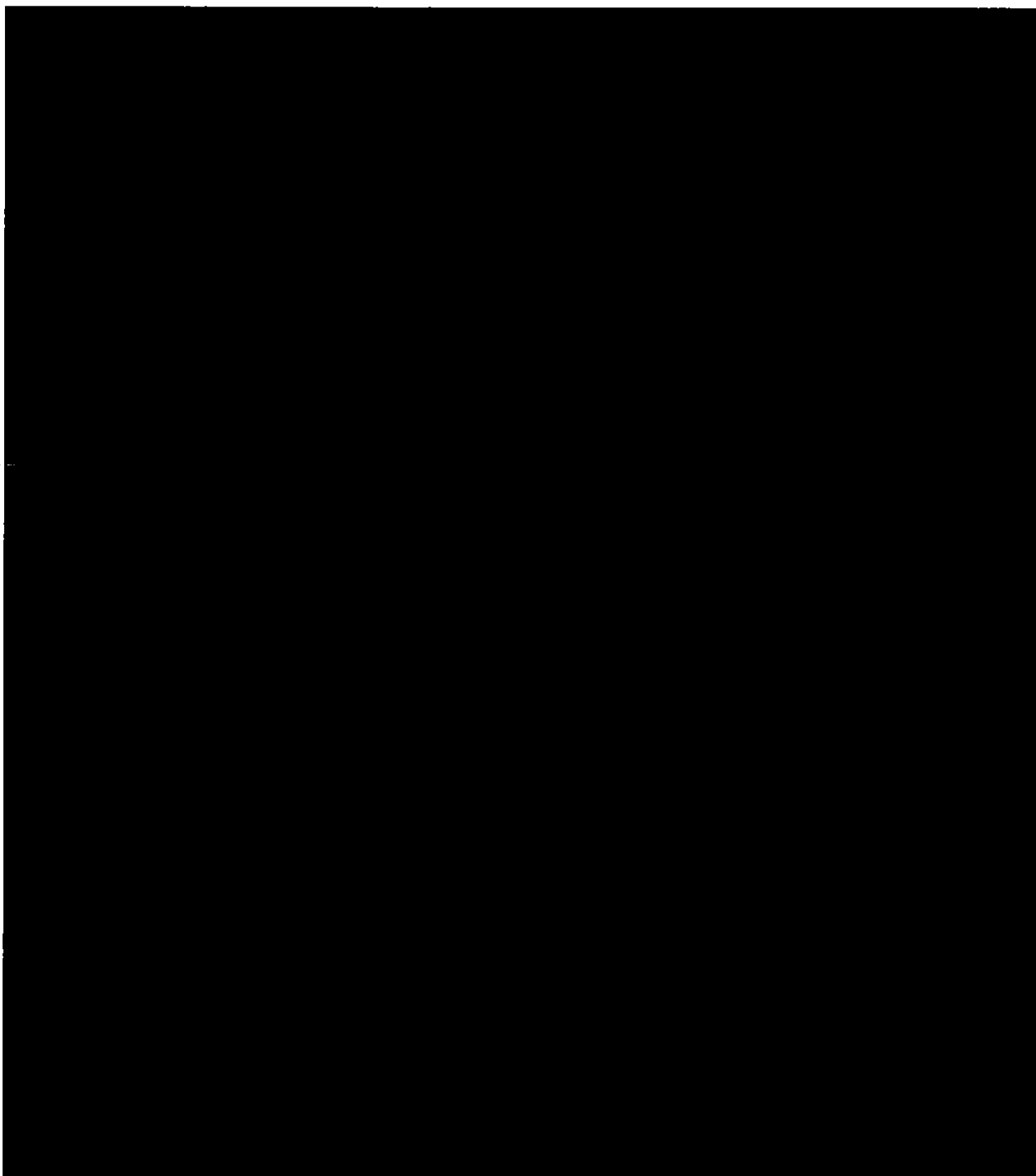
## **I. INTRODUCTION**

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 Non-infringement and No Damages (D.I. 411). 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 for summary judgment of Non-infringement and No Damages is based on these disputed issues of material fact, Facebook's motion should be denied.

## **II. COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS**

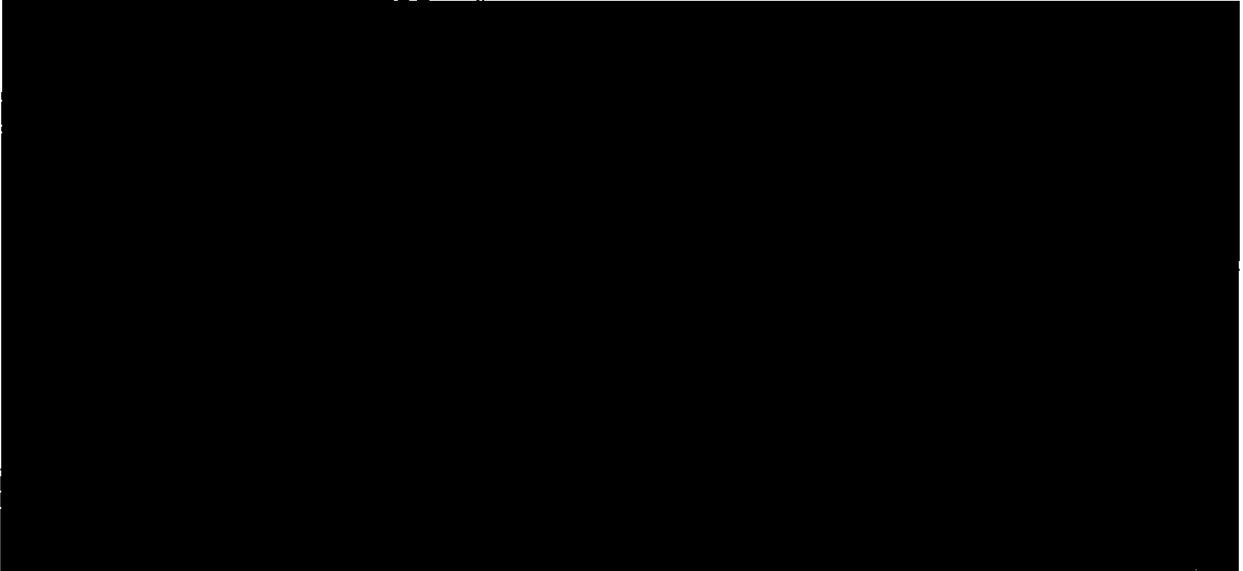
1. Facebook states that it does not infringe U.S. Patent No. 7,139,761 ("761 Patent") "...because each asserted claim recites elements and actions that must be performed -- if at all -- by both Facebook and third party end-users." D.I. 411 at 1. The asserted fact that each Claim recites elements requiring performance by third party end-users is DISPUTED. Dr. Vigna, Leader's expert on infringement, states [REDACTED]



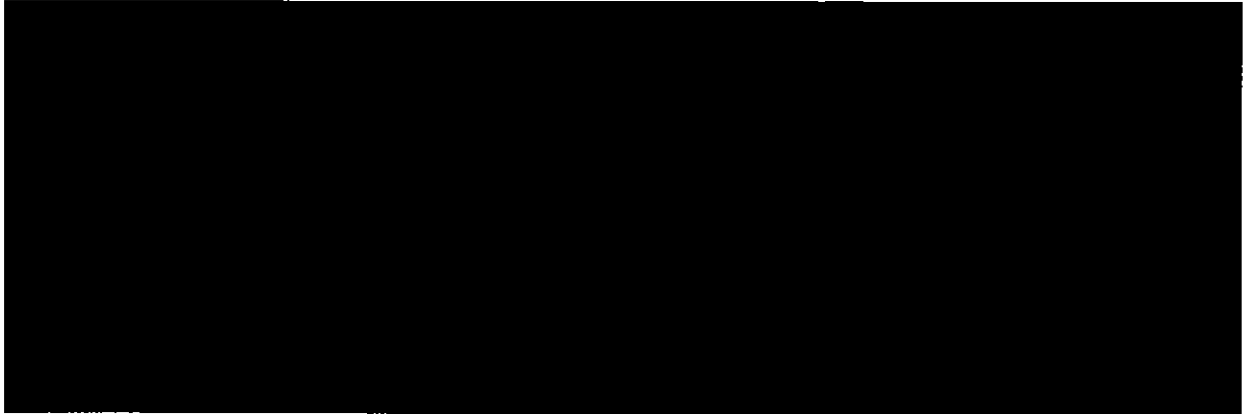
Leader also DISPUTES facts offered as “undisputed” which support a contention that Facebook did not control or direct its users.<sup>1</sup> See D.I. 388, Ex. B, Vigna Report at ¶ 132 (stating

---

<sup>1</sup> In addition, because Facebook is asserting this theory as a defense to infringement, and because the facts must be viewed in a light most favorable to the non-moving party, Leader does not

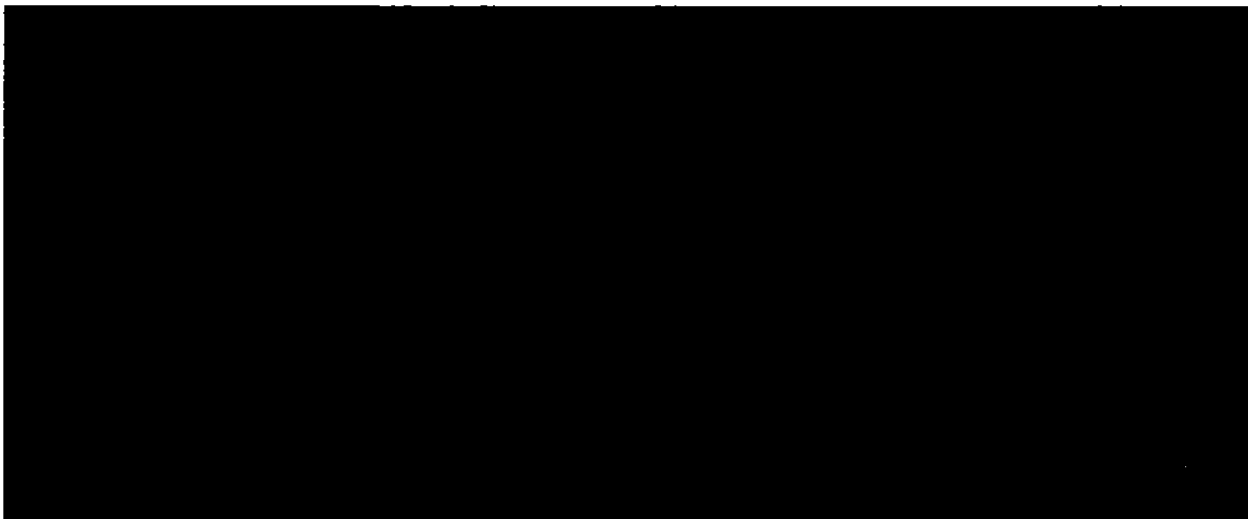


It appears that Facebook is not contesting infringement on its part when asserting a divided infringement defense, at least for the purposes of its motion, rather only non-infringement of those elements it asserts require the participation of a “third party end-user.” *See generally*, D.I. 411. That is to say, because the third party end-user is not under the “control and direction” of Facebook, thereby negating vicarious liability in Facebook’s opinion, there is no direct infringement of the claims due to this singular failure. Accepting this stipulation, there are at least genuine issues of material facts in dispute as to whether Facebook has sufficient “control and direction” of such end-users.



