

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

LEADER TECHNOLOGIES, INC., a
Delaware corporation,

Plaintiff and Counterdefendant,

v.

FACEBOOK, INC., a Delaware
corporation,

Defendant and Counterclaimant.

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

PUBLIC VERSION

CONFIDENTIAL - FILED UNDER SEAL

**FACEBOOK, INC.'S RESPONSE TO LEADER TECHNOLOGIES, INC.'S
"COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS" TO
MOTION FOR SUMMARY JUDGMENT OF NO WILLFUL INFRINGEMENT
OF U.S. PATENT NO. 7,139,761**

[MOTION NO. 4 OF 6]

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I. INTRODUCTION

LTI's Counter-Statement, without support, asserts that there are genuine issues of material fact that preclude summary judgment of no willful infringement. But LTI's Counter-statement contains—at best—only fanciful theories unsubstantiated by factual support, and arguments about the law. LTI has accordingly failed to raise a genuine issue of material fact, and the Court should proceed with adjudication of Facebook's motion on its merits.

II. SUMMARY OF RESPONSE

LTI has not disputed the fact that LTI never contacted Facebook or any of its employees to provide notice of the '761 patent or any allegations of infringement prior to the filing of this lawsuit. Redacted

Facebook's undisputed lack of prior knowledge of the '761 patent alone mandates entry of summary judgment against Leader's claim of willful infringement. Willfulness requires a showing that the alleged infringer acted despite an objectively high likelihood that its activity infringed a valid patent, which was known or should have been known to the alleged infringer. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (*en banc*), *cert. denied*, *Convolve, Inc. v. Seagate Tech., LLC*, 552 U.S. 1230 (2008). The Federal Circuit has clearly stated that this means the alleged infringer must be shown, at a minimum, to have had *actual knowledge* of the asserted *patent*. *Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner GMBH*, 408 F.3d 1374, 1377 (Fed. Cir. 2005); *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985). Despite numerous opportunities to do so during discovery, LTI has failed to present any evidence that Facebook had actual knowledge of the '761 patent before this lawsuit was filed.

Thus its entire theory of willful infringement is nothing more than attorney speculation and argument, and should not be allowed to be presented to the jury.

Rather than present any evidence of actual knowledge, LTI bases its entire willfulness claim on unsubstantiated and incredible theories that were never disclosed during discovery, and are not supported by any admissible evidence.

Redacted

Redacted

.¹ Any attempt to categorize these exhibits as support for LTI's fabricated story amounts to pure attorney speculation, which is insufficient as a matter of law to create a disputed issue of fact and defeat a motion for summary judgment. *Ridgewood Bd. of Educ. v. N.E. ex rel M.E.*, 172 F.3d 238, 252 (3d Cir. 1999). The burden is upon LTI to present actual evidence sufficient to allow a reasonable jury to find willful infringement, and LTI has provided no evidence to meet that burden. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (stating that the burden is on the non-moving party to come forward with specific facts after the thresh-hold showing is met by the moving party).

In addition to a lack of factual support, LTI confuses the legal standard for willfulness and attempts to challenge statements of law as disputed fact. In so doing, LTI focuses on a correct statement of the law – that the Court must consider the “totality of the circumstances” – while ignoring that the willfulness standard still requires a finding of actual knowledge of a patent in existence, even when considering the totality of the circumstances. *State Indus.*, 751 F.2d at 1236. Under this standard, evidence of pre-patent “copying” *may* be relevant to the totality of the circumstances, but only if subsequent actual knowledge of the issued patent is also established. Since LTI has admitted, and not disputed, that it provided no notice to Facebook of the issued '761 patent, and that it has no evidence that Facebook had any pre-lawsuit knowledge of the patent, there can be no willful infringement as a matter of law.

¹ Facebook objects to Hannah Declaration Exhibits 31 and 33 (D.I. 467) on the ground that it is hearsay. Fed. R. Evid. 801.

