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(APPEARANCES CONTINUED)

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1 THE CLERK: All rise. Court is  
2 now in session, the Honorable Leonard P. Stark  
3 now presiding.

4 THE COURT: Good morning.

5 (Everyone said, Good morning, Your  
6 Honor.)

7 THE CLERK: Please be seated.

8 THE COURT: Anything we need to  
9 take up before the jury comes in?

10 MR. ANDRE: Just real quick, Your  
11 Honor. I'm a little paranoid. I saw that  
12 Facebook made a filing this morning on Rule 58.  
13 Some objections. I just want to make sure our  
14 objections to the jury are noted and the Rule 58  
15 motion can come in sometime after the jury  
16 verdict, perhaps within ten days. Is that  
17 acceptable, Your Honor?

18 THE COURT: That's all acceptable  
19 with me. Thank you very much.

20 MR. RHODES: Your Honor, we forgot  
21 to move into evidence DTX 278 and 280.

22 THE COURT: It is admitted.

23 MR. RHODES: I appreciate that,  
24 Your Honor.

1 THE COURT: That's it?

2 MR. RHODES: I know. It's such a  
3 rare event.

4 THE COURT: Not that I am  
5 disappointed.

6 We'll stick to the plan from  
7 yesterday. We'll bring them in. I'll read the  
8 instructions.

9 Mr. Rhodes.

10 MR. RHODES: Not that it's  
11 conceivable that I will take up all my time,  
12 what would you do to signify me that I was in  
13 trouble on time if anything?

14 THE COURT: I think you have in  
15 the order of three hours.

16 MR. RHODES: Assuming I was at two  
17 hours and fifty-nine minutes.

18 THE COURT: Am I right that  
19 Facebook has about three hours?

20 According to this, Leader has an  
21 hour and thirteen minutes, and Facebook has  
22 three hours and two minutes, so -- but let's not  
23 worry about. It is your time, but.

24 MR. RHODES: There is not a force

1 on this great earth that would allow me to take  
2 three hours.

3 THE COURT: Someone else will pull  
4 you down, or I will.

5 MR. RHODES: On the off chance  
6 that he's killing me at hour thirteen, what  
7 would happen?

8 MR. ANDRE: I think that's a shot  
9 across my bow more than anything else. The time  
10 is close. I don't think we'll encroach on that  
11 time.

12 THE COURT: We are going to hold  
13 you to the hour and thirteen minutes, so if  
14 you're getting within five minutes, I imagine  
15 I'll have somebody here waving at you.

16 MR. RHODES: I have a dumb  
17 question, and I apologize for not knowing the  
18 Court's procedures. Do the instructions go in  
19 the jury room?

20 THE COURT: It will.

21 MR. ANDRE: I reserve some of the  
22 hour and thirteen minutes for rebuttal, so I  
23 expect to be sitting down, and as far as the  
24 breaks go --

1 THE COURT: Yes, I think -- I  
2 certainly think we'll give them a break after --  
3 we'll have at least one break before Mr. Rhodes  
4 speaks. Depending on how long it takes me, I  
5 might give you a five-minute break. If I can  
6 get through them quickly enough, we might go  
7 right into Leader and go to Mr. Rhodes.

8 MR. ANDRE: That's fine.

9 THE COURT: All right. Let's  
10 bring the jury in.

11 MR. ANDRE: Your Honor, for the  
12 record, the over/under on Mr. Rhodes's closing  
13 is two hours if you want to take action.

14 (The jury entered the courtroom at  
15 9:03 a.m.)

16 THE CLERK: All rise.

17 THE CLERK: Please be seated.

18 THE COURT: Good morning, ladies  
19 and gentlemen. Welcome back. Again as I told  
20 you before letting you go yesterday, the agenda  
21 for this morning is that I'm going to read you  
22 the final jury instructions and then we will  
23 hear closing arguments from both Leader and  
24 Facebook, and when they are all finished, the

1 case will be submitted to you all to begin your  
2 deliberations.

3 I've got a lot to read to you.  
4 You will also be getting a copy of these  
5 instructions when you deliberate, so just do  
6 your best, of course, to follow along, and I  
7 will begin now.

8 Section one is entitled "General  
9 Instructions." Jury instruction 1.1 is the  
10 introduction. It says,

11 Members of the jury, now it is  
12 time for me to instruct you about the law that  
13 you must follow in deciding this case.

14 I will start by explaining your  
15 duties, the general rules that apply in every  
16 civil case.

17 I will explain some rules that you  
18 must follow use in evaluating particular  
19 testimony and evidence.

20 I will explain the positions of  
21 the parties and the law you will apply in this  
22 case.

23 Finally, I will explain the rules  
24 that you must follow during your deliberations

1 in the jury room and the possible verdicts that  
2 you may return.

3 Please listen very carefully to  
4 everything I say.

5 I have provided each of you with a  
6 copy of these written instructions. You will  
7 have your written copy of these instructions  
8 with you in the jury room for your reference  
9 during your deliberations. You will also have a  
10 verdict form, which will list the questions that  
11 you must answer to decide this case.

12 Jurors' duties. You have two main  
13 duties as jurors. The first one is to decide  
14 what the facts are from the evidence that you  
15 saw and heard here in court. Deciding what the  
16 facts are is your job, not mine, and nothing I  
17 have said or done during the trial was meant to  
18 influence your decisions about the facts in any  
19 way.

20 Your second duty is to take the  
21 law that I give you, apply it to the facts, and  
22 decide under the appropriate burden of proof  
23 which party should prevail on each of the issues  
24 presented.

1           It is my job to instruct you on  
2           the law, and you are bound by the oath that you  
3           took at the beginning of trial to follow the  
4           instructions that I give you, even if you  
5           personally disagree with them. This includes  
6           the instructions that I gave you before and  
7           during the trial and these instructions. All  
8           the instructions are important, and you should  
9           consider them together as a whole.

10           Perform these duties fairly. Do  
11           not let any bias, sympathy, or prejudice that  
12           you may feel toward one side or the other  
13           influence your decision in any way.

14           Evidence defined. You must make  
15           your decision based only on the evidence that  
16           you saw and heard here the court. Do not let  
17           rumors, suspicions, or anything else that you  
18           may have seen or heard outside of court  
19           influence your decision in any way.

20           The evidence in this case includes  
21           only what the witnesses said while they were  
22           testifying under oath -- including deposition  
23           testimony that has been played or read to you --  
24           the exhibits that I allowed into evidence, and

1 any facts that the parties agreed to by  
2 stipulations which I will tell you about as part  
3 of these instructions.

4 Nothing else is evidence. The  
5 lawyer's statements and arguments are not  
6 evidence. Their questions and objections are  
7 not evidence. My legal rulings are not  
8 evidence. My comments and questions are not  
9 evidence. The notes taken by any juror are not  
10 evidence.

11 During the trial, I may not -- I  
12 may have not let you hear the answers to some of  
13 the questions the lawyers asked. I also may  
14 have ruled that you could not see some of the  
15 exhibits that the lawyers wanted you to see.  
16 You must follow my orders and completely ignore  
17 all of these things. Do not even think about  
18 them. Do not speculate about what a witness  
19 might have said or what an exhibit might have  
20 shown. These things are not evidence, and you  
21 are bound by your oath not to let them influence  
22 your decision in any way.

23 Further, sometimes I may have  
24 ordered you to disregard things that you saw or

1 heard or struck things from the record. You  
2 must follow my instructions to completely  
3 disregard such things you saw or heard and  
4 completely ignore those things struck from the  
5 record. Do not even think about them. These  
6 things are not evidence, and you are bound by  
7 your oath not to let them influence your  
8 decision in any way.

9 Make your decision based only on  
10 the evidence as I have defined it here and  
11 nothing else.

12 Direct and circumstantial  
13 evidence. You have heard the terms "direct  
14 evidence" and "circumstantial evidence."

15 Direct evidence is evidence like  
16 the testimony of any eye witness which, if you  
17 believe it, directly proves a fact. If a  
18 witness testified that she saw it raining  
19 outside and you believed her, that would be  
20 direct evidence that it was raining.

21 Circumstantial evidence is simply  
22 a chain of circumstances that indirectly proves  
23 a fact. If someone walked into the courtroom  
24 wearing a raincoat covered with drops of water

1 and carrying a wet umbrella, that would be  
2 circumstantial evidence from which you could  
3 conclude that it was raining.

4 It is your job to decide how much  
5 weight to give direct and circumstantial  
6 evidence. The law makes no distinction between  
7 the weight that you should give to either one,  
8 nor does it say that one is any better than the  
9 other. You should consider all the evidence,  
10 both direct and circumstantial, and give it  
11 whatever weight you believe it deserves.

12 Consideration of evidence. You  
13 should use your common sense in weighing the  
14 evidence. Consider it in light of your everyday  
15 experience with people and events and give it  
16 whatever weight you believe it deserves. If  
17 your experience tells you that certain evidence  
18 reasonably leads to a conclusion, you are free  
19 to reach that conclusion.

20 Statements of counsel. A further  
21 word about statements and arguments of counsel.  
22 The attorneys' statements and arguments are not  
23 evidence. Instead, their statements and  
24 arguments are intended to help you review the

1 evidence presented. If you remember the  
2 evidence differently from the attorneys, you  
3 should rely on your own recollection.

4 The role of attorneys is to  
5 zealously and effectively advance the claims of  
6 the parties they represent within the bounds of  
7 the law. An attorney may argue all reasonable  
8 conclusions from evidence in the record.

