

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CONNECTU, INC., CAMERON
WINKLEVOSS, TYLER WINKLEVOSS,
AND DIVYA NARENDRA,

Plaintiffs,

v.

FACEBOOK, INC., MARK ZUCKERBERG,
EDUARDO SAVERIN, DUSTIN
MOSKOVITZ, ANDREW MCCOLLUM,
AND THEFACEBOOK LLC,

Defendants.

1:07-CV-10593 (DPW)

Related Action: Civil Action No. 04-CV-
11923 (DPW)

District Judge Douglas P. Woodlock

Magistrate Judge Robert B. Collings

**CORRECTED MEMORANDUM IN OPPOSITION TO THE FACEBOOK
DEFENDANTS' MOTION TO COMPEL RESPONSE TO INTERROGATORY NO. 1**

Defendants Facebook, Inc., Mark Zuckerberg, Dustin Moskovitz, Andrew McCollum, and TheFacebook LLC (collectively, the "Facebook Defendants") suggest there are new facts that the Plaintiffs may use to update their original Response to the Facebook Defendants' Interrogatory No. 1, a contention interrogatory asking for all facts that support Plaintiffs' copyright claim. This suggestion is incorrect for two reasons. First, a central piece of code to the copyright claim – the code Mark Zuckerberg wrote for the Harvard Connection team in late 2003 or early 2004 – has not been produced and/or located by the Facebook Defendants in discovery. Second, the only piece of new evidence that even approaches giving cause for supplement – a January 2004 version of thefacebook.com source code – was produced *the same day* as the instant motion. Plaintiffs thus (a) are still missing material evidence that would require a supplemental interrogatory response, and (b) have had no time whatsoever to analyze

new evidence upon which Facebook Defendants apparently base their motion. Facebook Defendants' motion is wholly improper gamesmanship and should be denied.

ARGUMENT

Among other facts, Plaintiffs asserted in their original Response that the code being infringed includes the code Zuckerberg wrote for the Harvard Connection project.¹ Throughout the past six months, Plaintiffs were under the continual impression that the Facebook Defendants would comply with their discovery obligations and produce or locate this code. In the Facebook Defendants' Response to this Court's September 13 Order requiring them to locate the "Harvard Connection code which Zuckerberg allegedly worked on," the Facebook Defendants stated that they did not believe they were required to go to the expense of searching for this code. *See* Facebook Defendants' Response to Court's September 13, 2007 Order Re Location of Relevant Code at 3 ("As Facebook Defendants read the Order, engaging in such an effort [a comprehensive search of produced materials] is not required.") [Dkt. 123]. As such, Plaintiffs were left exactly where they started: with gigabytes worth of useless code and no way to determine where the Harvard Connection code existed.²

There is no possible way to supplement a contention interrogatory for which one has received no further evidence. *See* FED. R. CIV. P. 26(e)(2) ("A party is under a duty seasonably to amend a prior response to an interrogatory...if the party learns that the response is

¹ *See* Declaration of Monte M.F. Cooper In Support Of The Facebook Defendants' Motion to Compel Response to Interrogatory No. 1 ("Cooper Decl."), Ex. 1 at p. 5 ("**It would have also been natural and easy** for Defendants to use for thefacebook.com website the code Mr. Zuckerberg said he wrote (or was writing) for the Harvard Connection website beginning in November 2003.").

² As the Court is aware, there is an imaging process currently underway in which the Plaintiffs will finally have a full picture of the drives upon which relevant code was or should (footnote continued)

in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”). Furthermore, Plaintiffs’ contentions have not changed; they still believe that the code Mark Zuckerberg wrote for Harvard Connection in late 2003 and/or early 2004 is among the code that thefacebook.com infringes. Without the ability to view this code and compare it to thefacebook.com code – a situation of the Facebook Defendants’ creation – Plaintiffs could not supplement their Interrogatory Response with anything approaching meaningful facts.

The Facebook Defendants are playing a game with this Court. Yesterday, November 14, 2007 (the same day Facebook Defendants filed this motion), Plaintiffs *finally* received – after three years of requests – a version of thefacebook.com code as it existed when Mark Zuckerberg was still working on Harvard Connection, January 2004. *See* Declaration of Adam Wolfson, Ex. 1 (November 13, 2007 letter, received November 14, 2007, from Theresa Sutton to Rick Werder enclosing a CD with source code for a “late-January 2004 version of www.thefacebook.com”). This is the first piece of usable evidence connected to the copyright claim that has been produced in the entire history of this case. It is against all notions of fairness that the Facebook Defendants seek to compel a supplemental interrogatory response when they have withheld evidence necessary for part of that supplement until the day they file their motion (and the other necessary evidence is still missing).

Again, Facebook Defendants have demonstrated a marked determination to harass the Plaintiffs with serial motions and improper discovery practices. This strategy cannot be rewarded, especially in light of the Facebook Defendants’ lack of commitment to playing by this

have been stored. Plaintiffs have not yet been able to view any of these hard drive images based upon the schedule negotiated with the Facebook Defendants.

Court's rules. Plaintiffs thus respectfully request this Court to deny the motion and grant whatever other relief it deems just and fair.

DATED: November 16, 2007

/s/ Peter Calamari

Peter Calamari (*pro hac vice*)

Richard I. Werder, Jr. (*pro hac vice*)

Adam B. Wolfson (*pro hac vice*)

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