III. FACEBOOK'S RESPONSE TO LTI'S COUNTERSTATEMENT

A. Response to Paragraph 1

LTI sets forth its entire theory of willfulness and all of its evidentiary support in numbered paragraph 1 of its counterstatement. LTI then proceeds to repeat, in whole or in part, this same argument for each numbered paragraph that follows. Facebook here will address each purported "disputed fact" set forth by LTI in paragraph 1.

LTI states, without any factual citation, that its willfulness theory is based on the totality of the circumstances, Redacted

This is pure speculation with no evidentiary support, as evidenced by the fact that LTI merely cites to lawyer argument contained in a hearing transcript. No facts exist here at all, let alone genuine issues of material fact.

LTI next states that it required "nearly five years from 1997 to 2002" and "over 145,000 man-hours" to create an on-line collaboration tool. D.I. 510 at 2. This fact is immaterial to whether or not Facebook willfully infringed the '761 patent, and should be ignored.

LTI goes on to assert irrelevantly that "[i]n December 2002, Leader filed its patent application on its networking collaboration tool that led to the '761 patent" and that "[i]n February 2003 [Mr. McKibben] published his first white paper describing the general concepts of Leader's online collaboration tool, and in October 2003, he published his second white paper with many more technical details." *Id.* Facebook does not dispute that LTI filed a provisional patent application in December 2002 to which LTI claims priority under the '761 patent. Nor does Facebook dispute that LTI claims that it

published two white papers on its website in February and October 2003. However, neither fact is relevant to this motion, as the provisional application was not public, and the evidence proves no one at Facebook ever saw either of the white papers. D.I. 401, Ex. 2 at Resp. to Request for Admissions 31-34; Robinson Decl., Ex. 3 at 16:22-17:15, 17:16-18:6.

Redacted

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LTI next states that Mr. Zuckerberg “wrote the entire code for the [Facebook] website” during a two week period in January 2004, and then “launched the Facebook website on February 4, 2004.” D.I. 510 at 3. This is immaterial to LTI’s willfulness claim, and ignores that the initially launched Facebook website was extremely simple – lacking the very functionality LTI is now accusing of infringement.

Redacted

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LTI next ridiculously claims that “[t]he Facebook website is nearly identical to the Leader technology described in its white papers and on its website.” D.I. 510 at 3. This is a conclusory statement Redacted

LTI provides no factual support for this statement, nor can it. First, LTI ignores how much the Facebook website had changed since its launch.

Redacted

LTI attempts next to expand this statement with the claim that “the numbers [sic] of similarities between [LTI’s white papers] and Facebook’s original website are simply

too many to be coincidence.” D.I. 510 at 3-4. LTI then proceeds to list twenty-one purported similarities, including very generic and broad categories, with no cites to any evidence. Yet again LTI relies solely upon lawyer argument with no factual support. LTI notably does not cite to any evidence to show why any such purported similarities would have any significance in the computer science industry, because it cannot.

Redacted

LTI finally attempts to combine all of the above purported “facts” to draw an inference of willfulness based on the “totality of the circumstances.” The problem, however, is that there is no actual evidence to support LTI’s absurd theories. Thus the “totality of the circumstances” add up to fairytales, not facts.

As a seeming last resort, LTI asserts that Facebook redesigned its website in February 2010, which LTI claims “enhanced . . . the infringing features.” D.I. 510 at 5. LTI’s post-filing willfulness claim is unsupportable as a matter of law, since Facebook has presented ample defenses during this case to LTI’s infringement claims, eliminating any assertion that since the filing of this lawsuit Facebook acted despite an objectively high likelihood that its activity infringed a valid patent. *In re Seagate*, 497 F.3d at 1374 (a substantial question about invalidity or infringement is sufficient to avoid a charge of willfulness based on post-filing conduct). Moreover, because LTI’s post-filing willfulness argument stands alone, it must fail as a matter of law because LTI did not seek a preliminary injunction. *Id.*

B. Response to Paragraphs 2, 9, 10, 12, 17, 18, 21, 22, 23, 24, 31, 32, 33

In each of these paragraphs, LTI disputes the law, not facts. LTI repeatedly challenges the requirement that to support a claim of willfulness there must be prior actual knowledge of the asserted patent. *Imonex*, 408 F.3d at 1377. LTI also challenges the legal requirement that there be actual knowledge of a patent, not just that a patent is pending. *State Indus.*, 751 F.2d at 1236. Each of these principles of law, however, is well established. LTI's attempt to refute them as "disputed facts" is misplaced and incorrect.