9 It is not proper, however, for an  
10 attorney to state an opinion as to the truth or  
11 falsity of any testimony or evidence. What an  
12 attorney personally thinks or believes about the  
13 testimony or evidence in a case is not relevant,  
14 and you are instructed to disregard any personal  
15 opinion or belief concerning testimony or  
16 evidence that an attorney has offered during  
17 opening or closing statements or any other time  
18 during the course of the trial.

19 Credibility of witnesses. You are  
20 the sole judges of each witness's credibility.  
21 You should consider each witness's means of  
22 knowledge; strength of memory; opportunity to  
23 observe; how reasonable or unreasonable the  
24 testimony is; whether it is consistent or

1 inconsistent; whether it has been contradicted  
2 the witness's biases, prejudices, or interests;  
3 the witness's manner or demeanor on the witness  
4 stand; and all the circumstances that, according  
5 to the evidence, could affect the credibility of  
6 the testimony.

7 If you find the testimony to be  
8 contradictory, you must try to reconcile it, if  
9 reasonably possible, so as to make one  
10 harmonious story of it all. If you can't do  
11 this, then it is your duty and privilege to  
12 believe the testimony that in your judgment is  
13 the most believable and disregard any testimony  
14 that your judgment is not believable.

15 In determining the weight to given  
16 the testimony of a witness, you should ask  
17 yourself whether this is evidence tending to  
18 prove that the witness testified falsely about  
19 some important fact or whether there is evidence  
20 that at some other time the witness said or did  
21 something or failed to say or do something that  
22 was different from the testimony he or she gave  
23 at trial. You have the right to distrust such  
24 witness's testimony in other particulars, and

1 you may reject all of some of the testimony of  
2 that witness or give it such credibility as you  
3 may think it deserves.

4 You should remember that a simple  
5 mistake by a witness does not necessarily mean  
6 the witness was not telling the truth. People  
7 may tend to forget some things or remember other  
8 things inaccurately. If a witness has made a  
9 misstatement, you must consider whether it was  
10 an innocent lapse of memory or an intentional  
11 falsehood, and that may depend on whether it  
12 concerns an important fact or unimportant  
13 detail.

14 This instruction applies to all  
15 witnesses.

16 Number of witnesses. One more  
17 point about witnesses. Sometimes jurors wonder  
18 if the number of witnesses who testify makes any  
19 difference.

20 Do not make any decision based  
21 only on the number of witnesses who testified.  
22 What is more important is how believable the  
23 witnesses were and how much weight you think  
24 their testimony deserves. Concentrate on that,

1 not on the numbers.

2 Expert testimony. Expert  
3 testimony is testimony from a person who has a  
4 special skill or knowledge in some science,  
5 profession, or business. This skill or  
6 knowledge is not common to the average person,  
7 but has been acquired by the expert through  
8 special study or experience.

9 In weighing expert testimony, you  
10 may consider the expert's qualifications, the  
11 reasons for the expert's opinions, and the  
12 reliability of the information supporting the  
13 expert's opinions, as well as the factors I have  
14 previously mentioned for weighing testimony of  
15 any other witness.

16 Expert testimony should receive  
17 whatever weight and credit you think  
18 appropriate, given all the other evidence in the  
19 case. You are free to accept or reject the  
20 testimony of experts, just as with any other  
21 witness.

22 Deposition testimony. A  
23 deposition is the sworn testimony of a witness  
24 taken before trial. The witness is placed under

1 oath and swears to tell the truth, and lawyers  
2 for each party may ask questions. A court  
3 reporter is present and records the questions  
4 and answers. The deposition may also be  
5 recorded on videotape.

6 Deposition testimony is entitled  
7 to the same consideration and is to be judged  
8 insofar as possible in the same way as if the  
9 witness has been present to testify.

10 Burden of proof. In any legal  
11 action, facts must be proven by a required  
12 standard of evidence known as the burden of  
13 proof. In a patent case such as this, there are  
14 two different burdens of proof that are used.  
15 The first is called "preponderance of the  
16 evidence." The second is called "clear and  
17 convincing evidence."

18 Leader has the burden of proving  
19 patent infringement by what is called a  
20 preponderance of the evidence. When a party has  
21 the burden of proof by a preponderance of the  
22 evidence, it means that you must be persuaded  
23 that what the party seeks to prove is more  
24 probably true than not true. To put it

1 differently, if you were to put Leader's and  
2 Facebook's evidence on opposite sides of a  
3 scale, the evidence supporting Leader's  
4 assertions would have to make the scales tip  
5 somewhat on its side.

6 Facebook is also contending that  
7 the asserted claims of the '761 patent are  
8 invalid. Because patents are presumed valid,  
9 Facebook must prove its claims that the '761  
10 patent is invalid by clear and convincing  
11 evidence. When a party has a burden of proof by  
12 clear and convincing evidence, it means that the  
13 evidence must produce in your mind a firm belief  
14 and conviction that it is highly probable that  
15 the matter sought to be established is true.  
16 Proof by clear and convincing evidence,  
17 therefore, is a higher burden of proof than  
18 proof by a preponderance of the evidence.

19 You might have heard of the  
20 "beyond a reasonable doubt" burden of proof of  
21 criminal cases. This requirement is the highest  
22 burden of proof. It does not apply to civil  
23 cases, and therefore you should put it out of  
24 your mind.

1           Use of notes. You may use notes  
2 taken during the trial to assist your memory.  
3 Remember that your notes are for your personal  
4 use. They are not to be given or read to anyone  
5 else. Do not use your notes or any other  
6 juror's notes as authority to persuade your  
7 fellow jurors.

8           Your notes are not evidence, and  
9 they are by no means a complete outline of the  
10 proceedings or list of the highlights of trial.  
11 Your notes are valuable only as a way to refresh  
12 your memory.

13           Your memory is what you should be  
14 relying on what it comes time to deliberate and  
15 render your verdict in this case.

16           Now, on to Chapter 2, called "The  
17 Parties and Their Contentions," which begins  
18 with jury instruction 2.1: The parties.

19           I will now review for you the  
20 parties in this action and the positions of the  
21 parties that you will have to consider in  
22 reaching your verdict.

23           The plaintiff is Leader  
24 Technologies, Inc., which I refer to as

1 "Leader."

2 The defendant is Facebook, Inc.,  
3 which I refer to as "Facebook."

4 Leader is the owner of United  
5 States patent number 7,139,761. I refer to this  
6 patent as the '761 patent.

7 The parties' contentions. Leader  
8 contends that Facebook infringes claims 1, 4, 7,  
9 9, 11, 16, 21, 23, 25, 31 and 32 of United  
10 States patent number 7,139,761. These claims  
11 may be referred to as the asserted claims.

12 Facebook contends that it does not  
13 infringe any of the asserted claims of the '761  
14 patent. Facebook further contends that the  
15 asserted claims are invalid.

16 Summary of patent issues. You  
17 must decide the following issues in this case:

18 One, whether Leader has proven by  
19 a preponderance of the evidence that Facebook's  
20 manufacture or use of the Facebook website or  
21 the methods practiced by the Facebook website  
22 infringe any asserted claim of the '761 patent,  
23 either literally or under the doctrine of  
24 equivalents.

1 Two, whether Facebook has proven  
2 by clear and convincing evidence that any  
3 asserted claim of the '761 patent is invalid due  
4 to anticipation, obviousness, prior public use,  
5 or the on-sale bar.

6 Statement of undisputed facts.  
7 The following facts are undisputed between the  
8 parties:

9 One, Leader is the assignee of all  
10 ownership rights, title, and interest in the  
11 '761 patent.

12 Two, the 761 patent issued on  
13 November 21, 2006.

14 Three, Facebook owns and operates  
15 the Facebook website, which is currently located  
16 at [www.Facebook.com](http://www.Facebook.com), and was formerly located at  
17 [www.thefacebook.com](http://www.thefacebook.com).

18 Four, Facebook was launched on  
19 February 4, 2004.

20 Five Facebook provides a developer  
21 wiki at  
22 [http://wiki.developers.facebook.com/index.php/  
23 Main\\_Page](http://wiki.developers.facebook.com/index.php/Main_Page) and  
24 <http://developers.facebook.com/docs>.

1 Now we're on to Chapter 3, called  
2 "Infringement," and jury instruction number 3.1  
3 is called The Patent Laws.

4 At the beginning of the trial, I  
5 gave you some general information about patents  
6 and the patent system and a brief overview of  
7 the patent laws relevant to this case. I will  
8 now give you more detailed instructions about  
9 the patent laws that specifically relate to this  
10 case. If you would like to review my  
11 instructions at any time during your  
12 deliberations, they will be available to you in  
13 the jury room.

14 The asserted claims. Before you  
15 can decide any issues in this case, you will  
16 have to understand what the patent claims. The  
17 patent claims are the numbered sentences at the  
18 end of patent.

19 The patent claims involved here  
20 are claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31,  
21 and 32 of the '761 patent, which are located in  
22 columns 20, 21, 22, 23, and 24 of the '761  
23 patent, which is exhibit PTX 1 in evidence. The  
24 claims are intended to define in words the

1 boundaries of the invention. The claims define  
2 the patent owner's property rights.  
3 Infringement is the act of trespassing on those  
4 rights.

5 Only the claims of the patent can  
6 be infringed. Neither the specification, which  
7 is the written description of the invention, nor  
8 the drawings of a patent can be infringed.

9 Each of the claims must be  
10 considered individually. You must use the same  
11 claim meaning for both your decision on  
12 infringement and your decision on invalidity.

13 Independent and dependent claims.  
14 This case involves two types of patent claims,  
15 referred to as independent and dependent claims.

16 An independent claim sets forth  
17 all of the requirements that must be met in  
18 order to be covered by that claim; thus, it is  
19 not necessary to look at any other claim to  
20 determine what an independent claim covers. In  
21 this case, claims 1, 9, 21, and 23 of the '761  
22 patent are each independent claims.

