

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

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	CIVIL ACTION
)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-LPS
)	
v.)	
)	
FACEBOOK, INC., a Delaware corporation,)	
)	
)	
Defendant and Counterclaimant.)	
)	

**FACEBOOK’S OBJECTIONS TO FINAL JURY INSTRUCTIONS
PURSUANT TO FED. R. CIV. P. 51(b), 51(c)(2)**

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Dated: July 27, 2010

Pursuant to Federal Rule of Civil Procedure 51(b)(2) and 51(c), Facebook respectfully submits the following objections to the Final Jury Instructions issued by the Court on July 26, 2010 (D.I. 601). Pursuant to Rule 51(b)(2), after the Court informs the parties of its proposed instructions and proposed actions on the jury instructions, it “must give the parties an opportunity to object on the record and out of the jury’s hearing before the instructions and arguments are delivered.” Facebook submits these written objections on the record pursuant to Rule 51(b)(2) and 51(c)(2).

A. Jury Instruction 2.4 (“Statement of Undisputed Facts”)

Facebook respectfully objects to this instruction to the extent that it includes “Undisputed Fact” number 5, that “Facebook provides a developer wiki at http://wiki.developers.facebook.com/index.php/Main_Page and <http://developers.facebook.com/docs>.” This fact was only relevant to Leader’s claims for contributory and induced infringement. As the Court has properly chosen not to instruct the jury on those claims because of the lack of any evidence to support them, Facebook’s developer wikis are no longer relevant to any remaining issue.

C. Jury Instruction 3.4 (“Claim Construction for the Case”)

Facebook respectfully objects to the Court’s instruction regarding claim construction for not (1) informing the jury that “wherein” excludes “when;” or (2) informing the jury that a temporal sequence is required by Judge Farnan’s claim construction of “dynamically,” and the identity of the “preceding event.” Facebook incorporates by reference its arguments on the record on July 23, 2010 and July 26, 2010.

As explained in Facebook’s revised Proposed Jury Instruction 3.4 filed on July 23, 2010, throughout this trial Leader has improperly attempted to argue that the claim term “wherein” means “when.” (D.I. 596). *See, e.g.*, Tr. at 228:21-229:1, 232:13-19, 668:12-17, 669:13-17, 687:24-688:5, 708:16-21, 746:19-24. In not informing the jury that the term “wherein” excludes “when,” which even Leader does not appear to dispute, the Court has not cured the prejudice caused by Leader’s misleading arguments during opening statement and trial, nor prevented the

risk that Leader may improperly continue to assert them in closing arguments. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008); *American Patent Dev. Corp., LLC v. Movielink, LLC*, 637 F. Supp. 2d 224, 230 (D. Del. 2009).

E. Jury Instruction 3.7 (“Direct Literal Infringement”)

Facebook respectfully objects to Jury Instruction 3.7 (“Direct Literal Infringement”) on the ground that it does not state the law with respect to the “control or direction” standard for direct infringement under the standards set forth in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008) and *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007). Facebook further objects to giving an instruction on “control or direction” only with respect to claims 9, 11 and 16, and not the other asserted claims. Facebook objects to the Court’s decision not to give Facebook’s proposed jury instruction on “control or direction” filed with the Court on July 14, 2010 (D.I. 577).

The Court’s instruction identifies five factors the jury may consider. With respect to the first factor, “whether the claims at issue require those third parties to take action for the claims to be performed,” what the claims require is a pure question of law for the Court that should not be submitted to the jury. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d at 1360 (“When the parties raise an actual dispute regarding the proper scope of these claims, the court, not the jury, must resolve that dispute.”). Claims 9, 11 and 16 do, in fact, require third parties to perform at least two claim steps in order for those claims to be satisfied. *See Claim 9* (“creating data within a user environment of a web-based computing platform *via user interaction with the user environment by a user using an application*, the data in the form of at least files and documents” and “*the user employs at least one of the application and the data from the second environment*”). Inviting the jury to consider this as a factual issue would run afoul of *O2 Micro*.