LTI also repeatedly challenges the requirement that a claim of post-filing willfulness requires the patentee to seek a preliminary injunction. *In re Seagate*, 497 F.3d at 1374. LTI, however, admits that if post-filing conduct is the sole basis of a claim for willfulness then a patentee must seek a preliminary injunction. D.I. 510 at 27. LTI also challenges the legal principle that post-filing willfulness alone is a rare situation, and will require additional evidence of pre-filing willful conduct as well. *In re Seagate*, 497 F.3d at 1374 ("[W]illful infringement in the main must find its basis in prelitigation conduct . . ."). Again LTI's attempt to challenge the state of the law as "disputed fact" is misplaced and simply incorrect, and does not raise any issues of fact.

C. Response to Paragraphs 3, 5, 6, 7, 11, 13, 15, 16, 19, 20, 25, 28

In these paragraphs, LTI simply repeats the same unsubstantiated theories set forth in paragraph 1, in whole or in part,

Redacted

For the reasons set forth above, none of these paragraphs set forth any facts, let alone genuine issues of material fact, that counter the simple truth that Facebook had no

notice of the patent.

D. Response to Paragraph 4

LTI states that it is a disputed fact that “the complaint includes a boiler plate allegation of willful infringement; without a single factual predicate.” D.I. 510 at 6-7. This fact is true, but any dispute LTI may have is immaterial. The sufficiency of LTI’s ability to plead willfulness is irrelevant to LTI’s ability to prove willfulness with actual evidence.

E. Response to Paragraphs 5, 6, 7

LTI states that it is a disputed fact that “prior to this lawsuit, Leader ‘never contacted Facebook,’” “never notified Facebook of its patents,” and “never notified Facebook of any infringement allegation.” D.I. 510 at 7-9.

Redacted

These allegations neither address nor refute the fact that *LTI itself* never made an effort to contact Facebook in any manner and never provided Facebook with either the patent or its allegations of infringement, all of which LTI has previously admitted.

F. Response to Paragraphs 8, 14

Redacted

Redacted

G. Response to Paragraph 26

Redacted

H. Response to Paragraph 27

LTI states that it is a disputed fact that “the white papers [] contain no software code, and instead describe very broad concepts (if they can even be called that, given that they are couched in consultant speak generalities) for data management without providing any practical information as to how those concepts could be implemented.” D.I. 510 at 24. LTI, however, admits that the white papers do not contain software code. *Id.* Instead, LTI asserts that the white papers contain a “detailed description of the tools and software needed to build a social networking site.” LTI cites no evidence for this

conclusion, and as such it must be ignored as more lawyer argument.

I. Response to Paragraph 29

Redacted

J. Response to Paragraph 30

Finally, LTI states that it is a disputed fact that “LTI makes no showing that any of these features were unique to LTI’s alleged invention, nor can they.” D.I. 510 at 26. But, LTI does not actually dispute this statement, and in fact, LTI does not even address this statement. LTI instead argues that this statement “selectively chooses a small subset of Leader’s evidence and draws a conclusion that deliberately ignores the bulk of the evidence.” *Id.* LTI does not, however, dispute the truth of the statement as it applies to the arguments presented by Facebook. No issue of fact is presented here, either.

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IV. CONCLUSION.

For the reasons stated above, Facebook respectfully requests that this Court grant summary judgment that Facebook does not willfully infringe the '761 patent.

Dated: June 11, 2010

By: /s/ Steven L. Caponi

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