23 The remainder of the claims in the  
24 '761 patent are dependent claims. For example,

1 claims 4 and 7 depend upon claim 1. Claims 11  
2 and 16 depend upon claim 9. Claims 25, 31, and  
3 32 depend upon claim 23.

4 A dependent claim does not itself  
5 recite all of the requirements of the claim, but  
6 refers to another claim for some of its  
7 requirements. In this way, the claim depends on  
8 another claim.

9 A dependent claim incorporates all  
10 of the requirements of the other claim or claims  
11 to which it refers, as well as the additional  
12 requirements recited in the dependent claim  
13 itself; therefore, to determine the scope of a  
14 dependent claim, it is necessary to look at both  
15 the independent claim -- it is necessary to look  
16 at the dependent claim and the other claim or  
17 claims to which it refers.

18 If you find that a claim on which  
19 other claims depend has not been infringed,  
20 there cannot be any infringement of any  
21 dependent claim that refers directly or  
22 indirectly to that independent claim.

23 Claim construction for the case.  
24 I will now explain to you the meaning of some of

1 the words in this case. In doing so, I will  
2 explain some of the requirements of the claims.  
3 You must accept my definition of these words in  
4 the claims as correct. You should not take my  
5 definition of the language of the claims as an  
6 indication that I have a view regarding how you  
7 should decide the issues that you are being  
8 asked to decide, such as infringement and  
9 invalidity. These issues are yours to decide.

10 I instruct you that the following  
11 claim terms have the followings definitions:

12 One, the term "context" means  
13 "environment." The term "context" appears in  
14 claims 1, 4, 7, 23, and 25 of the '761 patent.

15 Two, the term "component" means "a  
16 computer-related entity, either hardware, a  
17 combination of hardware and software, software,  
18 or software in execution." The term "component"  
19 appears in claims 1, 4, 7, 23, 25, 31, and 32 of  
20 the '761 patent.

21 Three, the term "many-to-many  
22 functionality" means "two or more users able to  
23 access two or more data files." The term  
24 "many-to-many functionality" appears in claim 32

1 of the '761 patent.

2 Four, the term "dynamically" means  
3 "automatically and in response to the preceding  
4 event." The term "dynamically" appears in  
5 claims 1, 9, 21, and 23 of the '761 patent.

6 Five, the term "wherein" means "in  
7 which." The term "wherein" appears in claims 1,  
8 9, and 23.

9 You must not take into  
10 consideration any argument that the prosecution  
11 history of the patent or the specification of  
12 the patent may suggest a different definition of  
13 the terms set forth in this instruction. You  
14 are not permitted to use any alternative or  
15 modified definition in your determination of the  
16 infringement and invalidity issues in this case.

17 Open-ended or comprising claims.  
18 The preamble to claim 1 uses the phrase "[a]  
19 computer-implemented network-based system that  
20 facilities management of data, comprising. . ."

21 The preamble to claim 9 uses the  
22 phrase "[a] computer-implemented method of  
23 managing data comprising computer-executable  
24 acts of. . ."

1           The preamble to claim 21 uses the  
2           phrase "[a] computer-readable medium for storing  
3           computer-executable instructions for a method of  
4           managing data, the method comprising. . ."

5           The word "comprising" means  
6           "including the following, but not excluding  
7           others." If you find that Facebook's  
8           computer-readable medium practices all of the  
9           elements in claim 1, 9 or 21, the fact that  
10          Facebook's computer-readable medium might  
11          includes additional steps would not avoid  
12          literal infringement of a claim that uses  
13          "comprising" language.

14          Patent infringement generally. I  
15          will now instruct you how to decide whether or  
16          not Facebook has infringed the '761 patent.

17          Infringement is assessed on a  
18          claim-by-claim basis; therefore, there may be  
19          infringement as to one claim but no infringement  
20          as to another.

21          In this case, Leader has alleged  
22          that Facebook directly infringes claims 1, 4, 7,  
23          9, 11, 16, 21, 23, 25, 31, and 32 of the '761  
24          patent.

1 In order to prove infringement,  
2 Leader must meet its burden of proof of a  
3 preponderance of the evidence, i.e., that it is  
4 more likely than not that all of the  
5 requirements for infringement have been proven.

6 Direct literal infringement. In  
7 order to directly and literally infringe a  
8 patent claim, a product must include every  
9 limitation or element of the claim. If the  
10 accused Facebook system or method omits even a  
11 single element recited in a patent claim, then  
12 you must find that the accused Facebook system  
13 or method has not literally infringed that  
14 claim.

15 Facebook can also be liable for  
16 direct infringement of a method claim -- that  
17 is, independent claim 9 of the '761 patent and  
18 its dependent claims, claims 11 and 16 -- if, by  
19 itself or in combination with a third party, it  
20 performs all the steps of the claimed method.  
21 For Facebook to be liable for the acts of third  
22 parties, Leader must have proven by a  
23 preponderance of the evidence, that Facebook  
24 controls or directs the activity of those

1 parties who perform the steps of the method  
2 claims.

3 Determining whether Facebook  
4 controls or directs the activity of those  
5 parties who perform the steps of the method  
6 claims is a factual question for you alone to  
7 decide. In making this determination, factors  
8 you may consider include whether the claims at  
9 issue require those third parties to take action  
10 for the claims to be performed, or  
11 alternatively, whether the third parties merely  
12 activate functions already present in the  
13 underlying invention; whether there is a  
14 contractual relationship between Facebook and  
15 the third parties; whether users of Facebook are  
16 agents of Facebook; and whether Facebook  
17 supplies the instrumentalities, tools, and the  
18 website for the person using the website.

19 Infringement under the doctrine of  
20 equivalents. If you decide that Facebook does  
21 not literally infringe an asserted patent claim,  
22 you must then decide if Facebook infringes the  
23 claim under what is called doctrine of  
24 equivalents.

1 Under the doctrine of equivalents,  
2 Facebook can only infringe an asserted patent  
3 claim if the Facebook website includes parts or  
4 steps that are identical or equivalent to the  
5 requirements of the claim. If there is missing  
6 an identical or equivalent part or step to even  
7 one part or step of the asserted patent claim,  
8 Facebook cannot infringe the claim under the  
9 doctrine of equivalents. Thus, in making your  
10 decision under the doctrine of equivalents, you  
11 must first look at each individual requirement  
12 of the asserted patent claim and decide whether  
13 the Facebook website has an identical or  
14 equivalent part or step to that individual claim  
15 requirement.

16 You may find that an element or  
17 step is equivalent to a requirement of the claim  
18 that is not met literally if a person having  
19 ordinary skill in the field of technology of the  
20 patent would have considered the differences  
21 between them to be insubstantial or would have  
22 found that the structure or action, one,  
23 performs substantially the same function; and  
24 two, works in substantially the same way; three,

1 to achieve substantially the same result as the  
2 requirement of the claim.

3 In order for the structure or  
4 action to be considered interchangeable, the  
5 structure or action must have been known at the  
6 time of the alleged infringement to a person  
7 having ordinary skill in the field of technology  
8 of the patent. Interchangeability at the  
9 present time is not sufficient. In order to  
10 prove infringement by equivalents, Leader must  
11 prove the equivalency of the structure or action  
12 to a claim element by a preponderance of the  
13 evidence.

14 Infringement: Compare Facebook to  
15 claims of the; 761 patent. Members of the jury,  
16 in considering all of the evidence and  
17 determining if Leader has proven that Facebook  
18 infringes the asserted claims of the '761  
19 patent, you may only compare the Facebook  
20 website to the asserted claims of the '761  
21 patent. You should not compare any of Leader's  
22 products with the Facebook website.

23 Now on to Chapter 4, called  
24 "Validity Defenses," and the first instruction

1 in number 4.1 is called Validity in General.

2 The granting of a patent by the  
3 Patent Office carries with it the presumption  
4 that the patent is valid. Facebook contends  
5 that all of the asserted claims of the '761  
6 patent are invalid.

7 I will now instruct you on the  
8 rules you must follow in deciding whether or not  
9 Facebook has proven that claims 1, 4, 7, 9, 11,  
10 16, 21, 23, 25, 31, and 32 of the '761 patent  
11 are invalid. To prove that any claim of a  
12 patent is invalid, Facebook must persuade you by  
13 clear and convincing evidence, i.e., you must be  
14 left with a clear conviction that the claim is  
15 invalid.

16 Prior art. Under the patent laws,  
17 a person is entitled to a patent only if the  
18 invention claimed in the patent is new and  
19 nonobvious in light of what came before. That  
20 which came before is referred to as "prior art."

21 Prior art includes any of the  
22 following items if they were received into  
23 evidence during the trial:

24 One, any patent that issued more

1 than one year before the effective filing date  
2 of the '761 patent.

3 Two, any printed publication that  
4 was published more than one year before the  
5 effective filing date of the '761 patent.

6 Three, any product or method that  
7 was in public use or on sale in the United  
8 States more than one year before the effective  
9 filing date of the '761 patent.

10 Four, any printed publication that  
11 was published prior to the invention date of the  
12 '761 patent.

13 Five, any published United States  
14 patent application or issued United States  
15 patent with a filing date that predates the  
16 invention date of the '761 patent.

17 And, six, any product or method  
18 that was known or used by others in the United  
19 States prior to the invention date of the '761  
20 patent.