With respect to the second factor, “whether the third parties merely activate functions already present in the underlying invention,” Facebook respectfully submits that this factor does not have any relevance to the determination of “control or direction” standard for a *method* claim. The case from which a variant of this statement appears, *Fantasy Sports Properties, Inc.*

v. Sportsline.com, Inc., 287 F.3d 1108 (Fed. Cir. 2002), involved infringement of an *apparatus* claim. The statement in *Fantasy Sports* that “the user is only activating means that are *already present in the underlying software*,” *id.* at 1118 (emphasis in original), refers to the court’s holding that the apparatus in that case can be infringed by software that includes the claimed means element, “regardless [of] whether that means is activated or utilized in any way.” *Id.* Method claims such as claim 9 of the ’761 patent, on the other hand, are infringed only when their steps are actually performed. *See In re Kollar*, 286 F.3d 1326, 1332 (Fed. Cir. 2002) (“A process, however, is a different kind of invention; it consists of acts, rather than a tangible item. It consists of doing something, and therefore has to be carried out or performed.”). *Fantasy Sports* is further distinguishable in that the claims in that case contained no step involving participation or action by the user. 287 F.3d at 1119 (“[T]here is no ‘user participation’ or ‘control’ limitation in the claims of the ’603 patent requiring that an accused fantasy football game be operated by any specific entity.”). This second factor, which states a principle applicable only to infringement analyses of apparatus claims, does not apply to the control or direction analysis as applied to method claims.

The third factor, “whether there is a contractual relationship between Facebook and the third parties,” is problematic because only certain types of contractual relationships are relevant to “control or direction.” The Federal Circuit has held, for example, that “arms-length agreements” do not as a matter of law satisfy the control or direction standard, *BMC Resources*, 498 F.3d at 1380-81; *Muniauction, Inc.*, 532 F.3d at 1329 (“At the other end of this multi-party spectrum, mere ‘arms-length cooperation’ will not give rise to direct infringement by any party.”). A “contractual relationship” is only relevant to the extent that relationship gives the alleged direct infringer the ability to control the actions of another entity, for example “by contracting out steps of a patented process to another entity.” *BMC Resources*, 498 F.3d at 1381. Facebook objects to not giving further clarifying instructions that only such limited types of contractual relationships may give rise to control or direction.

With respect to the fifth factor, “whether Facebook supplies the instrumentalities, tools and the website for the person using the website,” this factor is not relevant under *Muniauction*, 532 F.3d at 1329-30, which holds that providing a website, controlling access to it and instructing users on its use is not relevant to determining control or direction.

Finally, Facebook respectfully objects to the Court’s decision not to give a “control or direction” instruction with respect to the non-method asserted claims. Each of the other independent claims (e.g., claims 1, 21 and 23) include at least one explicit step that must be performed by “the user,” implicating a third party’s actions and requiring Leader to show “control or direction” over those third party actions.

B. Jury Instruction 4.2 (“Prior Art”)

Facebook respectfully objects to this instruction for the reasons stated in its objections dated July 25, 2010 (D.I. 600). The Hubert, Swartz, iManage, and Ausems prior art references are undisputedly prior art under 35 U.S.C. § 102(b) and § 102(e). Facebook incorporates by reference its objections filed on July 25.

D. Jury Instruction 1.11, 2.3, 4.1, 4.4, 4.5, 4.6, 4.7, 4.9, and 4.10

Facebook respectfully renews its objection to each of these instructions to the extent they require Facebook to show its invalidity defenses by “clear and convincing” evidence. Facebook respectfully submits that a lesser burden of proof should be applied to Facebook’s invalidity defenses because they are based on prior art references, prior offers for sale and prior public uses that were never disclosed to or considered by the U.S. Patent and Trademark Office (“PTO”) during the prosecution of the ’761 patent. Facebook submits this objection to preserve its right to argue for the extension, modification or reversal of existing law on this subject, and Facebook incorporates by reference its arguments made in its proposed jury instructions and during the July 1 Pretrial Conference.

Dated: July 27, 2010

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