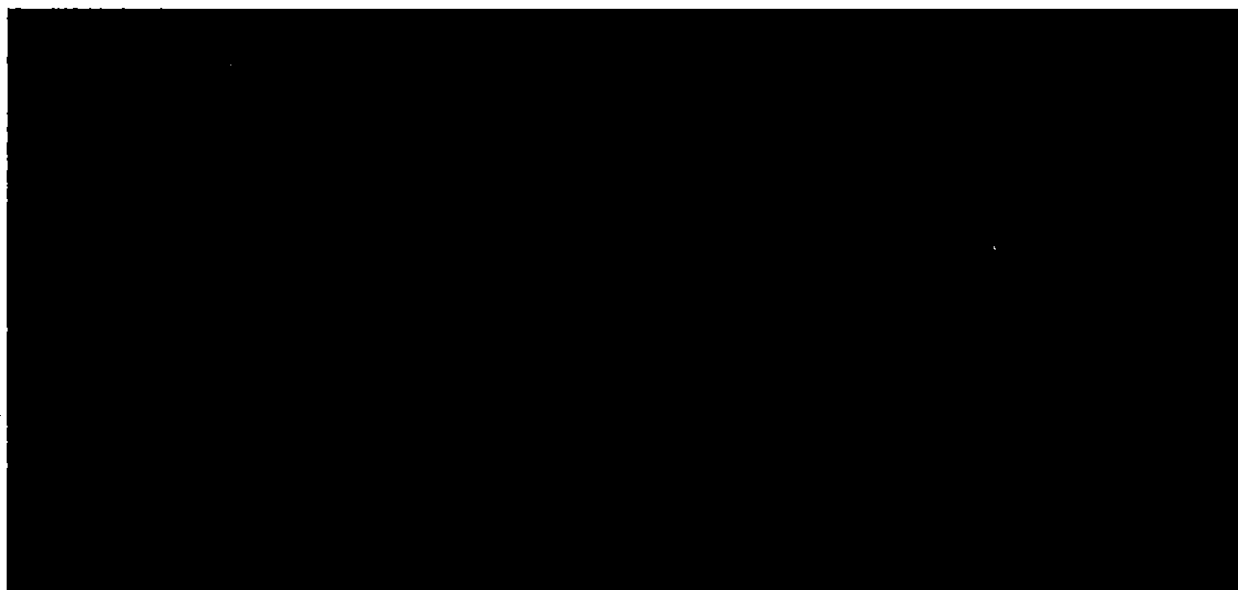
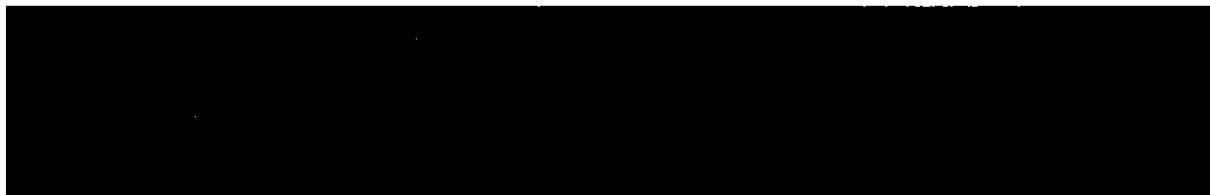
---

believe that Facebook has met its burden to justify bringing a summary judgment motion on the matter.



2. Facebook states that all of the asserted claims can only be infringed by Facebook when combined with end-users. D.I. 411 at 1. As noted above, such an asserted fact is DISPUTED. Facebook assumes the asserted claims cannot be read in any other fashion but to impute such divided infringement by Facebook and its end-users. This is not the case, as Dr.

Vigna states



Leader DISPUTES Facebook's contrary assertions based on the pleadings and testimony of Facebook itself.

[REDACTED]

[REDACTED] Genuine issues of material fact thus exist in regard to whether or not Facebook infringes any of the '761 Patent method Claims under joint infringement. A dispute also exists as to whether Facebook is liable under divided infringement.

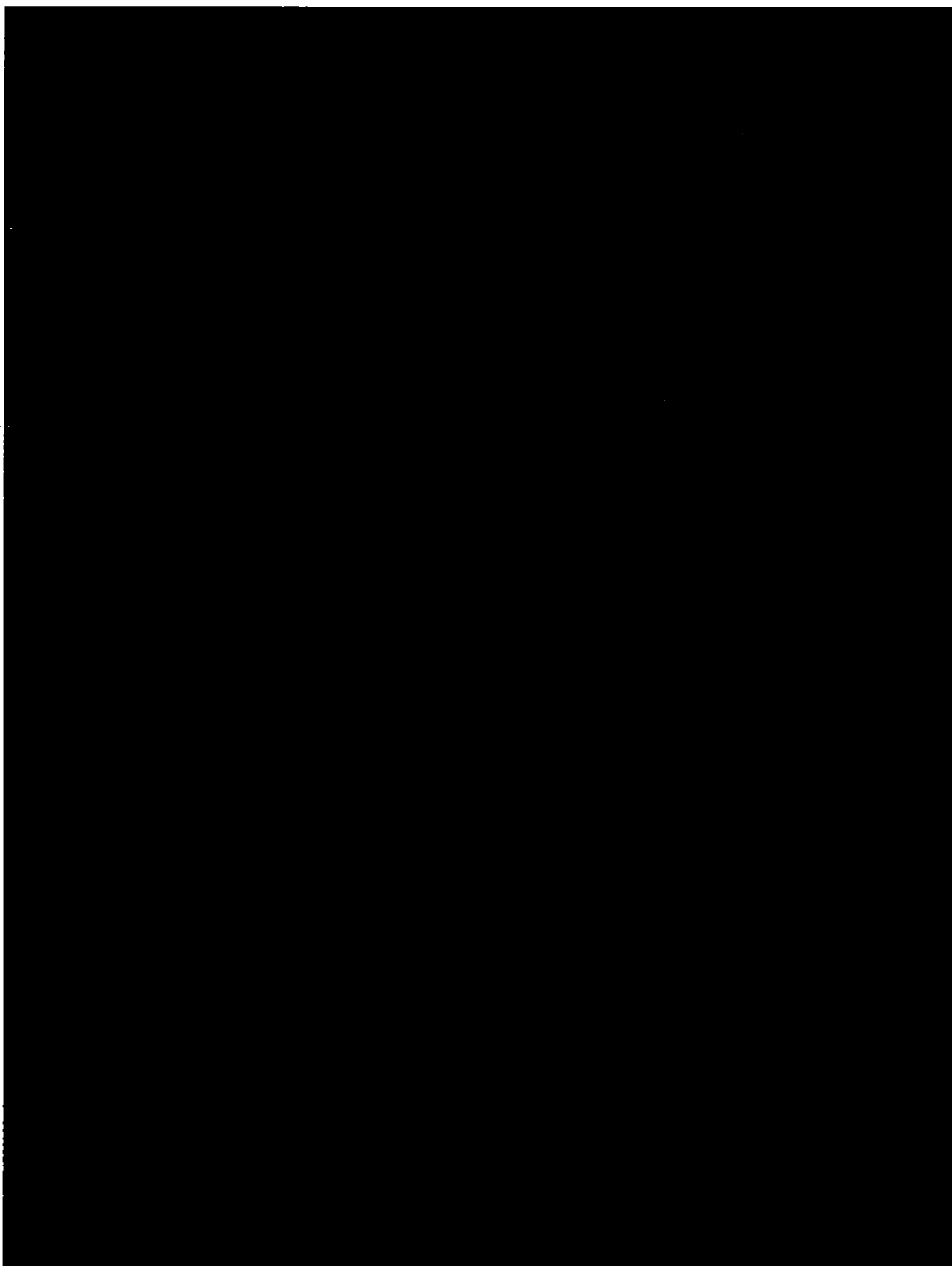
3. Facebook states that the '761 Patent "purports" to disclose certain information. D.I. 411 at 1. Leader DISPUTES this statement of fact that the '761 Patent "purports" to disclose anything. The '761 Patent is entitled to an assumption of validity, and is assumed correct in what it claims until proven otherwise by clear and convincing evidence. Thus a genuine issue of material fact exists in what the '761 Patent "purports" to disclose.

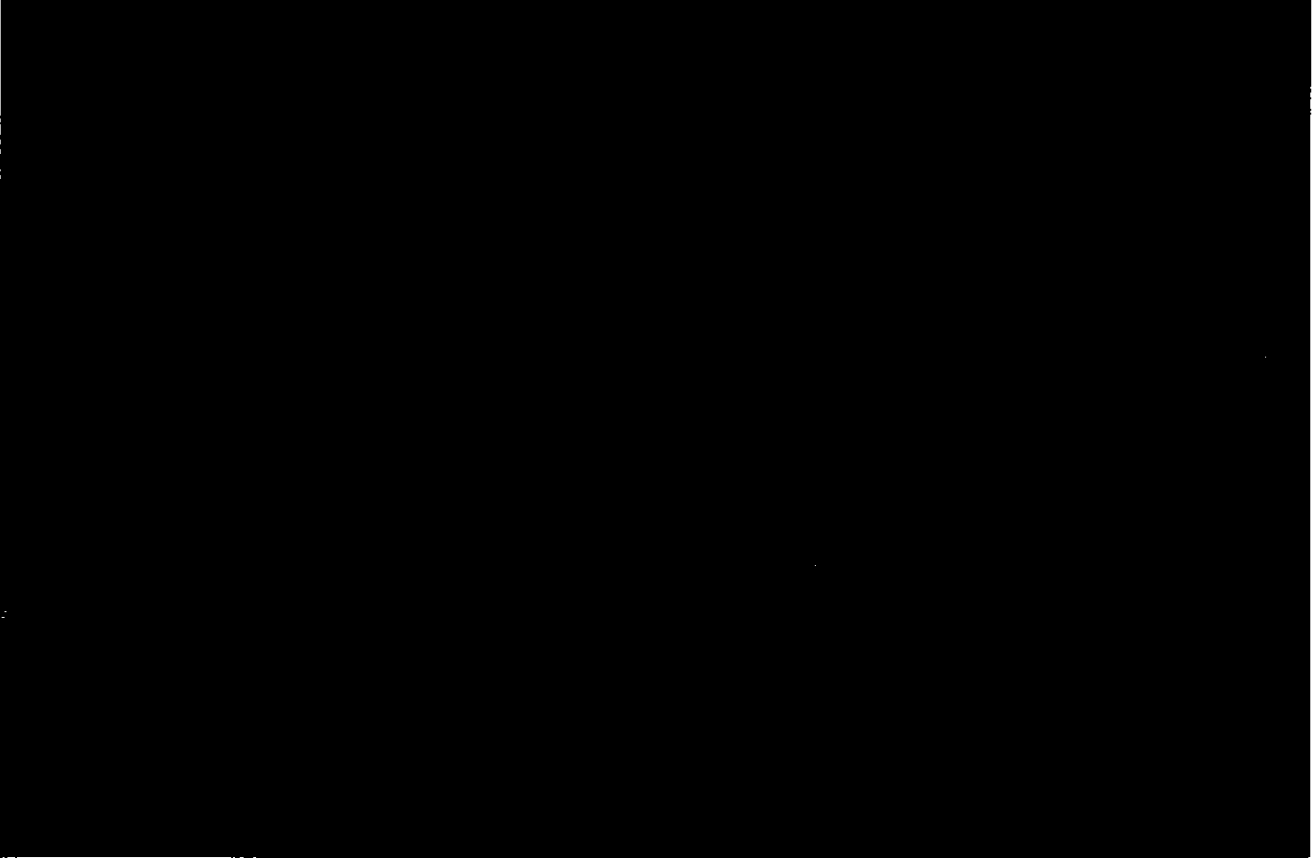
4. Facebook states that "The patent further claims that the invention relates to "structures and methods for creating relationships between users, applications, files, and folders." This fact is DISPUTED to the extent that it takes quotes out of context. Rather than the "claims," this quote was taken from the "Technical Field" section of the specification.

