

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-11923-DPW

CONNECTU LLC
Plaintiff

v.

MARK ZUCKERBERG, et al
Defendants

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT B. COLLINGS
UNITED STATES MAGISTRATE JUDGE
HELD ON NOVEMBER 18, 2005

APPEARANCES:

For the plaintiff: John F. Hornick, Esquire, Jonathan M. Gelchinsky, Esquire, Margaret A. Esquenet, Esquire, Troy Grabow, Esquire, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 901 New York Avenue, N.W., Washington, DC 20001, (202) 408-4000.

For the defendants: Daniel K. Hampton, Esquire, Holland & Knight, LLP, 10 St. James Avenue, Boston, MA 02116, (617) 523-6850 and I. Need Chatterjee, Esquire, Robert D. Nagel, Esquire Orrick, Herrington & Sutcliffe, LLP, 4 Park Plaza, Suite 1600, Irvine, CA 02614-2558, (949) 567-6710.

Jeremy P. Occek, Esquire, Proskauer Rose, LLP, One International Place, Boston, MA 02110, (617) 526-9600.

For defendant Eduardo Saverin: Daniel Hampton, Esquire, Holland & Knight, LLP, 10 St. James Avenue, Boston, MA 02116, (617) 523-2700 and Robert Hawk, Esquire, Heller Ehrman, LLP, 275 Middlefield Road, Menlo Park, CA 94025, (650) 324-7156.

Court Reporter:

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1 the server here at the court that runs your whole network.
2 That's what a server is. It's just a hard drive in a different
3 place that a lot of people are linked into. Now--

4 THE COURT: But is it, to, to get on the server's
5 hard drive, does it have to be backed by an individual off of
6 an individual computer?

7 MR. HORNICK: You might, you might store something on
8 that server, but if we wanted to take an image of it, we would
9 then go to that server, take an image of that. Now, what I'm
10 saying about what happens--

11 THE COURT: No, my question is, why, when you're
12 saying that things from an individual computer's hard drive get
13 on the hard drive of the server when someone backs them up, so
14 isn't the server then, you know, isn't the best evidence so to
15 speak the individual hard drive of the computer?

16 MR. HORNICK: Well, it depends on what we're looking
17 for here, Your Honor. If we're looking for the Harvard
18 connection code that Mr. Zuckerberg worked on, that's probably
19 going to be in the individual's computer. It's probably not
20 going to be in the server that ran the website. If we're
21 looking for that face match code or the course match code or
22 that online journal, it's probably going to be on the
23 individual computers. But if we're looking for the FaceBook
24 code up to the time of launch, it probably was on
25 Mr. Zuckerberg's computer. On the day of launch, it was on

1 some third party server. He uploads it to that server. The
2 server then runs it, runs the website. They no longer use that
3 server, so you'd want to go that one, image it and it's not
4 going to be any burden to, I mean, they don't have to take down
5 the business to do that. And then at some point in time, they
6 moved to another server. So what I'm saying is that if we
7 start with the personal computers and the server on the date of
8 launch, we may find what we need and we might not have to go
9 any farther.

10 THE COURT: Okay. We may hear from the defendant.

11 MR. CHATTERJEE: Your Honor, it just, it seems to me
12 that this is a very focused issue they want to get certain
13 code. We've searched for it. We have--

14 THE COURT: How have you searched for it? Tell me
15 what you've done.

16 MR. CHATTERJEE: We, we, we have actually gone to the
17 facilities. We've actually gone to Marc Zuckerberg, the
18 founder of FaceBook and really the person with the fulcrum of
19 this case. We've gone to his home and we've actually
20 physically searched his home without, without him participating
21 and we've gone--

22 THE COURT: Now, how have you searched his home?

23 MR. CHATTERJEE: We've actually gone through, you
24 know, all of his, you know, his room where he keeps all of his
25 electronic equipment. We've gone through the, the other people

1 in the house that live there, there are a number of people
2 that live there, they're a bunch of college students,
3 essentially living together. We've gone to the FaceBook
4 offices and physically searched it. We've produced code that,
5 one of the things that wasn't entirely clear from the
6 presentation was that, it creates the inference that there's
7 been no code provided. We've provided a fair amount of code.
8 There's one memory stick that we have where we produced that
9 code and it was a corrupted file. Now, the server that
10 Mr. Hornick was talking about, originally when the FaceBook was
11 created, the server actually was a laptop computer. It was one
12 in the same. As the, as the needs of the system grew, they
13 exported it to other places in order to support, you know,
14 dozens, hundreds, millions of people accessing the system, but
15 there would be new versions of the up code created as the
16 system grew and the needs changed. We produced all of the code
17 that we've been able to find from those earlier days. We
18 continue searching and we've actually, now that the FaceBook
19 has grown there's a person in charge of operations and there's
20 also a person in charge of the IT infrastructure. We continue
21 working with them to see if we can locate the additional that
22 would be responsive that deals with the source of--

23 THE COURT: I take it there's no dispute that they're
24 entitled to the source codes and the only issue is whether they
25 exist or not, is that true or not?