21 Facebook contends that the  
22 following are prior art:

23 One, European Patent Number EP  
24 1087306, also referred to as Hubert '306.

1 Two, U.S. Patent Number 7,590,934,  
2 also referred to as Hubert '934.

3 Three, U.S. Patent Number  
4 6,236,994, also referred to as Swartz '994.

5 Four, iManage DeskSite 6.0 User  
6 Reference Manual, also referred to as iManage.

7 Five, U.S. Patent Number 6,434,403  
8 B1, also referred to as Ausems '403.

9 And, six, Leader's Leader2Leader  
10 product, also referred to as Leader2Leader.

11 The date of the invention and the  
12 date of filing of the patent application may  
13 affect what is prior art.

14 In this case, Leader contends its  
15 invention date is August 19, 1999, which is its  
16 date of conception of the invention, and that  
17 its effective filing date is December 11, 2002,  
18 the date of Leader's filing of the provisional  
19 patent application.

20 Facebook contends that the  
21 invention date and the effective filing date are  
22 both December 10, 2003, which is the date of the  
23 filing of the patent application.

24 I will give you instructions later

1 regarding how to determine the invention date  
2 and the effective filing date. Once you have  
3 decided the invention date and the effective  
4 filing date, you can determine what is prior art  
5 in this case.

6 During Leader's cross-examination  
7 of Facebook's expert, Professor Greenberg,  
8 Leader's counsel made statements implying that  
9 the U.S. Patent Office examiner who worked on  
10 the '761 patent, Diane Mizrahi, was aware of and  
11 considered the Swartz patent. I instruct you  
12 not to draw such a connection. Because of  
13 Patent Office procedures, it would not be  
14 reasonable for you to draw the inference that  
15 the examiner, Ms. Mizrahi, was aware of and  
16 considered the Swartz patent during prosecution  
17 of the '761 patent.

18 With respect to Facebook's  
19 contentions that the '761 patent is invalid due  
20 to anticipation or obviousness due to prior art,  
21 the only relevant comparisons are between the  
22 claims of the '761 patent and the disclosures of  
23 the prior to art references. What the PTO or  
24 the examiner of the '761 patent considered or

1 did not consider is not relevant to your  
2 determination and should not be considered by  
3 you.

4 Invention date: Conception and  
5 reduction to practice.

6 I will now explain to you how you  
7 will determine the invention date that I  
8 mentioned earlier. The date of invention is  
9 either when the invention was reduced to  
10 practice or when it was conceived, provided the  
11 inventor was diligent in reducing the invention  
12 to practice.

13 Conception is the mental part of  
14 an invented act, i.e., the formation in the mind  
15 of the inventor of a definite and permanent idea  
16 of the complete and operative invention as it is  
17 thereafter to be applied in practice, even if  
18 the inventor didn't know at the time that the  
19 invention would work. Conception of an  
20 invention is complete when the idea is so  
21 clearly defined in the inventor's mind that, if  
22 the idea were communicated to a person having  
23 ordinary skill in the field of the technology,  
24 he or she would be able to reduce the invention

1 to practice without undue research or  
2 experimentation.

3 This requirement does not mean  
4 that the inventor has to have a prototype built  
5 or have actually explained the invention to  
6 another person, but there must be some evidence  
7 beyond the inventor's own testimony that  
8 confirms the date on which the inventor had the  
9 complete idea. Conception may be proven when  
10 the invention is shown in its complete form by  
11 drawings, disclosure to another person, or other  
12 forms of evidence presented at trial.  
13 Conception must include every feature or  
14 limitation of the claimed invention.

15 Diligence means working  
16 continuously, though not necessarily every day.  
17 If an inventor attempts to rely on an earlier  
18 date of conception, it must show that it  
19 exercised reasonable diligence throughout the  
20 entire period between the date of conception and  
21 the date the invention was reduced to practice.  
22 This requires the inventor to show that it took  
23 specific and affirmative acts during this entire  
24 period that were directly related to the

1 reduction to practice of the invention at issue  
2 and that acceptable excuses be provided for any  
3 period of inactivity.

4 Voluntarily setting aside  
5 development of the alleged invention or taking  
6 time to commercially exploit an invention or a  
7 separate product or invention do not constitute  
8 acceptable excuses. A claimed invention has  
9 been reduced to practice when it has been  
10 constructed, used, tested, sufficiently to show  
11 that it will work for its intended purpose or  
12 when the inventor files a patent application.

13 An invention may also be reduced  
14 to practice even if the inventor had not made or  
15 tested a prototype of the invention if it has  
16 been fully described in a filed patent  
17 application.

18 If you find that Leader has proven  
19 a conception date of August 19, 1999, and that  
20 Leader was diligent in reducing the invention to  
21 practice, then the invention date is August 19,  
22 1999. If you do not find that Leader has proven  
23 conception and reduction to practice, then the  
24 invention date is the same date as the effective

1 filing date.

2 Prior art effective filing date.

3 Leader filed a provisional patent application on  
4 December 11, 2002. You must determine whether  
5 the asserted claims of the '761 patent are  
6 sufficiently supported by the provisional  
7 application.

8 Leader contends that the asserted  
9 claims of the '761 patent are entitled to the  
10 filing date of the provisional application,  
11 while Facebook contends the asserted claims are  
12 not.

13 Leader may rely on the filing date  
14 of its provisional application to establish the  
15 effective filing date if the application teaches  
16 one of ordinary skill in the art to make and use  
17 the claimed invention of the '761 patent and to  
18 do so without undue experimentation.  
19 Additionally, the provisional application must  
20 disclose each and every element of the asserted  
21 claims of the '761 patent.

22 If you determine that Leader has  
23 shown by a preponderance of the evidence that  
24 the effective filing date is December 11, 2002,

1 then Facebook must prove by clear and convincing  
2 evidence that this is not the correct effective  
3 filing date.

4 If you find that Leader is  
5 entitled to an effective filing date that is the  
6 same date as the filing date of the provisional  
7 application, then December 11, 2002, is the  
8 effective filing date of the '761 patent for  
9 purposes of validity and the prior art.

10 Anticipation. A person cannot  
11 obtain a patent if someone else already has made  
12 an identical invention. Simply put, the  
13 invention must be new. An invention that is not  
14 new or novel is said to be anticipated by the  
15 prior art. Under the U.S. patent laws, an  
16 invention that is anticipated is not entitled to  
17 patent protection. To prove anticipation,  
18 Facebook must prove with clear and convincing  
19 evidence that the claimed invention is not new.

20 In this case, Facebook contends  
21 that claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31,  
22 and 32 of the '761 patent are anticipated. To  
23 anticipate a claim, each and every element of  
24 the claim must be present in a single item of

1 prior art that is dated at least one year prior  
2 to the effective filing date. You may not  
3 combine two or more items of prior art to prove  
4 anticipation.

5 In determining whether every one  
6 of the elements of the claimed invention is  
7 found in the prior art, you should take into  
8 account what a person of ordinary skill in the  
9 art would have understood from his or her  
10 examination of the particular prior art.

11 In determining whether the single  
12 item of prior art anticipates a patent claim,  
13 you should take into consideration not only what  
14 is expressly disclosed in the particular item of  
15 prior art, but also what inherently resulted  
16 from its practice. This is called "inherency."  
17 To establish inherency, the evidence must make  
18 clear that the prior art necessarily resulted in  
19 the missing descriptive matter and that it would  
20 have been so recognized by a person of ordinary  
21 skill in the art at the time the patent  
22 application was filed.

23 You must keep these requirements  
24 in mind and apply them to each piece of prior

1 art you consider in this case. There are  
2 additional requirements that apply to the  
3 particular categories of anticipation that  
4 Facebook contends in this case. I will now  
5 instruct you about those.

6 Anticipation: Prior public use.  
7 Facebook contends that claims 1, 4, 7, 9, 11,  
8 16, 21, 23, 25, 31, and 32 of the '761 patent  
9 are invalid because the alleged invention  
10 described in those claims was in public use more  
11 than one year before the effective filing date  
12 of the patent. To prove public use of a  
13 particular claim, Facebook must prove by clear  
14 and convincing evidence that, one, Leader  
15 disclosed a product that meets all the elements  
16 of that claim to the public more than one year  
17 before the effective filing date; and, two, the  
18 invention disclosed in that claim was ready for  
19 patenting when alleged public use occurred.

20 Any use of the alleged invention  
21 of a patent by any person who is under no  
22 limitation restriction or obligation of secrecy  
23 to the inventor may constitute a public use that  
24 invalidates the patent if the use occurred more

1 than one year prior to the effective filing date  
2 of the patent. For example, a demonstration of  
3 a product that embodies the alleged invention of  
4 the patent claim may constitute a public use  
5 that renders the claim invalid if the person who  
6 received the demonstration was under no legal  
7 obligation to the inventor to maintain secrecy.  
8 The absence of affirmative steps to maintain  
9 secrecy of prior use of an invention is evidence  
10 of a public use.

11 The law does not require prior use  
12 of an alleged invention to be widely  
13 disseminated to qualify as public use. The  
14 disclosure of the invention to even a single  
15 third party may qualify as public use, provided  
16 the third party was under no legal obligation to  
17 maintain secrecy. Mere knowledge of the  
18 invention by the public is not sufficient.

19 An invention is ready for  
20 patenting either when it's reduced to practice  
21 or when the inventor has enabled the invention  
22 by preparing drawings or other descriptions of  
23 the invention sufficient to allow a person of  
24 ordinary skill in the art to make or use the

1 invention.

2 On-sale bar. A patent claim is  
3 invalid if it can be shown by clear and  
4 convincing evidence that an embodiment that  
5 contains all the elements of that claim was,  
6 more than one year before the effective filing  
7 date, both, one, subject to commercial offer for  
8 sale in the United States; and, two, ready for  
9 patenting.

10 Facebook contends that claims one,  
11 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 of the  
12 '761 patent are anticipated because the  
13 invention was on sale in the United States more  
14 than one year before the effective filing date.