5. Facebook states that "As shown below, each of the four asserted independent claims of the '761 Patent recites steps or structures that must be performed by at least two distinct actors: (1) Facebook and its computer systems; and (2) a Facebook end-user." D.I. 411 at 2. Leader DISPUTES these facts because Facebook assumes the asserted claims can not be read in any other fashion but to impute such divided infringement by Facebook and its end-users. [REDACTED]


[REDACTED]







*Id.* at ¶ 22. In short, Facebook controls the infringing software at issue. *See generally, American Patent Dev. Corp. v. Movielink, LLC*, 637 F. Supp. 2d 224 (D. Del. 2009). Like in *American Patent Development*, the accused product in this case is software. *Id.* at 227. In that case, as here, defendant argued that it did “not control its customers’ computers, or the software running on them.” *Id.* at 235. Here, Facebook is essentially arguing the same thing -- that it did and does not control its customers’ use of the Facebook software. In fact, Dr. Vigna opines to the

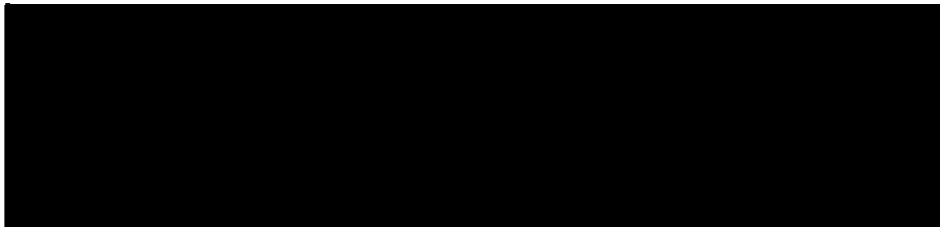


D.I. 388, Ex. B, Expert Report of Vigna at ¶ 132. A genuine issue of material fact is in dispute as to whether or not Facebook can even assert a divided infringement defense, in addition to whether or not Facebook controls its users’ utilization of the Facebook software.

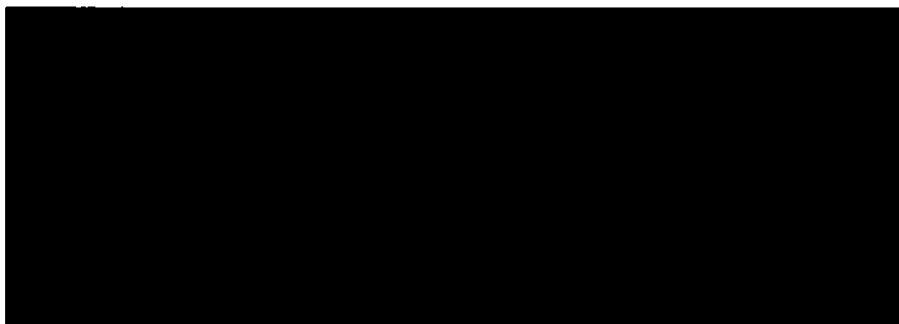
6. Facebook states that “Claim 9 covers a method of managing data....” D.I. 411 at 2. Leader DISPUTES this incomplete description to the extent Facebook is alleging this is an undisputed fact. Claim 9 is “A computer-implemented method of managing data, comprising computer-executable acts of....” This claim undeniably describes, by way of the preamble, a computer system that assumes the existence of data for which to manage.

7. Facebook states that Claim 9 “claims a specific action that must be performed an end-user of that platform....” (emphasis in original). D.I. 411 at 3. In addition, Facebook states that Claim 9 “requires combined action by both the user and the web-based computing platform.”

Leader DISPUTES these assertions of fact. As Dr. Vigna states:



D.I. 388, Ex. B, Expert Report of Vigna at ¶ 128 (emphasis added). For example, the Claim 9 preamble recites “A computer-implemented method of managing data, comprising computer-executable acts of....” With regard to Claim 9, Dr. Vigna further states:



*Id.* at ¶ 182. This is in direct contradiction to Facebook’s assertion that the website does not perform this function. Dr. Vigna bases his opinion on Facebook’s infringement of this Claim on the source code (including the revision history of the source code as found in the subversion database), LTI 156938 - 156940, LTI 156978 - 156981, LTI 156982 - 156987 and LTI 156988 -

156989, LTI 157151-61, FB00109170-90, FB00109984-7, FB00113746-50, FB00109988-9, FB00113761-4, FB00113845-6, FB00109790-2, FB00109835, FB00109836-8, FB00109855-69, FBSC0001151-4, FBSC0001155-61, FB00109907-8, FB00109972, FB00113839-42, FB00109495-525, FB00129626-9, FBSC0000821-2, FB00113847, FB00109919, FBSC0001138, FBSC0001164, FB00113881-95, FB00113896-910, FB00110138-9, FB00110140-41, FB00111063, FB00113968 and FB00110153, LTI 157102, LTI 157113, LTI 157128, LTI 157133, LTI 157134, LTI 157135, LTI 157136, and LTI 157137.

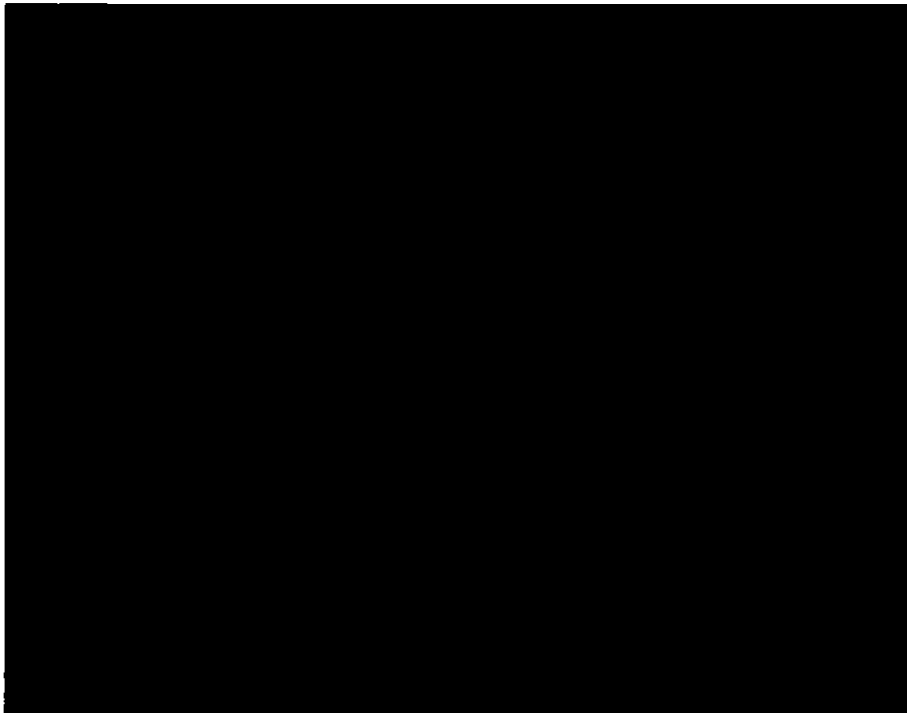
Facebook controls the infringing software at issue. *See generally American Patent Dev. Corp. v. Movielink, LLC*, 637 F. Supp. 2d 224 (D. Del. 2009). Like in *American Patent Development*, the accused product in this case is software. *Id.* at 227. In that case, as here, defendant argued that it did “not control its customers’ computers, or the software running on them.” *Id.* at 235. Here, Facebook is essentially arguing the same thing -- that it did and does not control its customers’ use of the Facebook software. In fact, Dr. Vigna [REDACTED]

of Vigna at ¶ 132.

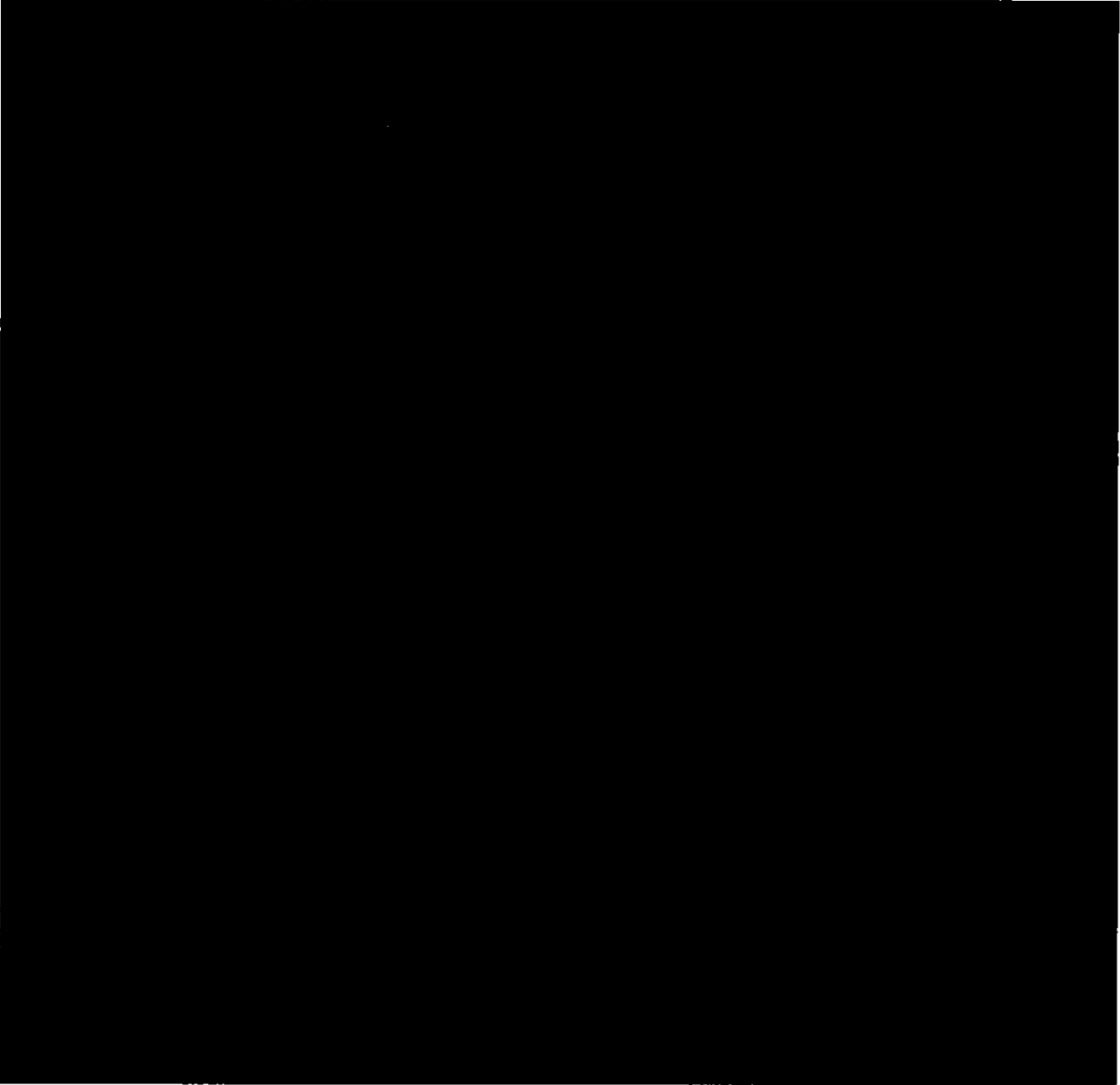
Thus, genuine issues of material fact are in dispute as to whether or not Facebook can even assert a divided infringement defense, and if so, whether or not Facebook controls its users' utilization of the Facebook software.