1 MR. CHATTERJEE: Your Honor, I, I think there's one
2 refinement on that. It's, when you say the source code--

3 THE COURT: Or source codes.

4 MR. CHATTERJEE: Right, the, I, I think after a
5 certain point in time, the source codes totally change and
6 there's really no, no need or relevance for that, but, however,
7 during the relevant time period, the pre-launch--

8 THE COURT: Is there a dispute as to the relevant
9 time period?

10 MR. CHATTERJEE: I think there is, Your Honor. That,
11 that's actually the second part.

12 THE COURT: What do you say the, oh, that's the, the
13 May 21, 2004 issue?

14 MR. CHATTERJEE: Yes, Your Honor, although we have
15 produced the source codes.

16 THE COURT: Okay. Now when you say you searched,
17 what have you done with respect to hard drives?

18 MR. CHATTERJEE: We have, do you mean have we imaged
19 them, is that your question? We--

20 THE COURT: Have you looked for deleted items on
21 them?

22 MR. CHATTERJEE: Yes. We've, I mean obviously
23 there's--

24 THE COURT: Have you, have you done what they, if
25 they got the mirror image, have you done what they're going to

1 do?

2 MR. CHATTERJEE: We've done some of it. We're trying
3 to do some more of it because, we notified them yesterday. We
4 think we've found some additional material. We're not sure
5 what it is, and we're trying to take the forensic images and
6 provide that information to them if it's responsive.

7 THE COURT: Well, it seems to me that the way, the
8 way things work is that the plaintiff makes a request for
9 evidence that's relevant to the claims and defenses of either
10 party of which they're entitled to under the rules. If they've
11 requested this stuff and you have not objected to it, then it
12 seems to me it's your burden to produce it. And I normally
13 would not go to allowing one party to have a mirror image of
14 another party's computer unless I was, unless I had some reason
15 to believe number one that it wasn't being, that, you know,
16 that the defendant wasn't doing it to the extent that they were
17 obligated to do it under the federal rules, or there was some
18 sort of chicanery involved, and I think that's, that's where we
19 are on, on this particular things.

20 MR. CHATTERJEE: We, we've produced everything we've
21 been able to find and we've searched fairly thoroughly of all,
22 all the electronic devices we've been able to find to date, and
23 we continue to do that. So, Your Honor, I mean, we've produced
24 the code that we've been able to find. Now what the plaintiff
25 wants to find, is they want to find the Harvard connection

1 code--

2 THE COURT: Right.

3 MR. CHATTERJEE: --on these laptops. It isn't there.
4 They may not be happy about that, but that's a truism. They
5 want to find Harvard connection code copied into the FaceBook
6 code that that we produced. That isn't there. They're not
7 happy about that. We've, there are some pieces of
8 information--

9 THE COURT: Well, they're not convinced it's not
10 there. That, that's the issue.

11 MR. CHATTERJEE: Right, and Your Honor, we searched
12 and, and--

13 THE COURT: Right.

14 MR. CHATTERJEE: --some evidence simply may not exist
15 anymore. We, we've looked thoroughly for it, and I'm not sure
16 the Draconian relief of mirror imaging every single one of
17 these systems is going--

18 THE COURT: You're saying it would do no good because
19 you've already done it, and you can't find it.

20 MR. CHATTERJEE: Yes, Your Honor.

21 THE COURT: That's your position.

22 MR. CHATTERJEE: Yes, Your Honor.

23 THE COURT: All right.

24 MR. HAMPTON: Your Honor, if I might be heard
25 briefly--

1 THE COURT: Sure.

2 MR. HAMPTON: --on behalf of defendant Saverin.

3 Defendant Saverin's situation illustrates I think a bit of a
4 problem with the plaintiff's monolithic approach here. Even
5 with Mr. Hornick's proposal for a rolling search, he's
6 requested the images of all the individual defendants' hard
7 drive. Mr. Saverin is one of the individual defendants. In
8 opposition to this motion, he submitted a declaration stating
9 under oath that he never had any of the code, either for the
10 Harvard connection or for the FaceBook, and his involvement
11 with this whole case was brief. He's an economics student who
12 was providing some inside on the business model for the
13 FaceBook, never had the relevant code. The situation is even
14 worse, however, Your Honor, because he longer has the hard
15 drive for the relevant period we're talking about. The
16 computer that he was using at the time he's given to his
17 mother, who is a clinical psychologist in Florida. She now has
18 the computer and is using that in the conduct of her business
19 and presumably that has highly sensitive patient information on
20 it. So the plaintiff's proposal, although it seems reasonable
21 to say well we just want to start with the individual hard
22 drives of the individual defendants and the servers of the
23 FaceBook, really shows that at least with respect to defendant
24 Saverin how overbroad and unjustified that request is. I'm
25 sure you'll hear from Mr. Hornick about what he thinks of where

1 we are on that issue now, but as I just heard his proposal
2 today, he would still propose that we provide the image of Mr.
3 Saverin's individual hard drive, and there's no record evidence
4 whatsoever that that is reasonably calculated to lead to
5 anything that's relevant in the case, particularly the source
6 code that they claim is really what they're after here.