15 In this case, Facebook must prove  
16 by clear and convincing evidence that a product  
17 that met all the limitations of the asserted  
18 claims was ready for patenting and was offered  
19 for sale more than a year prior to the effective  
20 filing date. Once again, your determination of  
21 the effective filing date will affect whether or  
22 not you find that a commercial offer for sale  
23 for the Leader invention occurred more than a  
24 year before the effective filing date; however,

1 it is irrelevant whether or not the offer for  
2 sale was secret or non-secret.

3 An invention was on sale if the  
4 claimed invention was embodied in the thing  
5 commercially offered for sale.

6 An offer for sale need not be  
7 accepted to trigger the on-sale bar. That the  
8 offer, even if accepted, might not have  
9 ultimately led to an actual sale of the  
10 invention is also not relevant. The essential  
11 question is whether or not there was an attempt  
12 to obtain commercial benefit from the invention.  
13 An offer to sell can invalidate a patent even if  
14 the offer was secret, such as under the  
15 protection of a nondisclosure agreement.

16 An invention is ready for  
17 patenting either when it is reduced to practice  
18 or when the inventor has enabled the invention  
19 by preparing drawings or other descriptions of  
20 the invention sufficient to allow a person of  
21 ordinary skill until the art to make or use the  
22 invention. The claimed invention is ready for  
23 patenting when there is reason to believe that  
24 it will work for its intended purpose.

1 Experimental use. Leader contends  
2 that there were no public demonstrations or  
3 offers for sale of the invention more than a  
4 year before the effective filing date. One  
5 reason for Leader's contention is the law of  
6 experimental use.

7 The law recognizes the defense of  
8 experimental use for claims of public use and  
9 offers for sale because the inventor must be  
10 given the opportunity to develop the invention.  
11 If the public use or offer for sale was an  
12 experimental use performed in order to bring the  
13 invention to perfection or to determine if the  
14 invention was capable of performing its intended  
15 purpose, then such a use does not invalidate the  
16 claim.

17 Certain activities are  
18 experimental if they are a legitimate effort to  
19 perfect the invention or to determine if the  
20 invention will work for its intended purpose.  
21 So long as the primary purpose is  
22 experimentation, it does not matter that the  
23 public used the invention or that the inventor  
24 incidentally derived profit from it.

1                   Only the experimentation by and  
2                   under the control of the inventor of the patent  
3                   qualifies for this exception. Experimentation  
4                   by a third party for its own purposes does not.  
5                   The experimentation must relate to the features  
6                   of the claimed invention and it must be for the  
7                   purpose of technological improvement, not  
8                   commercial exploitation. A test done primarily  
9                   for marketing and only incidentally for  
10                  technological improvement is not an experimental  
11                  use but a public use. If any commercial  
12                  exploitation does occur, it must be merely  
13                  incidental to the primary purpose of  
14                  experimentation.

15                  If you find that Facebook has  
16                  shown a prior public use or offer for sale of an  
17                  invention that meets all the elements of the  
18                  asserted claim at issue by clear and convincing  
19                  evidence, then Leader must prove by a  
20                  preponderance of the evidence that the purpose  
21                  of the prior public use for alleged offer for  
22                  sale was experimental.

23                  Printed publication. For a  
24                  printed publication to anticipate a patent

1 claim, it must, when read by a person of  
2 ordinary skill in the art, expressly disclose  
3 each element of the claimed invention to the  
4 reader. The disclosure must be complete enough  
5 to enable one of ordinary skill in the art to  
6 practice the invention without undue  
7 experimentation. When the printed publication  
8 is an issued U.S. patent, that patent is assumed  
9 to be enabling.

10 To prove anticipation of the  
11 patented invention, Facebook must show by clear  
12 and convincing evidence that before the  
13 effective filing date a third party disclosed in  
14 a printed publication or that the third party  
15 patented an invention which included all of the  
16 elements of the asserted claims of the '761  
17 patent.

18 In addition, a printed publication  
19 must be reasonably accessible to those members  
20 of the public who would be interested in its  
21 contents. It is not necessary that the printed  
22 publication be available to every member of the  
23 public. The information must, however, have  
24 been maintained in some form, such as printed

1 pages, microfilm, or photocopies. An issued  
2 patent is a printed publication. A published  
3 patent application is a printed publication of  
4 its publication date.

5 Obviousness generally. Even  
6 though an invention may not have been  
7 identically disclosed or described before it was  
8 made by an inventor, in order to be patentable,  
9 the invention must also not have been obvious to  
10 a person of ordinary skill in the field of  
11 technology of the patent at the time the patent  
12 was filed.

13 Facebook may establish that the  
14 patent claims are invalid by showing that the  
15 claimed invention would have been obvious to  
16 persons of ordinary skill in the art at the time  
17 the patent was filed.

18 In determining whether a claimed  
19 invention is obvious, you must consider the  
20 level of ordinary skill in the field of computer  
21 science that someone would have had at the time  
22 the claimed invention was made, the scope and  
23 content of the prior art, and any differences  
24 between the prior art and the claimed invention.

1 In deciding what the level of  
2 ordinary skill for the '761 patent is, you  
3 should consider all the evidence introduced at  
4 trial, including but not limited to:

5 One, the levels of education and  
6 experience of the inventor and other persons  
7 actively working in the field.

8 Two, the types of problems  
9 encountered in the field.

10 Three, prior-art solutions to  
11 those problems.

12 Four, rapidity with which  
13 inventions are made.

14 And, five, the sophistication of  
15 the technology.

16 The existence of each and every  
17 element of the claimed invention in the prior  
18 art does not necessarily prove obviousness.  
19 Most, if not all, inventions rely on  
20 building-blocks of prior art. In considering  
21 whether or not a claimed invention is obvious,  
22 you may find obviousness if you find that at the  
23 time of the claimed invention there was a reason  
24 that would have prompted a person having

1 ordinary skill in the field of computer science  
2 to combine the known elements in a way the  
3 claimed invention does, taking into account such  
4 factors as:

5 One, whether the claimed invention  
6 was merely the predictable result of using  
7 prior-art elements according to their known  
8 functions.

9 Two, whether the claimed invention  
10 provides an obvious solution to a known problem  
11 in the relevant field.

12 Three, whether the prior art  
13 teaches or suggests the desirability of  
14 combining elements claimed in the claimed  
15 invention.

16 Four, whether the prior art  
17 teaches away from combining elements in the  
18 claimed invention.

19 Five, whether it would have been  
20 obvious to try the combinations of elements,  
21 such as when there is a design need or market  
22 pressure to solve a problem and there are a  
23 finite number of identified, predictable  
24 solutions.

1                   And, six, whether the change  
2                   resulted more from design incentives or other  
3                   market forces. To find it rendered the  
4                   invention obvious, you must find that the prior  
5                   art provided a reasonable expectation of  
6                   success.

7                   In determining whether the claimed  
8                   invention was obvious, consider each claim  
9                   separately. Consider only what was known at the  
10                  time of the invention. Do not use hindsight.

11                  In making these assessments, you  
12                  should take into account any objective evidence,  
13                  sometimes called secondary considerations, that  
14                  may have existed at the time of the invention  
15                  and afterwards that may shed light on the  
16                  obviousness or not of the claimed invention.

17                  Secondary considerations of  
18                  nonobviousness are Leader's rebuttal to  
19                  Facebook's claim of obviousness. They include:

20                  One, whether the invention was  
21                  commercially successful as a result of the  
22                  merits of the claimed invention rather than the  
23                  result of design needs or market-pressure  
24                  advertising or similar activities. The Facebook

1 website is commercially successful. It is for  
2 you, of course, to determine whether the  
3 Facebook website contains all the elements of  
4 any of the asserted claims of the '761 patent.

5 Two, whether there was a long-felt  
6 need for a solution to the problem facing the  
7 inventors which was satisfied by the claimed  
8 invention.

9 Three, whether others have tried  
10 and failed to make the invention.

11 Four, whether others invented the  
12 invention at roughly the same time.

13 Five, whether others copied the  
14 invention.

15 Six, whether there were changes or  
16 related technologies or market needs  
17 contemporaneous with the invention.

18 Seven, whether the invention  
19 achieved unexpected results.

20 Eight, whether others in the field  
21 praised the invention.

22 Nine, whether persons having  
23 ordinary skill in the art of the invention  
24 expressed surprise or disbelief regarding the

1 invention.

2 Ten, whether others sought or  
3 obtained rights from the patent holder.

4 And, eleven, whether the inventor  
5 proceeded contrary to in accepted wisdom in the  
6 field.

7 Finding any or all of these  
8 secondary considerations may suggest that the  
9 claim was not obvious.

10 Scope and content of the prior  
11 art. In considering whether the claimed  
12 invention was obvious, you must first determine  
13 the scope and content of the prior art.

14 The scope and content of the prior  
15 art for deciding whether the invention was  
16 obvious includes prior art in the same field as  
17 the claimed invention -- regardless of the  
18 problem addressed by the item -- and prior art  
19 from different fields that a person of ordinary  
20 skill in the art, using common sense, might  
21 combine if familiar so as to solve the problem,  
22 like fitting together the pieces of a puzzle.

23 Do not consider what will happen  
24 after the trial. Members of the jury, in this

1 case you may have heard or noticed inferences as  
2 to what may happen after this trial. You are to  
3 disregard any inferences as to what may happen  
4 after you have rendered your verdict.

5 And, finally, Chapter 5, which is  
6 entitled "Deliberations and Verdict."  
7 Instruction number 5.1 is called Deliberation  
8 and Verdicts.