8. Facebook states that Claims 1 and 23 "purport" to show an apparatus or system for facilitating the management of data. D.I. 411 at 3. Leader DISPUTES this fact to the extent that the '761 Patent is entitled to an assumption of validity. Thus, the '761 Patent does not "purport" anything, but is assumed correct until proven otherwise by clear and convincing evidence.

9. Facebook states that Claims 1 and 23 both require a step that must be performed "by the end-user." *Id.* Leader DISPUTES this alleged statement of fact. As Dr. Vigna provides:



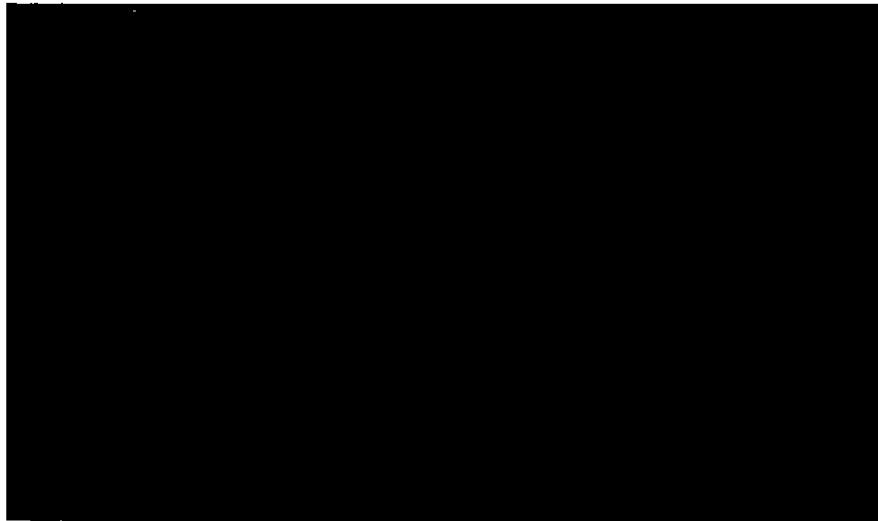
D.I. 388, Ex. B, Expert Report of Vigna at ¶ 21. [REDACTED]



*Id.* at ¶ 61 (emphasis added). In reaching this conclusion, Dr. Vigna relied on at least the source code (including the revision history of the source code as found in the subversion database), LTI 156866 - 156870, LTI 157138 - 157150 and LTI 156887 - 156901, LTI 156902 - 156905 and LTI 156906 - 156911, LTI 156996 - 156997, LTI 156998 - 157000, LTI 157006 - 157009, LTI 157151-61, FB00110012-21, FB00110022-25, FB00110026-27, FB00110029, FB00110079-81, FB00110111-12, FB00110092, FB00111092-94, FB00120176-79, FB00124392, FB00128924-

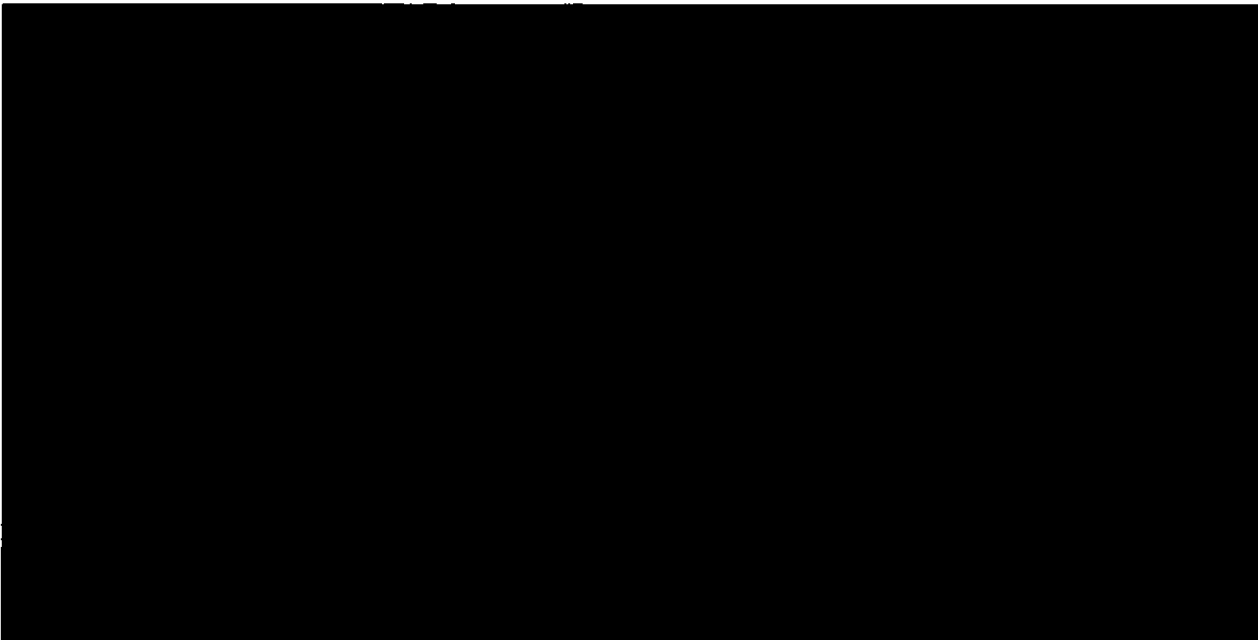

31, FB00128851-62, FB00128863-86, FB00128887-99, FB00128900, FB00109965-66, FB00109890-91, FB00109897-98, FB00109804, FB00109757-75, FB00109296-97, FB00109982-3, FB00109055-57, FB0098402-08, FB0073961-81, FB0042505-15, FB00114065-6, FB00109997-10000, FB00129574-80, FB00110070-3, FB00113769-71, FB00113772-838, FB00113860, FB00110116, FB00112880-3, FB00113052-71, FB00113080-85, FB00129574-80, FB00129385-9, FBSC0001140-5, FBSC0001103, FBSC0001060-1, FBSC0001033-7, FBSC0001040-2, FB00113707-11, FB00113712-3, FB00113868, FB00110137, FB00109936-40 and FB00129552, FB00109909-14, FB00109921, FB00109828 and FB00109832, LTI 157081, LTI 157082, LTI 157083, LTI 157084, LTI 157085, LTI 157086, LTI 157087, LTI 157088, LTI 157089, LTI 157090, LTI 157091, LTI 157092, LTI 157093, LTI 157094, LTI 157095, LTI 157096, LTI 157097, LTI 157098, LTI 157099, LTI 157100, LTI 157101, LTI 157111, LTI 157112, LTI 157126, LTI 157127, LTI 157129, LTI 157130, LTI 157131, and LTI 157132.

For Claim 23, Dr. Vigna reaches a similar conclusion:



*Id.* at ¶ 317. In reaching this conclusion, Dr. Vigna relies upon *at least* the source code (including the revision history of the source code as found in the subversion database), LTI 156938 - 156940, LTI 156978 - 156981, LTI 156982 - 156987 and LTI 156988 - 156989, LTI

157151-61, FB00109170-90, FB00109984-7, FB00113746-50, FB00109988-9, FB00113761-4, FB00113845-6, FB00109790-2, FB00109835, FB00109836-8, FB00109855-69, FBSC0001151-4, FBSC0001155-61, FB00109907-8, FB00109972, FB00113839-42, FB00109495-525, FB00129626-9, FBSC0000821-2, FB00113847, FB00109919, FBSC0001138, FBSC0001164, FB00113881-95, FB00113896-910, FB00110138-9, FB00110140-41, FB00111063, FB00113968 and FB00110153, LTI 157102, LTI 157113, LTI 157128, LTI 157133, LTI 157134, LTI 157135, LTI 157136, and LTI 157137.

  
 D.I. 388, Ex. B, Expert Report of Vigna at ¶27. Thus, Facebook has control of the software and its users. Importantly, Facebook can revoke the user's license to use the Facebook site also. <http://www.facebook.com/terms.php>; *see also American Patent Dev.*, 637 F. Supp. 2d at 237 (stating that the ability to revoke the license "Perhaps most compelling").

In addition to the contractual obligations of its users, Facebook exerts sufficient additional control over its users because Facebook controls which applications users have access



to, and from what environment such applications may be found. In short, Facebook controls the infringing software at issue. Like in *American Patent Development*, Facebook is arguing that it did “not control its customers’ computers, or the software running on them.” *Id.* at 235. In fact, Dr. Vigna opines [REDACTED]

[REDACTED] D.I. 388, Ex. B, Expert Report of Vigna at ¶ 132. A genuine issue of material fact is in dispute as to whether or not Facebook can even assert a divided infringement defense, in addition to whether or not Facebook controls its users’ utilization of the Facebook software.

10. Facebook states that Claim 1 “require[s] action by the *end-user*....” D.I. 411 at 3.

This fact is DISPUTED. Dr. Vigna is clear that it is his opinion [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.* at ¶ 23.

Moreover, Facebook exerts sufficient control over the users because Facebook controls which applications users have access to, and from what environment such applications may be found.