7 MR. HORNICK: Your Honor, if I might?

8 THE COURT: Go ahead.

9 MR. HORNICK: There's a very important reason to do
10 imaging other than what we've heard. They say, and this is the
11 first we've heard that they've made these steps, there's a lot
12 of unexplained things about the background of this code, but
13 there's a very important reason to do imaging other than to
14 find the code and that's to find if it was deleted, for example
15 after claims were asserted in this case. That's something
16 that, that an expert would look for. Five years ago, ten years
17 ago--

18 THE COURT: Wait a minute, hold on.

19 MR. HORNICK: Yes.

20 THE COURT: Hold on. Are, are you looking, is your
21 search including a search for deleted documents that may be on
22 the hard drive that an expert would have been able to retrieve?

23 MR. CHATTERJEE: Your Honor, we've searched for, for
24 code anywhere on these devices.

25 THE COURT: Answer the question specifically.

1 MR. CHATTERJEE: Yes.

2 THE COURT: At, does your, has the search that you've
3 conducted involve a search that would involve the search of
4 deleted items that might be recovered?

5 MR. CHATTERJEE: Yes, and it continues to this day.

6 THE COURT: Continue, Mr. Hornick.

7 MR. HORNICK: So the issue is not just whether the
8 information might have been deleted, but when it was deleted
9 and in what situation, what concept.

10 THE COURT: Well, if they can't find the deleted
11 items, how are they going to find when it was deleted?

12 MR. HORNICK: Well an expert may be able to confirm
13 those things. Five years ago, ten years ago, imaging hard
14 drives was unusual. But today--

15 THE COURT: I know.

16 MR. HORNICK: --it has become very common.

17 THE COURT: I know, but it's uncommon for one side in
18 a dispute to get a mirror image of another side's computer.
19 That is not the usual way the things are done in litigation.
20 That, that, that's an extraordinary remedy which is the reason
21 that I'm trying to assess the need, your asserted need and what
22 their position is.

23 MR. HORNCICK: Well, Your Honor, I would say that
24 although that it is unusual that it may not happen on the every
25 day course, but it is not so drastic because all it is is the

1 device to help try to recover documents that everybody admits
2 existed at one time.

3 THE COURT: Yes, but one of the problems with it is
4 you got the whole hard drive and you get tons of documents on
5 there that are, that are not, not relevant, not necessary for
6 the particular purpose and it's a, it's, a lot of defendants or
7 opposing parties see it as a gross invasion of the privacy of
8 their business. That's the problem with it.

9 MR. HORNCICK: Well other courts have considered that
10 very issue and the problem is that you can't do an image of
11 just the part that you need.

12 THE COURT: I know, that's the--

13 MR. HORNCICK: Because you don't know what part you
14 need.

15 THE COURT: --reason why it's an extraordinary remedy
16 to give people mirror images of other people's computers.

17 MR. HORNCICK: But we've built into the particular
18 protocol that we're proposing protections against finding and
19 using information that is not what we're looking for. First of
20 all, we originally proposed that our expert would do this. We
21 don't want it to be our expert now for various reasons. We
22 would propose an independent expert do this. And the
23 independent expert is to look only for code. And the
24 independent expert, we will not be present while he does his
25 work. He'll sign the protective order. There will, nothing

1 that he does will disclose any attorney/client privilege.

2 THE COURT: And it will be at your expense?

3 MR. HORNCICK: And it will be at our expense, that's
4 right. What he finds will be provided to both counsel and to,
5 and we can provide it to the Court or he can provide it to the
6 Court. He maintains the copies of that, those devices,
7 whatever they are in a secure fashion or he can provide them to
8 the Court to maintain in a secure fashion until the case is
9 over. The courts that have considered this issue have looked
10 at all of these issues about whether the, whether you're
11 providing access to privileged information or confidential
12 information or other types of information, and they've said
13 that you have to, have to weigh the needs of the case versus
14 the burden. And in many cases have found that the needs of the
15 case outweigh the burden and what they do is they put into
16 place a protocol that protects the parties' rights so that,
17 that burden is minimized.

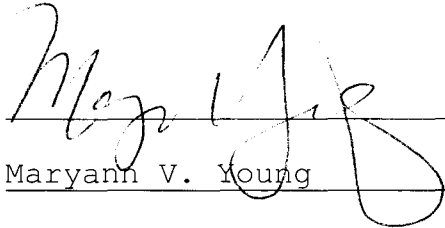
18 THE COURT: All right. What's your problem with that
19 protocol?

20 MR. CHATTERJEE: Your Honor, it's, it's exactly the
21 escalation procedure that Mr. Hornick identified. First off--

22 THE COURT: But in what, what, why is there, why is
23 that a, why is his proposal a problem from your point of view?
24 The person who's going to look at it is not connected with
25 them. In other words, they're not going to, you're not going

CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.



Maryann V. Young

January 11, 2006