9 That concludes the part of my  
10 instructions explaining the rules for  
11 considering some of the testimony and evidence.  
12 Now let me finish up by explaining some of the  
13 things about your deliberations in the jury room  
14 and your possible verdicts.

15 Once you start deliberating, do  
16 not talk to the jury officer or to me or to  
17 anyone else except each other about the case.  
18 If you have any questions or messages, you must  
19 write them down on a piece of paper, sign them,  
20 and then give them to the jury officer. The  
21 officer will give them to me, and I will respond  
22 as soon as I can. I may have to talk to the  
23 lawyers about what you have asked, so it may  
24 take me some time to get back to you.

1 Any questions or messages normally  
2 should be sent to me through your foreperson,  
3 who by the custom of this court is Juror Number  
4 1 in the first row.

5 One more thing about messages. Do  
6 not ever write down or tell anyone how you stand  
7 on your votes. For example, do not write down  
8 or tell anyone that you are split four-four or  
9 six-two or whatever your vote happens to be.  
10 That should stay secret until you are finished.

11 Unanimous verdict. Your verdict  
12 must represent the considered judgment of each  
13 juror. In order for you as a jury to return a  
14 verdict, it is necessary that each juror agree  
15 to the verdict. Your verdict must be unanimous.

16 It is your duty as jurors to  
17 consult with one another and to deliberate with  
18 a view towards reaching an agreement if you can  
19 do so without violence to your individual  
20 judgment. Each of you must decide the case for  
21 yourself, but do so only after an impartial  
22 consideration of the evidence with your fellow  
23 jurors.

24 In the course of your

1 deliberations, do not hesitate to re-examine  
2 your own views and change your opinions if  
3 convinced it is erroneous, but do not surrender  
4 your honest conviction as to weight or effect of  
5 evidence solely because of the opinion of your  
6 fellow jurors or for the purpose of returning a  
7 verdict.

8 Remember at all times that you are  
9 not partisans. Your sole interest is to seek  
10 the truth from the evidence in this case.

11 A form of verdict has been  
12 prepared for you. You will take this form to  
13 the jury room. When you have reached -- and  
14 when you have reached unanimous agreement as to  
15 your verdict, you will have your foreperson fill  
16 in, date, and sign the form. You will then  
17 return to the courtroom, and your foreperson  
18 will give your verdict.

19 It is proper to add the caution  
20 that nothing said in these instructions and  
21 nothing in the form of a verdict is meant to  
22 suggest or convey in any way or manner any  
23 intimation as to what verdict I think you should  
24 find. What the verdict shall be is your sole

1 and exclusive duty and responsibility.

2 I mentioned you will have a jury  
3 verdict form. I want to tell you now before you  
4 hear arguments from counsel what the verdict  
5 form says because it lists the questions you as  
6 a jury need to answer.

7 Section A is called Leader's  
8 Patent Infringement Claims Against Facebook, and  
9 question one is entitled Literal Infringement.  
10 Do you find that Leader has proven by a  
11 preponderance of the evidence that Facebook has  
12 literally infringed each and every element of  
13 any of the asserted claims of U.S. Patent Number  
14 7,139,761? Yes or no.

15 And then further, if you answered  
16 yes, please place a check mark next to the  
17 claims you found to be infringed, and then the  
18 asserted claims are listed there for you.

19 Question two is entitled  
20 Infringement Under the Doctrine of Equivalents.  
21 If you found that Facebook did not literally  
22 infringe some or all of the claims of U.S.  
23 Patent Number 7,139,761 in question one, do you  
24 find that Leader has proven by a preponderance

1 of the evidence that Facebook has infringed any  
2 of those claims under the doctrine of  
3 equivalents? Yes or no.

4 And then if you answered yes,  
5 please mark the claims you found to be infringed  
6 under the doctrine of equivalents.

7 Question three is entitled Control  
8 or Direction. With respect to its infringement  
9 claims against Facebook, with respect to claims  
10 9, 11, and 16, has Leader shown by a  
11 preponderance of the evidence that Facebook  
12 controls or directs the accused actions of  
13 Facebook and users and/or Facebook employees?  
14 And 3(a), is Facebook end-users instrumental and  
15 3(b) is Facebook employees. Yes or no.

16 Question four, prior priority date  
17 of U.S. Patent Number 7,139,761. Do you find  
18 that Leader has proven by a preponderance of the  
19 evidence that U.S. Patent Number 40/432255, the  
20 provisional application, fully discloses each  
21 and every element of every asserted claim of  
22 U.S. Patent Number 7,139,761? Yes or no.

23 If you answered yes, please mark  
24 the asserted claims of U.S. Patent Number

1 7,139,761 for which you found that each and  
2 every element was fully disclosed by the  
3 provisional application, and then there's a list  
4 of the asserted claims.

5 Section B of the verdict form is  
6 entitled "Facebook's Patent Invalidity  
7 Defenses," and under Section B, question one is  
8 called on-sale bar. Do you find that Facebook  
9 has proven by clear and convincing evidence that  
10 the asserted claims of U.S. Patent Number  
11 7,139,761 are invalid because the alleged  
12 invention was the subject of an invalidating  
13 offer of sale? Yes or no question.

14 Two, prior public use. Do you  
15 find that Facebook has proven by clear and  
16 convincing evidence that the asserted claims of  
17 U.S. Patent Number 7,139,761 are invalid because  
18 the alleged invention was the subject of an  
19 invalidating public use? Yes or no question.

20 Three, anticipation by iManage.  
21 Do you find that Facebook has proven by clear  
22 and convincing evidence that any of the asserted  
23 claims of U.S. Patent Number 7,139,761 are  
24 invalid because they are anticipated by iManage

1 DeskSite 6.0, iManage, yes or no. If you  
2 answered yes, please mark the claims you found  
3 to be anticipated and then there's a chart  
4 listing the claims.

5 Question four, anticipation by  
6 Swartz. Do you find that Facebook has proven by  
7 clear and convincing evidence that any of the  
8 asserted claims of U.S. Patent Number 7,139,761  
9 are invalid because they are anticipated by U.S.  
10 Patent Number 6,236,994 B1, Swartz, yes or no.  
11 If you answered yes, please mark the claims you  
12 found to be anticipated, and there's a chart  
13 listing the asserted claims.

14 Question five, anticipation by  
15 Hubert. Do you find that Facebook has proven by  
16 clear and convincing evidence that any of the  
17 asserted claims of U.S. Patent Number 7,139,761  
18 are invalid because they are anticipated by  
19 European Patent Number EP 1087306 or U.S. Patent  
20 Number 7,590,934 B2, also known also Hubert, yes  
21 or no. If you answered yes, please mark the  
22 claims you found to be anticipated, and there's  
23 a chart listing the asserted claims.

24 And finally, question six,

1 obviousness. Do you find that Facebook has  
2 proven by clear and convincing evidence that any  
3 of the claims of U.S. Patent Number 7,139,761  
4 are invalid on the ground of obviousness, yes or  
5 no. And if you answered yes, please mark the  
6 claims you found to be obvious, and there's a  
7 chart listing the asserted claims.

8 That completes my instructions.  
9 They were fairly lengthy. I am going to give  
10 you a fifteen-minute break before you begin to  
11 hear the arguments of attorneys. Let me just  
12 caution you again, although you're about to be  
13 ready to deliberate, you're not yet ready to  
14 deliberate, so you're still not to talk to one  
15 another or to anyone else about the case until  
16 after we come back and hear the arguments from  
17 counsel, so let's take a fifteen-minute break.

18 THE CLERK: All rise.

19 (The jury exited the courtroom at  
20 10:09 a.m.)

21 THE COURT: We'll be back in  
22 fifteen minutes.

23 (A recess was taken at 10:09 a.m.)

24 THE CLERK: All rise.

1 (The proceedings reconvened at  
2 10:25 a.m.)

3 THE COURT: We'll go ahead and  
4 bring the jury in.

5 (The jury entered the courtroom at  
6 10:25 a.m.)

7 THE CLERK: Please be seated.

8 THE COURT: Okay, ladies and  
9 gentlemen of the jury, we will now hear closing  
10 arguments from the parties.

11 Mr. Andre.

12 MR. ANDRE: Thank you, Your Honor.

13 May it please the Court, ladies  
14 and gentlemen of the jury.

15 First and foremost, thank you.

16 I'm sure spending six days talking about  
17 computer science technologies was not the top of  
18 the things on your list you wanted to do this  
19 week. We really appreciate the time and  
20 attention you paid to this. It means everything  
21 to us, the teams that spent hours. It means  
22 everything to Leader.

23 This little company in Columbus,  
24 Ohio, in the last years had to survive a lot of

1 stuff. They survived the dot-com-bubble burst  
2 in the late '90s or 2000. They survived the  
3 economic tsunami that's hit the country. Will  
4 they survive whatever happens at the end of this  
5 trial? They probably will.

6 To be honest with you, these guys  
7 are survivors; at least they call it the tough  
8 Midwestern mentality. I think that's right, but  
9 they really shouldn't have to. They shouldn't  
10 have to have survived someone else taking their  
11 technology and using it without their  
12 permission, and you and you alone can make sure  
13 that doesn't happen.

14 I started this case talking about  
15 innovation, how Leader was innovators. I showed  
16 you a 1997 business plan, PTX 767. This is the  
17 business plan at the dawn of the internet.

18 You saw Leader thinking about new  
19 ways to solve problems. Innovation. That's  
20 what it's all about.

21 I talked about the development  
22 team that put forward hours and hours and hours  
23 of hard work, 145,000 man-hours in five years,  
24 \$10 million this company invested in developing

1 this suite of technologies.

2 That technology was developed for  
3 one purpose: To help people communicate better,  
4 to network, collaborate, whatever you want to  
5 call it. It was about communication.