As noted above, Leader can put forth sufficient evidence to prove that Facebook retains direction and control of the software and its users. Facebook argues that it did and does not control its customers' use of the Facebook software. In fact, Dr. Vigna opines [REDACTED]

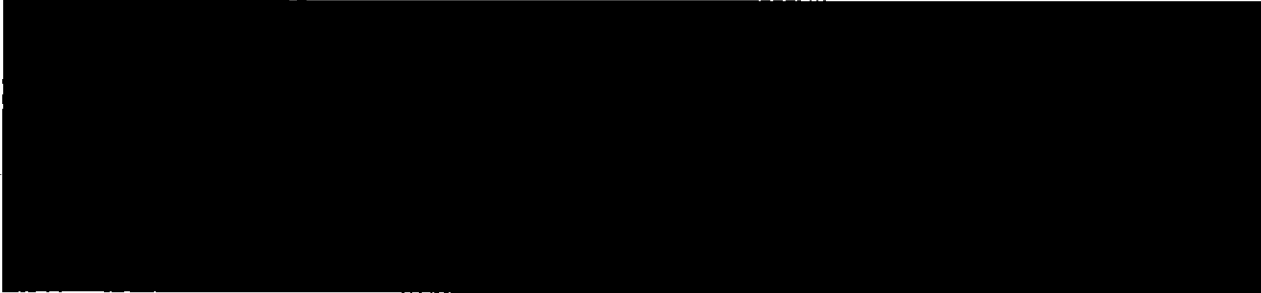
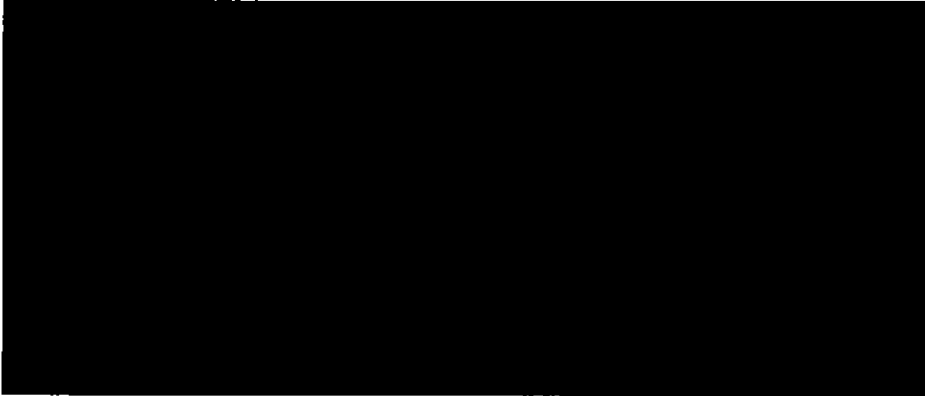
[REDACTED]

[REDACTED]

*Id.* at ¶ 132. A

genuine issue of material fact is in dispute as to whether or not Facebook can even assert a divided infringement defense, in addition to whether or not Facebook controls its users' utilization of the Facebook software. In addition, Facebook's employees are also users, controlled by Facebook:

[REDACTED]



Thus, “direction and control” is a material fact intensive issue, which is in dispute as to whether or not Facebook had control of its users.

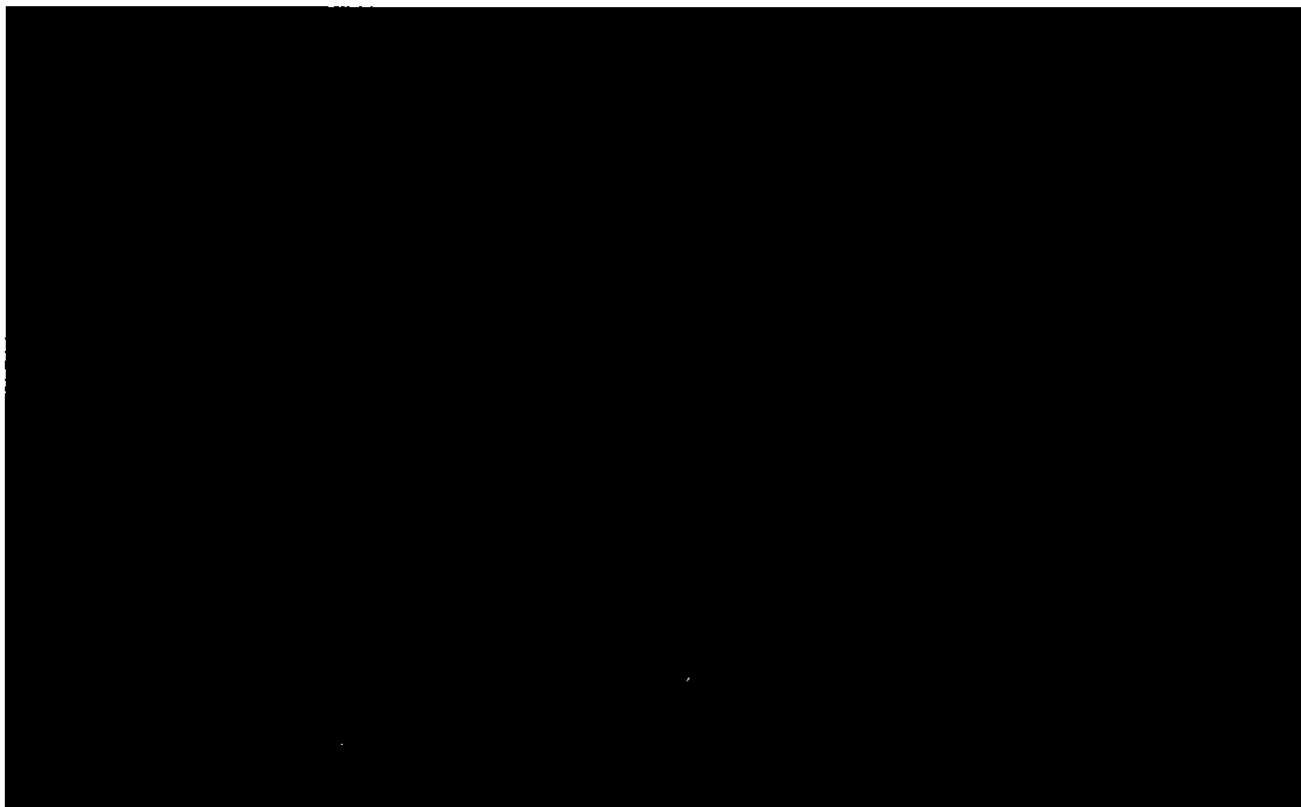
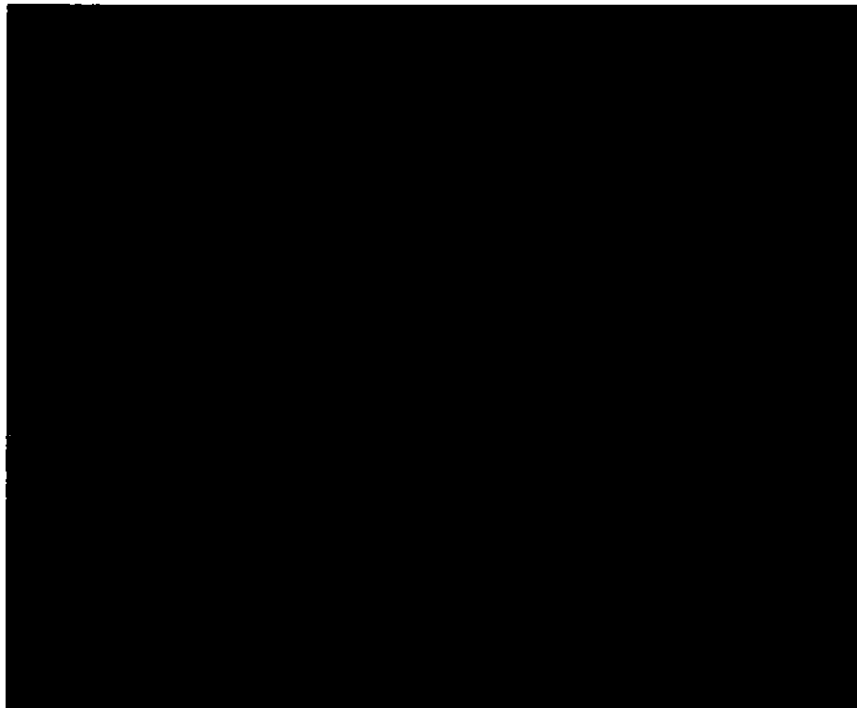
11. Facebook states that Claims 23 has no material difference from Claim 1. D.I. 411 at 4. Leader DISPUTES this fact, and notes the doctrine of claim differentiation presumes a material difference in claim scope among claims. Facebook’s off-the-cuff conclusion that Claim 1 and 23 are not materially different is incorrect and disputed to the extent it is labeled as an “undisputed fact.”

12. “Context” has been construed to mean “environment” by the Court. D.I. 281 at 1. Facebook asserts that “user workspace” means the same thing as “context.” D.I. 411 at 4. Leader DISPUTES that “context,” “user workspace,” and “environment” all mean the same thing. Claim 23 and 1 do in fact have material differences.

13. Facebook states that Claims 23 “ends with a method step that must be performed by the end-user of the system....” D.I. 411 at 4. Leader DISPUTES this alleged statement of fact. Leader does not agree that Claim 23 ends with a method step that must be performed by a user,

but rather, that Facebook infringes Claim 23 both directly and indirectly as set forth in Dr.

Vigna's expert report:





*Id.* at ¶ 317. In reaching this conclusion, Dr. Vigna relies upon *at least* the source code (including the revision history of the source code as found in the subversion database), LTI 156938 - 156940, LTI 156978 - 156981, LTI 156982 - 156987 and LTI 156988 - 156989, LTI 157151-61, FB00109170-90, FB00109984-7, FB00113746-50, FB00109988-9, FB00113761-4, FB00113845-6, FB00109790-2, FB00109835, FB00109836-8, FB00109855-69, FBSC0001151-4, FBSC0001155-61, FB00109907-8, FB00109972, FB00113839-42, FB00109495-525, FB00129626-9, FBSC0000821-2, FB00113847, FB00109919, FBSC0001138, FBSC0001164, FB00113881-95, FB00113896-910, FB00110138-9, FB00110140-41, FB00111063, FB00113968 and FB00110153, LTI 157102, LTI 157113, LTI 157128, LTI 157133, LTI 157134, LTI 157135, LTI 157136, and LTI 157137.

14. Facebook asserts that Claim 21 is an article of manufacture claim which closely “tracks Claim 9.” D.I. 411 at 4. Leader DISPUTES this alleged statement of fact, as Claim 9 is a computer-implemented *method* of managing data, while Claim 21 is a *computer-readable medium* for storing computer code.

15. It is DISPUTED that Facebook only “connects people with friends and others.” D.I.

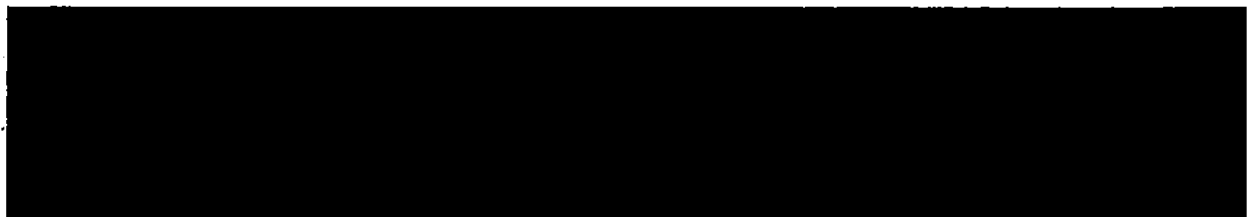
411 at 4. Facebook is an on-line collaboration tool which facilitates the sharing of data among users, as described in the '761 Patent:



D.I. 388, Ex. B, Expert Report of Vigna at ¶¶ 21 and 22.

16. It is DISPUTED that Leader's infringement claims are limited to "three purported 'Use Cases' described in the expert report of its technical expert, Giovanni Vigna." D.I. 411 at

4. Throughout Dr. Vigna's report he states



[REDACTED]

[REDACTED] Moreover, each of the “Use Case” sections actually contain multiple uses cases.