6 Now Facebook has made an issue of  
7 the fact that in 1997, these guys weren't making  
8 anything about essential networks. Their  
9 invention was not to be used for social  
10 networks. It's about business solutions, I  
11 believe they said.

12 There's been a ton of great  
13 inventions in which people have intended it for  
14 one purpose, and it turned out to be something  
15 better used for another purpose. You heard  
16 about duct tape, Play-Doh, various other  
17 inventions like that.

18 My favorite story is about five  
19 years before Leader was founded. There was a  
20 group of researchers who come up with a drug  
21 called sildenafil. These guys discovered a new  
22 drug, and they were very excited, thought it was  
23 going to help chest pain, angina, and they got  
24 patents on the new drug. Very, very excited

1 about it.

2 Did a first clinical trial, and  
3 they were disappointed because the drug didn't  
4 do so well for heart pain, but it had an  
5 interesting side effect. Some of you may have  
6 heard this story. That drug today is one of the  
7 top-selling drugs in the country -- or in the  
8 world rather -- under the name Viagra. The side  
9 effect, you can probably guess what that is.

10 Do the inventors still deserve the  
11 benefits of inventing the drug? Of course they  
12 do. Does Leader deserve the benefit of  
13 developing a platform for an internet-based,  
14 web-based platform when none were available?  
15 None or very few. None the way they came up  
16 with it.

17 They invented this technology  
18 before social networking. They invented this  
19 technology when the founders of Facebook were  
20 still in grade school. They were out there  
21 doing it, and the first thing they did after  
22 they got the technology developed, they shared  
23 it with the world.

24 They went out, and we saw PTX 765,

1 and they published this to the world, saying we  
2 did it. This is proof we did it.

3 They talk about the platform  
4 requirements and platform standards. They gave  
5 the world an invention. This is what they did.  
6 They did that in 2003.

7 Now, at the beginning of this  
8 case, I showed you a timeline. This timeline.  
9 We've gone through about how Leader was founded,  
10 about when the invention occurred, in 1999. We  
11 showed you evidence of that, uncontested.

12 We showed you the year before  
13 Google, talked about how they titled the  
14 provisional application days after they came out  
15 with the invention. The day they went to the  
16 patent office, they published their inventions  
17 in 2003.

18 Facebook came out in 2004. The  
19 patent issued in 2006, and now we have  
20 1.8 billion internet users. That's a  
21 20,000 percent increase.

22 Everything on this timeline is  
23 true and uncontested. The truth is what we're  
24 here for today.

1 I mean, a few years back I was  
2 working in science. I was a scientist actually.  
3 I'm kind of new to this legal thing, and what  
4 drew me to the law was the chance to find truth,  
5 to come to great courts like this and courtrooms  
6 and stand amongst people like you and see if we  
7 could find what the truth is.

8 One of the first things they  
9 taught in law school is this is not an exercise  
10 in finding the truth. It's an exercise in  
11 advocacy. I heard judges say it, lawyers say  
12 it.

13 I don't believe it. I think this  
14 is about truth. Maybe I'm naive. Maybe it's  
15 pig-headed. I'm not sure what I am, but I think  
16 it's an exercise in truth and what the best way  
17 of finding out what the truth is. That's my  
18 quest, to give you the evidence.

19 And during the opening statements,  
20 Facebook's counsel said we're going to talk  
21 about specifics versus generalities. I had  
22 hoped we were going to see that, but after  
23 ending the week, what you got was a lot of  
24 evidence from Leader. We showed you a lot of

1 different types of evidence.

2 And what you got from Facebook  
3 were cartoons, a lot of animation and cartoons  
4 and artistry. That's the difference, so I  
5 wanted to show you how I think the truth and how  
6 our team thinks of truth.

7 How do you find the truth? The  
8 way to find the truth is through the evidence.

9 Day one I told you I was going to  
10 show you overwhelming evidence of infringement.  
11 Seven sources said we'll show you Facebook's  
12 website, show you confidential Facebook  
13 documents, public Facebook documents, the  
14 Facebook developer documents, Facebook engineers  
15 testimony, Facebook platform application, and  
16 the source code itself. Those were the seven  
17 sources of truth that I was going to show you.

18 And we went through with  
19 Dr. Vigna. Remember him on the stand for two  
20 days? And we went through these seven sources  
21 of evidence with checking in these boxes. We  
22 went through painstakingly, box after box after  
23 box, on every claim and put in these red checks.  
24 Every time you see a red check next to one of

1 these independent claims, there's at least five  
2 sources of truth behind it. The dependent  
3 claims, we had at least two more. Every check  
4 has evidence behind it. Every single one.

5 Now I want to say a little more  
6 about Dr. Vigna. Do you remember Dr. Vigna, our  
7 amazing Italian expert who can make source code  
8 sound interesting, which is a trick?

9 Dr. Vigna, when he was talking  
10 about the Facebook technology, he was the only  
11 expert in this entire case that used the right  
12 claim construction. He used the construction  
13 provided by the Court. He didn't try to rewrite  
14 the claims. He used the construction provided  
15 by the judge, and you heard the judge read those  
16 instructions to you.

17 One of the big issues in  
18 contention was what does "wherein" mean.  
19 Dr. Vigna says it means "in which." The other  
20 experts had different definitions. You heard  
21 from the Court it means "in which."

22 Dr. Vigna was the only expert,  
23 when we talk about Facebook's technology, that  
24 explained what the preceding event meant in the

1 "dynamically updating." What is the preceding  
2 event? These claims are written in functional  
3 language. These are complex claims in  
4 functional language in computer science.

5 Dr. Vigna explained what the  
6 preceding event was happening in the technology.  
7 That's what the claims are about. It's not a  
8 preceding event in the sentence. This is not  
9 some kind of exercise. It's complex technology.

10 When you talk about the preceding  
11 event, it's based on what's happening in the  
12 technology. Dr. Vigna was the one who explained  
13 that to you over and over and over again.

14 And finally the most important,  
15 Dr. Vigna was the only person in this entire  
16 case that showed you Facebook's technology. No  
17 one else did. Think about that. They had three  
18 of their engineers on the stand. They had their  
19 expert on the stand. Only one person showed you  
20 Facebook's technology. That was Dr. Vigna, and  
21 we'll show you some of the things he showed you  
22 last week to remind what we saw.

23 First thing he did was make a  
24 movie about going on the internet. Couldn't get

1 internet in the courthouse, not allowed to do  
2 so. He showed you getting on the internet and  
3 using Google to Facebook, and this interceptor  
4 command that stops the commands going out in  
5 Facebook and looking at them.

6 Here he is logging into Facebook,  
7 and he used the bird analogy, how he cut the  
8 bird and looked at it and sent it to Facebook.  
9 This is real activity of the Facebook website.

10 He logs in, and he's on his home  
11 page. He wants to go to profile page and clicks  
12 the button. That signal is being sent to  
13 Facebook, but he stops it first.

14 What does he show you? He showed  
15 you Facebook tracking him as we went from his  
16 home page to his profile page, and he releases  
17 this code to go to Facebook and pushes a button  
18 and comes back, and now he's on his profile  
19 page.

20 He wants to change his photo. He  
21 wants to put in new user-defined data, so he  
22 sends a request to Facebook. They give him the  
23 source code module, how to upload the photo,  
24 does so, releases it, comes back, and now he's

1 doing to browse to things, which is user-defined  
2 data. He wants to upload.

3 He picks which one. He looks,  
4 stops the signal, and there it is. That's  
5 information about the user-defined data, the  
6 photo and the context information about it is  
7 going to be stored in metadata on the Facebook  
8 servers.

9 Once he releases it, identify the  
10 cookies and tracking information and everything  
11 that Facebook collects all this different  
12 profile information. He forwards it to  
13 Facebook, comes back, uploads the picture, and  
14 bingo. User-defined data that he picked is now  
15 on Facebook.

16 The context information about that  
17 photo is stored in metadata on the photo table.  
18 Dr. Vigna showed you that. He then went to show  
19 you how they do the tracking.

20 Same thing on the internet. He  
21 wants to go down and see his friend Mary Smith,  
22 so he clicks over the Mary Smith. Signal goes  
23 to Facebook. He stops it. He says it's  
24 tracking him, going -- you see here all these

1 unique identifiers. This is him going to  
2 another context. First context to second  
3 context. You see all the information.

4 He forwards it, and now Mary  
5 Smith's page. They know he's there. They kept  
6 up the metadata, tracked him going there.  
7 Writes a message on Mary's wall, "what do you  
8 want to cook tonight," clicks "share." There's  
9 going to be an update in the metadata about  
10 where he is and what he just did, the action he  
11 just took, and that's the preceding event.

12 When it comes back, when you show  
13 the information that's being clicked, all this  
14 tracking information based on that activity and  
15 based on the fact that he's at that second  
16 context, it comes back.

17 You notice his new profile photo  
18 shows up here. That was accessed from the first  
19 context. You can see right here, shows it was  
20 in the first context. That was what was in his  
21 previous page. That's all the different  
22 information.

23 He showed how when he goes back to  
24 his profile page, which he'll do here in a

1 second, goes back to his profile, you notice  
2 there's a statement there, "John wrote on Mary  
3 Smith's wall," evidence that they tracked him  
4 going over there, that when he was there he took  
5 an action on the page. That preceding event  
6 caused metadata to be updated, and the  
7 user-defined data, the data from the first  
8 context, is accessed into the second context.

9 First of all, getting to see  
10 something like that is pretty cool. I didn't  
11 know that kind of stuff existed, to be quite  
12 frank. Knowing it under the hood, as they call  
13 it, seeing it happen, walking through the claim  
14 elements one by one, showing it live on the  
15 internet. He's the only person who did that.