17. Facebook states that “Each of these ‘Use Cases’ outlines a specific sequence of actions that can be performed by an end-user of Facebook that, when combined with steps taken by Facebook's servers in response to those actions, allegedly results in infringement of the asserted claims.” This fact is DISPUTED to the extent Facebook implies that Dr. Vigna’s general description of use cases constitutes Dr. Vigna’s infringement analysis. Notably, Facebook cites to paragraphs 35-59 for its assertion. Yet, paragraph 35 of Dr. Vigna’s report makes clear that paragraphs 36-60 merely [REDACTED]

[REDACTED]

[REDACTED] See D.I. 388, Ex. B, Expert Report of Vigna at ¶ 35; *see also* Dr. Vigna’s deposition transcript at 104:16-105:22. [REDACTED]

[REDACTED] D.I. 388, Ex. B, Expert Report of Vigna at ¶¶ 61-359. Furthermore, each of Facebook’s citations of Dr. Vigna’s report omit a critical paragraph, for each use case. Indeed Dr. Vigna’s Report, paragraphs 43, 52, and 60 describe Facebook’s technical documents, and deposition transcripts from Facebook’s engineers. *Id.* at ¶¶ 43, 52, and 60.

18. As discussed above, it is DISPUTED that the Claims of the ‘761 Patent require a “division of claim elements among separate actors” in order to find infringement. D.I. 411 at 4. Dr. Vigna, Leader’s expert on infringement, states that [REDACTED]

[REDACTED] D.I. 388, Ex. B, Expert Report of Vigna at ¶

23. [REDACTED]

[REDACTED]

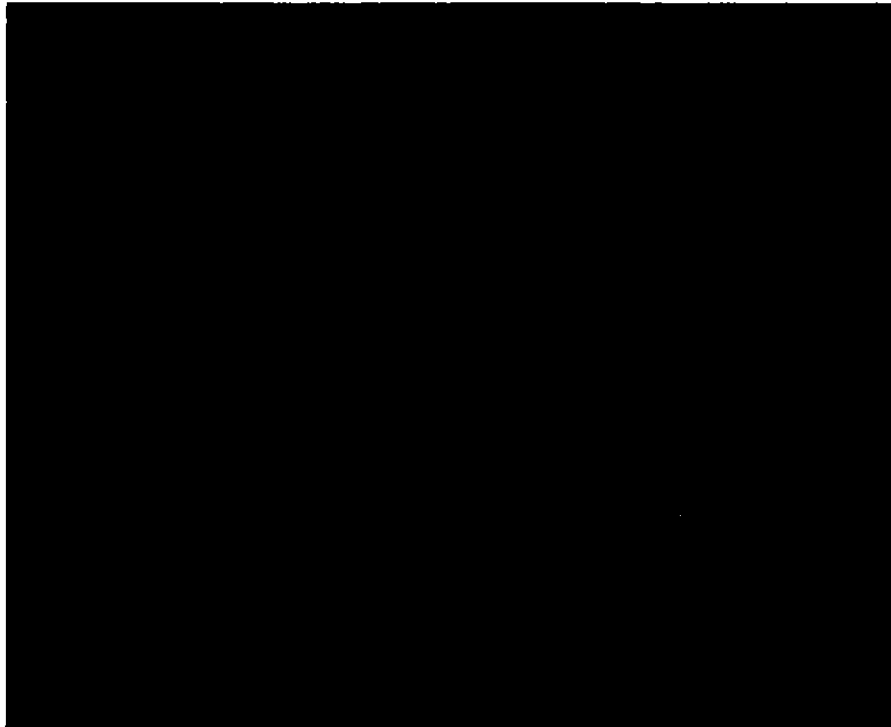
19. Leader DISPUTES Facebook's characterization of the Vigna Expert Report to the extent that the report speaks for itself, and does not require Facebook's re-characterization of its contents. D.I. 411 at 4-5. For example, Dr. Vigna does not state that the Use Cases "involve two essential steps." *Id.* Nor does Dr. Vigna state that a user "allegedly" does anything. Such mischaracterization of facts are likely material, and to the extent Facebook would paraphrase or change the text of the report, Leader disputes such recasting of the facts and opinions contained therein.

20. While Leader does not dispute that it bears the burden to prove Facebook infringes each element of the asserted claims, it is Facebook who is seeking summary judgment of non-infringement in this motion. Thus Facebook bears the burden to at least identify which Claim elements are not met. In this motion, Facebook is only arguing that all of the Claims of the '761 Patent require the participation of a third party end-user in addition to Facebook, and that such infringement of those Claims can not be attributed to Facebook. No evidence or argument has been put forward that Facebook does not practice those elements it acknowledges are relevant to it (i.e. the elements it must practice in unison with the third party end-users). To the extent Facebook states as fact that Leader must somehow identify elements Facebook does not practice

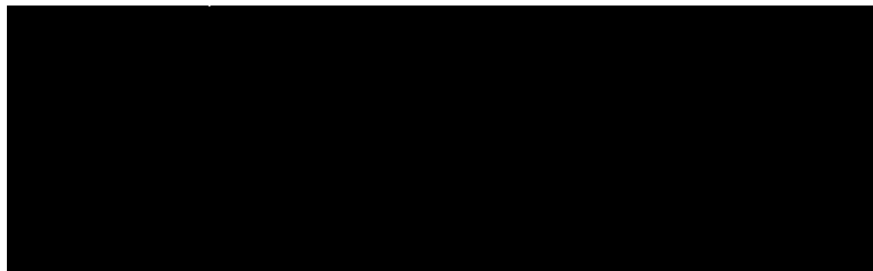


(as Leader asserts Facebook practices all elements of the asserted claims with its expert), this is DISPUTED.

21. Leader DISPUTES the implied fact that the only assertions made by Leader grounding infringement of the '761 Patent by Facebook are "(1) use of the website by end-users who are members of the public; and (2) internal use of the website by Facebook employees...." D.I. 411 at 6. Leader has asserted that Facebook infringes the '761 Patent by direct infringement and by indirect infringement. D.I. 1 at ¶¶ 9 and 10. Dr. Vigna was clear:

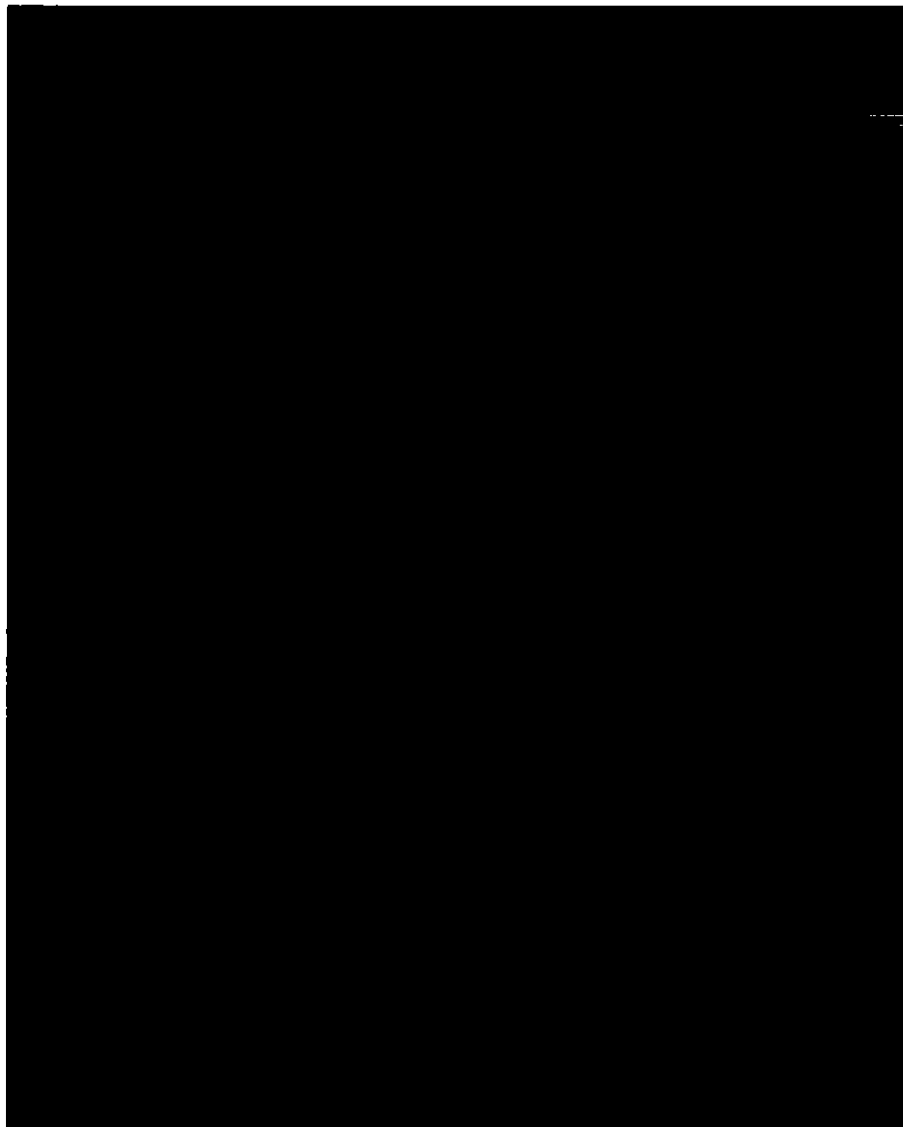


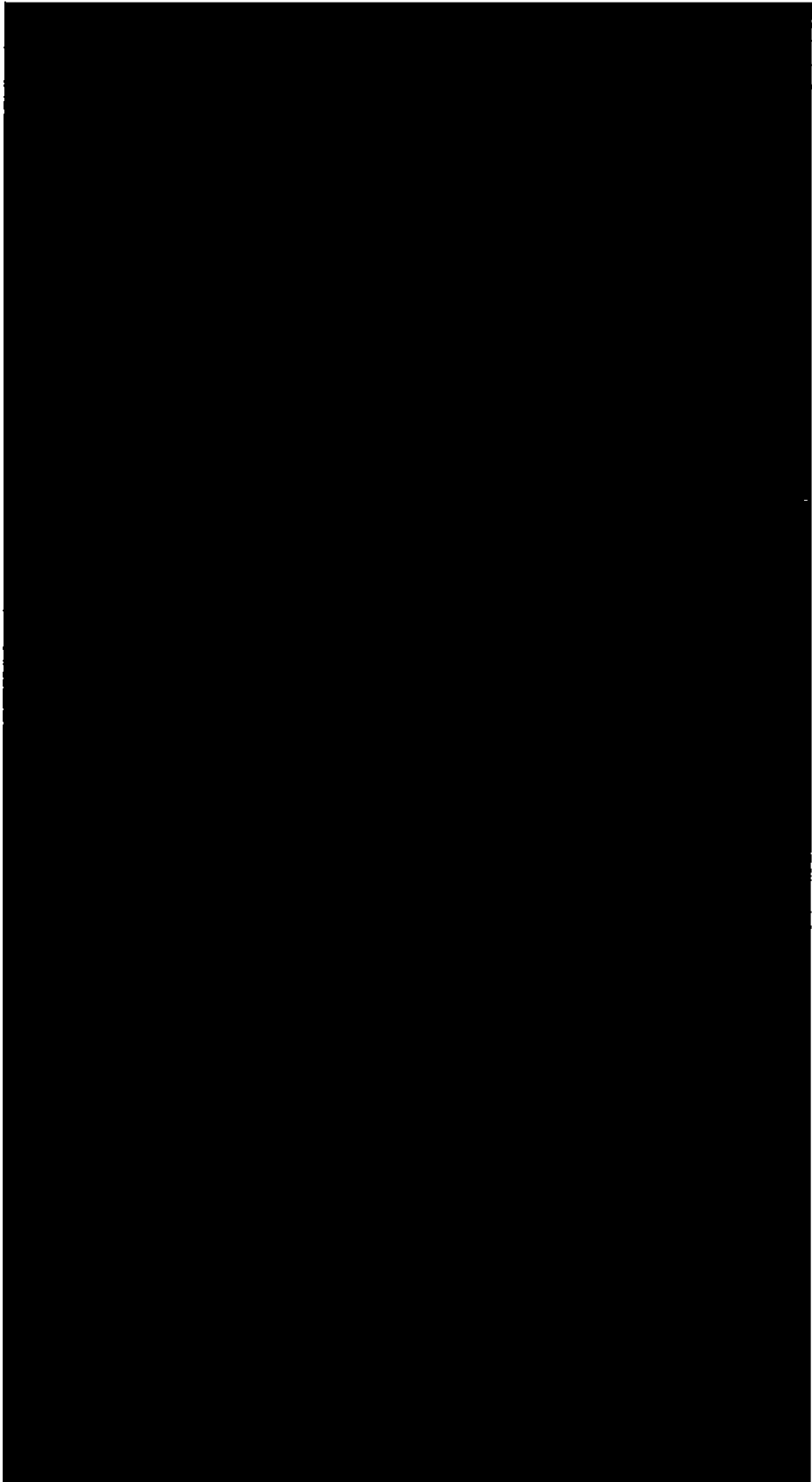
D.I. 388, Ex. B, Expert Report of Vigna at ¶¶ 23 and 25. To the extent that a divided infringement defense is viable, Dr. Vigna has stated:




*Id.* at ¶ 132. Such an opinion would apply to any Claims where divided infringement was a permissive defense.

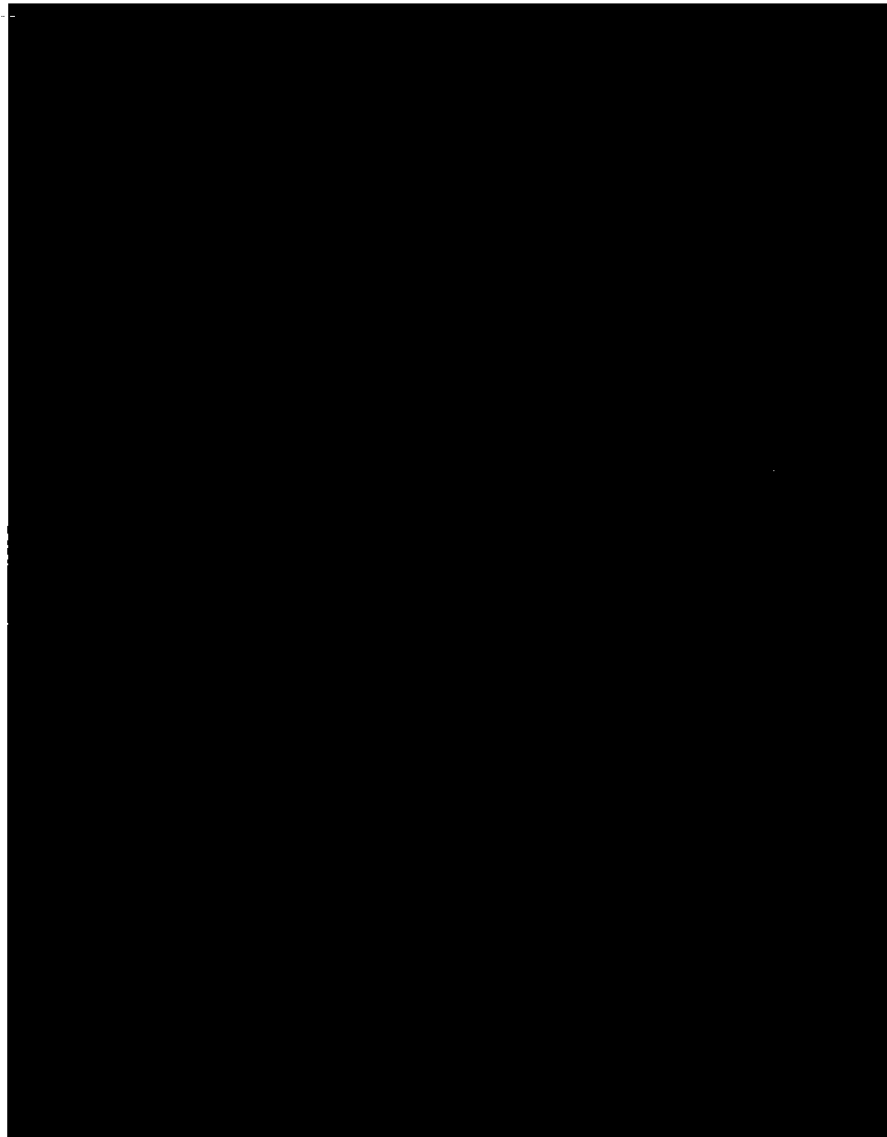
22. Leader DISPUTES Facebook's statement of fact that Leader "has offered no coherent theory, let alone evidence, that Facebook controls or directs end-users in the performance of *any* claim step." D.I. 411 at 6. As describes above, there is ample evidence supporting a genuine issue of material fact on the issue of control and direction.

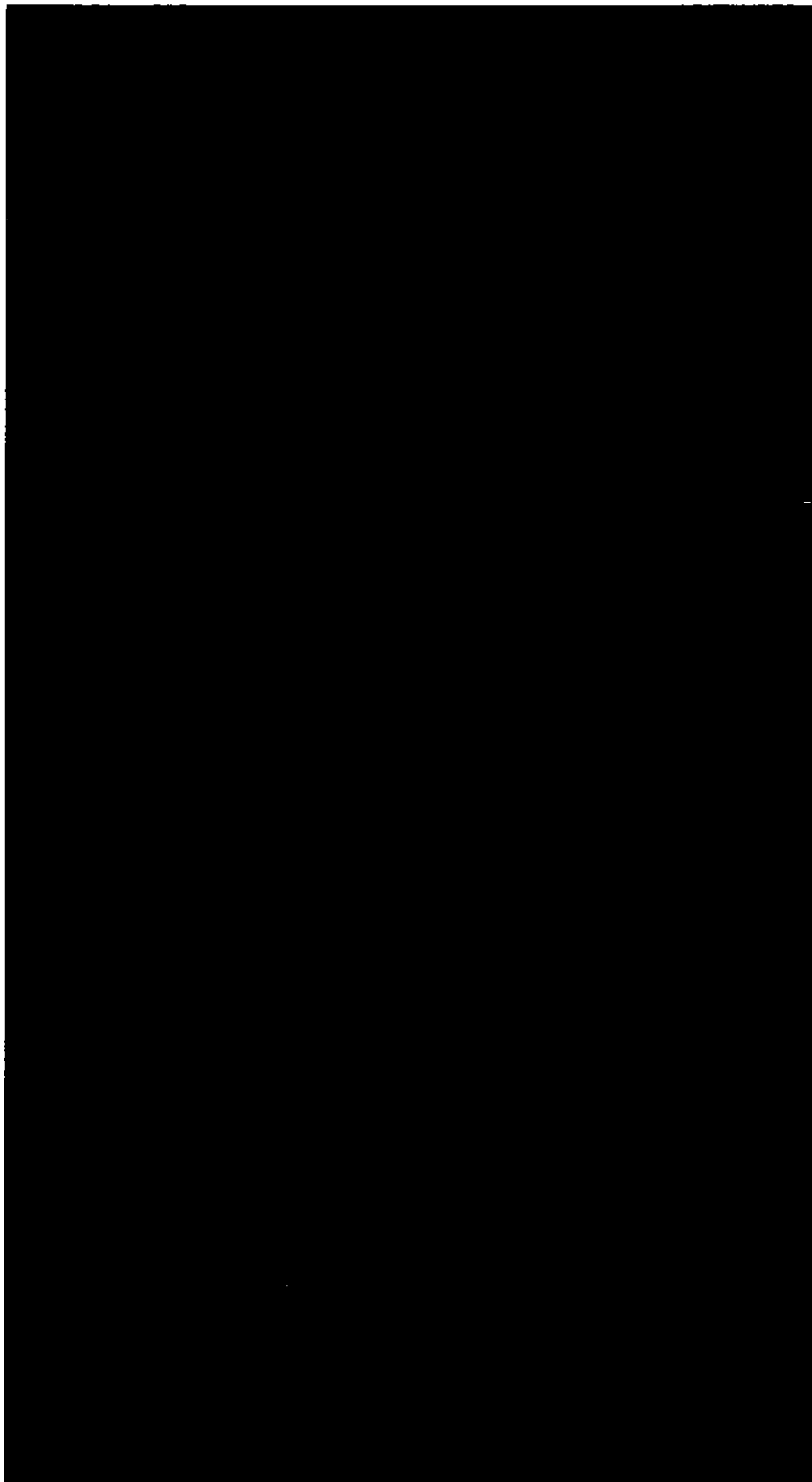





  
D.I. 388, Ex. B, Expert Report of Vigna at ¶¶ 128-133. Leader has indeed articulated a theory on divided infringement.

23. Leader DISPUTES Facebook's statement of fact that Leader "has identified nothing beyond [Facebook providing the website, controlling access to it, and instructing users how to use it] for its theory of infringement." D.I. 411 at 6. As describes above, there is much evidence grounding a genuine issue of material fact on the matter of control and direction of third party end-users:



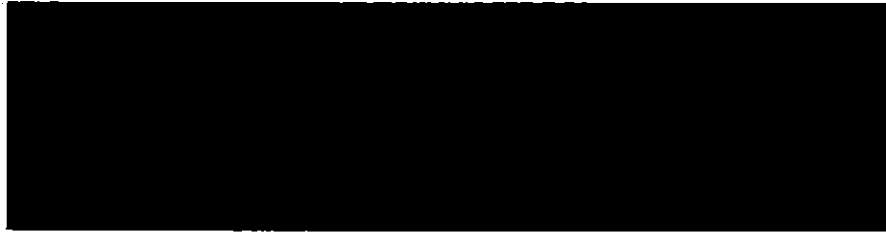


  
D.I. 388, Ex. B, Expert Report of Vigna at ¶¶ 128-133.

24. Leader DISPUTES it has no recourse to seek money damages from infringement by Facebook and its employees. D.I. 411 at 6. Facebook goes even further in this instance, admitting that Facebook and its employees infringe the claims of the '761 Patent, only positing that there is no damages theory enabling Leader to collect money damages. *Id.* (stating that Leader, as to what Facebook calls the second theory of infringement, “cannot recover for alleged infringement...for the simple reason that it has asserted no claim for damages based on alleged internal use....”). Based on such an admission (or lack of denial,) summary judgment of non-infringement should be denied as to non-infringement. There is no reason for the Court to proceed further, as Facebook states “if the Court grants summary judgment of non-infringement...it should grant summary judgment on [Leader’s] damages claim....” *Id.* In this case, summary judgment of non-infringement would be denied because Facebook does not contest the so-called “second theory of infringement” it assigns to Leader.

25. Facebook comments on several cases, beginning on page 6 and ending on page 8. *Id.* at 6-8. To the extent Facebook mischaracterizes the holdings of those cases and couches such conclusions as statements of undisputed fact, Leader DISPUTES those facts.

26. Leader DISPUTES Facebook’s statement of fact that it is unable to infringe Claim 9, 11, or 16 unless its end-users practice “the final step.” *Id.* at 9. As described above, Dr. Vigna states:



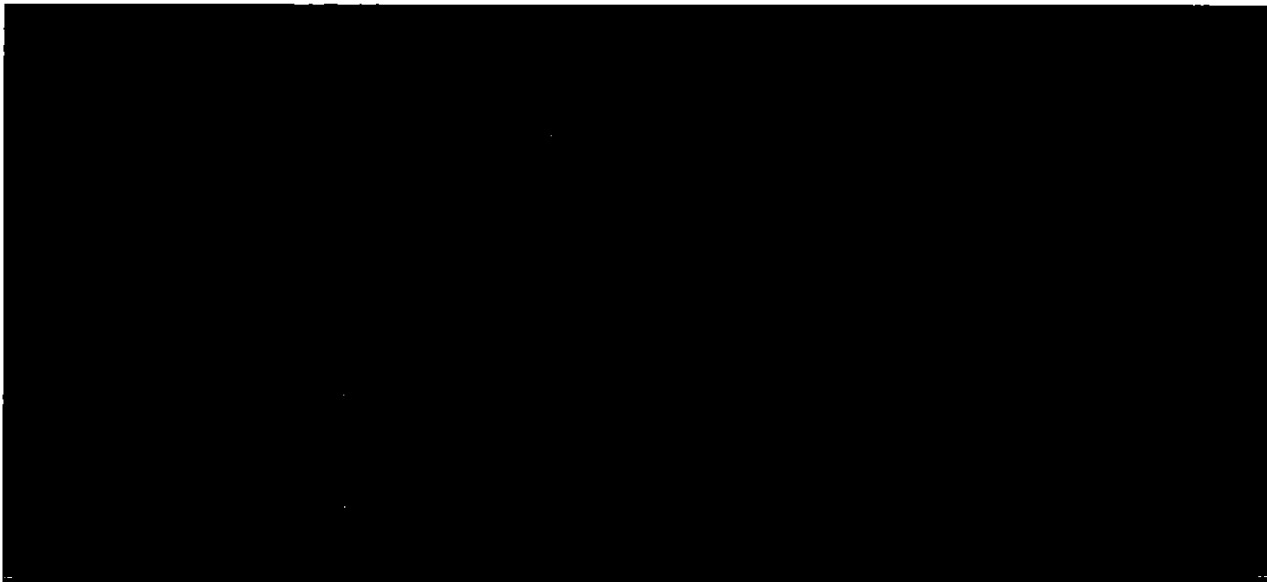
D.I. 388, Ex. B, Expert Report of Vigna at ¶ 128 (emphasis added). For example, the Claim 9 preamble recites “A computer-implemented method of managing data, comprising computer-executable acts of:....” The very part of Claim 9 that Facebook asserts requires a third party end-user, Dr. Vigna states:




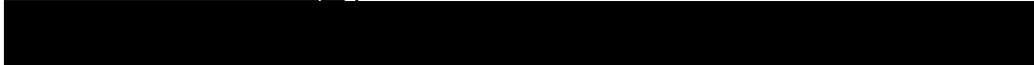
*Id.* at ¶ 182. This is in direct contradiction to Facebook’s assertion that the website does not perform this function. Dr. Vigna bases his opinion on Facebook’s infringement of this Claim on the source code (including the revision history of the source code as found in the subversion database), LTI 156938 - 156940, LTI 156978 - 156981, LTI 156982 - 156987 and LTI 156988 - 156989, LTI 157151-61, FB00109170-90, FB00109984-7, FB00113746-50, FB00109988-9, FB00113761-4, FB00113845-6, FB00109790-2, FB00109835, FB00109836-8, FB00109855-69, FBSC0001151-4, FBSC0001155-61, FB00109907-8, FB00109972, FB00113839-42, FB00109495-525, FB00129626-9, FBSC0000821-2, FB00113847, FB00109919, FBSC0001138, FBSC0001164, FB00113881-95, FB00113896-910, FB00110138-9, FB00110140-41, FB00111063, FB00113968 and FB00110153, LTI 157102, LTI 157113, LTI 157128, LTI 157133, LTI 157134, LTI 157135, LTI 157136, and LTI 157137.

Dr. Vigna opines, *in addition* to





In addition, Facebook contractually requires that users comply with its terms of an agreement ("Agreement"), specifically singling out "Sharing Your Content and Information." <http://www.facebook.com/terms.php>. Facebook requires users to provide only accurate information. *Id.* Information is defined as "facts and other information about you, including the actions you take." *Id.* The Agreement states "[w]hen you use an application, your content and information is shared with the application." *Id.* Under the "Safety" heading, Facebook enumerates twelve activities the user "will not" engage in, with an addition eight commands in the "Registration and Account Security" section. *Id.* 

 D.I. 388, Ex.

B, Expert Report of Vigna at ¶27. Importantly, Facebook can revoke the user's license to use the Facebook site also. <http://www.facebook.com/terms.php>; see also *American Patent Dev.*, 637 F. Supp. 2d at 237 (stating that the ability to revoke the license "Perhaps most compelling").

27. Leader DISPUTES that Facebook's members and Facebook are "at most, in 'arms-length cooperation'". D.I. 411 at 9. As discussed above, Facebook controls the software and the users of the software.



28. Leader DISPUTES that Facebook users are “acting on their own behalf” when using the Facebook website. *Id.* [REDACTED]

[REDACTED] See D.I. 388, Ex. B, Expert Report of Vigna at ¶ 27. [REDACTED]

[REDACTED] *Id.* at ¶¶ 22 and 25. There is in the very least genuine issues of material fact as to whether Facebook controls such users sufficiently to be vicariously liable for their actions.

[REDACTED]

Finally, Facebook contractually requires that users comply with its terms of an agreement (“Agreement”), specifically singling out “Sharing Your Content and Information.” <http://www.facebook.com/terms.php>. Facebook requires users to provide only accurate information. *Id.* Information is defined as “facts and other information about you, including the actions you take.” *Id.* The Agreement states “[w]hen you use an application, your content and information is shared with the application.” *Id.* Under the “Safety” heading, Facebook enumerates twelve activities the user “will not” engage in, with an addition eight commands in the “Registration and Account Security” section. *Id.* [REDACTED]

B, Expert Report of Vigna at ¶27. Importantly, Facebook can revoke the user's license to use the Facebook site also. <http://www.facebook.com/terms.php>; *see also American Patent Dev.*, 637 F. Supp. 2d at 237 (stating that the ability to revoke the license "Perhaps most compelling").

29. Leader DISPUTES any statement of fact supporting its divided infringement defense as applied to claims other than method claims. D.I. 411 at 10. Such a position is untenable, and argument for summary judgment based on it is improper. No set of facts can support this misstatement of law, and Leader therefore disputes any facts that Facebook offers in support for such a defense.

30. Leader DISPUTES that Claims 1, 21, and 23 are "hybrid" claims. *Id.* Facebook refers the Court to Facebook's pending Motion for Summary Judgment of Invalidity [Motion 1 of 6] in support of its "hybrid" theory. D.I. 382. Facebook's statements regarding the hybrid theory are addressed in Leader Counterstatement to Facebook's Motion for Summary Judgment of Invalidity. To the extent Facebook asserts material facts that are meant to support the assertion that the Claims 1, 21, and 23 are not system or apparatus claims, facts not actually pled in its summary judgment motion for non-infringement and no damages, such facts are disputed. Facebook's experts fail to mention such a "hybrid" theory of claim coverage, and Facebook has no evidence to support its hybrid theory.

31. Leader DISPUTES that Claims 1, 21, and 23 require a user to complete a step. D.I. 411 at 10. As provided above and stated by Dr. Vigna, [REDACTED]

[REDACTED] Facebook controls the infringing software at issue. Facebook is arguing that it did and does not control its customers' use of the Facebook software. In fact, Dr. Vigna opines to [REDACTED]

[REDACTED]

D.I. 388, Ex. B, Expert Report of Vigna at ¶ 132.

Facebook also controls its users by contractually requiring that users comply with its terms of an agreement (“Agreement”), specifically singling out “Sharing Your Content and Information.” <http://www.facebook.com/terms.php>. Facebook requires users to provide only accurate information. *Id.* Information is defined as “facts and other information about you, including the actions you take.” *Id.* The Agreement states “[w]hen you use an application, your content and information is shared with the application.” *Id.* Under the “Safety” heading, Facebook enumerates twelve activities the user “will not” engage in, with an addition eight commands in the “Registration and Account Security” section. *Id.* [REDACTED]

[REDACTED] D.I. 388, Ex. B, Expert Report of Vigna at ¶ 27. Importantly, Facebook can revoke the user’s license to use the Facebook site also. <http://www.facebook.com/terms.php>.

32. Leader DISPUTES that it can not recover damages based on Facebook’s infringement of the ‘761 Patent. D.I. 411 at 11. Facebook asserts as an undisputed material fact that in order for it to infringe, end-users must be involved. *Id.* However, Facebook admits that its own employees infringe the asserted Claims under its divided infringement and “hybrid” claims theories. *Id.* at 6 (discussing what Facebook terms as Leader’s “second theory” of infringement, not disputing that Facebook and employees infringe under a joint infringement theory, but rather only stating that no claim for damages based on internal use has been alleged.) A genuine issue of material fact exists as to whether or not Leader asserted claim for damages which encompasses internal use. For example, the Complaint seeks damages for infringement.

D.I. 1 at 3. Leader disputes the “undisputed material fact” that its plea for damages is somehow waived if Facebook’s infringement is based solely on the internal use of its infringing technology.

33. Leader DISPUTES that it is “seeking no damages” for infringement of Claim 9. D.I. 411 at 11. Facebook imputes a theory of damages which Leader has not adopted. Leader’s theory of damages is based upon the assumption of infringement and validity of the patent.

Expert Report of Parr at 18. Mr. Parr states:

[REDACTED]

*Id.* Nowhere in Mr. Parr’s analysis is there a requirement of who or how many infringed the ‘761 Patent — infringement is assumed. Mr. Parr simply stated that [REDACTED]

[REDACTED]

[REDACTED] D.I. 411 at 11 [REDACTED]

[REDACTED] Such considerations are not part of an analysis which is done for a reasonable royalty calculation. Leader disputes Facebook’s “statement of undisputed fact,” to the extent the Court deems them material, that such considerations impact a reasonable royalty calculation.

### III. CONCLUSION

For the reasons noted above, Facebook's motion for summary judgment of non-infringement and no damages 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  
969394

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](mailto:provner@potteranderson.com)  
[jchoa@potteranderson.com](mailto: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](mailto:Preston-T@blankrome.com)  
[caponi@blankrome.com](mailto: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](mailto:hkeefe@cooley.com)  
[mweinstein@cooley.com](mailto:mweinstein@cooley.com)  
[jnorberg@cooley.com](mailto:jnorberg@cooley.com)  
[mkeyes@cooley.com](mailto: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](mailto:provner@potteranderson.com)