16 We also looked at documents. We  
17 look at three types of documents: The  
18 confidential documents, the public documents,  
19 and the developer documents. With Dr. Vigna  
20 alone, we marked twenty-four exhibits.

21 Twenty-four exhibits on eleven claims. Think  
22 about that.

23 The kind of documents we showed  
24 you about the context information, PTX 904,

1 returns metadata about all of the photo albums  
2 by specific users. We showed you PTX 252,  
3 almost walked you through the first claim  
4 element, upload data to Facebook, put it on the  
5 storage or database. Metadata about it is  
6 passed.

7 Confidential documents that show  
8 you the very first element, PTX 907, talks about  
9 this is the actual photo table. This is the  
10 context information of information kept in the  
11 photo table. This is in metadata. All these  
12 different categories of information they  
13 provide, this came from another confidential  
14 document.

15 We kept track of the actions you  
16 take on Facebook. Facebook tells people we  
17 track you. That's what they do.

18 PTX 300, they talk about who you  
19 can track, how many people Facebook users start  
20 and stop viewing your post in news feed. Once  
21 again they tell people, we're tracking you. If  
22 you're on Facebook, we know what you're doing.

23 PTX 341. This is confidential  
24 document talking about the feed tracking

1 logging. This is how they do the logging of the  
2 tracking. Dr. Vigna explained that in great  
3 detail.

4 PTX 180, the session table and  
5 cookie table. All stored in the user database.  
6 Once again tracking the user. The documents in  
7 this case were overwhelming.

8 You also heard from multiple  
9 Facebook engineers. Now, Mr. Cox came live.  
10 When they talked about the technology, they  
11 couldn't help but give us the infringement  
12 story. You can prove infringement of these  
13 claims with their testimony.

14 Mr. Cox talked about -- so the  
15 first you -- you uploaded your photo. What was  
16 that information? The metadata about the photo  
17 itself. The photo table, user-defined data, the  
18 photo, the context information is stored in  
19 metadata, in the photo table.

20 Mr. Wiseman talking about  
21 uploading photos. Depending on what context  
22 you're in, might some other information -- it  
23 will take some bytes and files and store them in  
24 your photo filer, and then it will create a

1 database entry that represents that photo. Once  
2 again the context information is being stored in  
3 metadata in the photo table.

4 Ms. Keefe talked about when you go  
5 from one context to the seconds context -- used  
6 those words to people at Facebook.

7 "When they go from one profile  
8 page to another profile page, they're  
9 going from the first context to the  
10 second context; right? They meant that  
11 when that was -- they go from first  
12 context to second context. That's used;  
13 right? That's a page -- you -- you know  
14 -- you -- yeah, when they move from one  
15 context to another, that's logged  
16 metadata, is when you go from one  
17 context to another."

18 Next slide, Dan Rose, vice  
19 president of Facebook, called it tracking.

20 "When we -- when something shows  
21 up on the website, by definition we're  
22 tracking it. We have to track it in  
23 order for it to show up on the website.

24 "I don't know what you're

1 referring to by tracking, but how  
2 logging an action in a database  
3 somewhere so we can present that action  
4 on the website is something -- that's  
5 what we do. That's what the site does.  
6 It tracks. Of course it does."

7 Chris Cox. "Does Facebook track  
8 user movement from one location to  
9 another using anything other than  
10 cookies?"

11 "Yeah, it does. It logs."

12 They asked Mr. Cox what that  
13 meant.

14 "So when it's logged, is that  
15 tracked? I mean, what does that mean,  
16 'logged'?"

17 "So there's a file called log  
18 file, and that gets a new line, a new  
19 row, th at -- just say you know this  
20 person looked at this page at this  
21 time. You go from one page to another,  
22 you get your log file update."

23 "So it gives you information about  
24 the ID of the person?"

1 "Yes."

2 "It gives you information about  
3 the page they went to?"

4 "Yes, and the time."

5 "Yes, metadata. That's all that  
6 is. It's tracking information."

7 That's in the methodology.

8 Next time Mr. Cox talks about,  
9 "You testified that when you have a  
10 photo, there's metadata stored about  
11 that photo in the photo table; right?"

12 "Yes."

13 "And then when you go to someone  
14 else's profile, you write on the wall,  
15 you get metadata stored in the wall  
16 table; correct."

17 "Yes."

18 "And you also get metadata stored  
19 in the minifeed table; right?"

20 "Yes."

21 They've proven our case for us.  
22 Their engineers.

23 Next slides. Mr. Wang.

24 "What metadata would be stored

1           there?"

2                        "So the data, I believe, is stored  
3           on the minifeed data. The minifeed data  
4           information."

5                        "And finally, Mr. Wang, all the  
6           tables: The photo table, the minifeed  
7           table, the wall table, the log file  
8           table, all these tables, all these  
9           tables are maintained on the user data;  
10          is that right?"

11                      "Yes, the user database is  
12          basically the service that we use to  
13          query all these different tables."

14                      Their engineers gave us  
15          infringement. They testified. When they talked  
16          about the log, they gave it to us. Dr. Vigna  
17          confirmed all this. They didn't contest  
18          anything Dr. Vigna said on the stand. They only  
19          agreed with it.

20                      We showed you Exhibit 934, and  
21          you'll have this in the jury binder. If you  
22          look at the sides and remember what Dr. Vigna  
23          testified to, he goes to his first context.

24                      This is his home page. So he's in

1 his first context right here. That's it.

2 He wants to interact with the  
3 site. He wants to upload a photo. What  
4 happens? User-defined data, the photo itself,  
5 comes into the site. When that happens,  
6 metadata, the context information about this  
7 photo, is stored in metadata, and there is it.  
8 The context information, associated user  
9 environments, profile photo stored in metadata.

10 PTX 907. That's the context.

11 That talks about the metadata about the  
12 user-defined data. When he goes to Mary Smith's  
13 wall, the second context, you see the tracking  
14 information is here. They know he's over there,  
15 and that's what we were talking about too,  
16 tracking the user from the first context to  
17 second context.

18 It's in the session table, the  
19 cookie table. It's all stored on the user  
20 database right there.

21 Exhibit 180. Takes an action on  
22 Mary Smith's wall, accesses data provided in the  
23 first context to the second context, her wall,  
24 accessing his photo to come to her wall. That's

1 accessing the data previously uploaded in the  
2 first context, and that is dynamically updated  
3 metadata based on the change. In other words,  
4 metadata is updated with information regarding  
5 the second context. You saw it in the code  
6 right there.

7 Finally go back to Dr. Vigna's  
8 page, and it says he just wrote on Mary's wall.  
9 This is the evidence of the tracking and dynamic  
10 update of the metadata. Those are Exhibit 9842  
11 in your packet. You can see it every step of  
12 the way.

13 We also showed you source code.  
14 Source code. We locked the doors. We taped up  
15 the windows to make sure no one sees source  
16 code. This is the DNA. This is it. That is  
17 what it's all about with computer scientists.  
18 They protect source code because this is the DNA  
19 of the website.

20 Dr. Vigna got in the source code a  
21 lot, and sometimes it seemed hard to follow. It  
22 was. He showed it to you and showed you file  
23 after file after file, and what was truly  
24 amazing was that as he went through that and

1 showed every single aspect of infringement, no  
2 one contested it.

3 They had three engineers who coded  
4 that source code. Three of them took the stand.  
5 They had an expert that took the stand. No one  
6 opened up the source code.

7 Do you think if Dr. Vigna was  
8 giving improper testimony that someone would  
9 have opened up the source code and said he's  
10 wrong? They would have, but they couldn't.  
11 They couldn't contest it.

12 When the engineers and their  
13 expert talked about source code, what you got  
14 was this source code. That's what they use.  
15 They use cartoons. They use animation.

16 We used source code. That's the  
17 evidence.

18 You heard Judge Stark talk about  
19 the method claims direction and control. Does  
20 Facebook have direction and control of the  
21 people who use the site?

22 Well, employees, these people are  
23 under employment contracts. They tell them to  
24 test the site. They tell them to use the site.

1 You saw evidence of this in PTX 145.

2 How about the users and the  
3 developers? Well, there's terms of use there as  
4 well. They give users of this website a laundry  
5 list of things. You will do this. You will not  
6 do that. You will do this. You will not do  
7 that. There are rules playing on Facebook. You  
8 can't do certain things, and some things you  
9 have to do.

10 Facebook supplies the website.  
11 You heard that in the jury instructions. They  
12 supply the website for people to use it. When  
13 people use it, that's infringement. It's under  
14 the direction and control of Facebook.

15 We're not saying that Facebook  
16 puts a gun to someone's head and says, you have  
17 to use Facebook. They don't have that kind of  
18 control. That's not what it means.

19 What it means is they supply the  
20 website. If you follow the rules, you're under  
21 the direction and control of Facebook. You'll  
22 see that with claim 9 and the dependent claims.

23 Now I think it's important to  
24 compare the evidence you heard from us versus

1 evidence you heard from them. They put three of  
2 their engineers on the stand, live testimony.  
3 You heard from Mr. Cox, Mr. Wiseman, and  
4 Mr. Roswell. You heard from Dr. Herbsleb, and  
5 shockingly all you saw, the only exhibits marked  
6 with four witnesses, the only exhibit marked,  
7 *Yahoo for Dummies* and *e-Bay for Dummies*. Two  
8 exhibits. That's it.

9 What you did get a lot of were  
10 cartoons and animations drawn up by lawyers.  
11 One of the things that's a little thing gets on  
12 my nerves, every witness got up there and said,  
13 I created some exhibits. I created exhibits. I  
14 created slides for everyone. They had three or  
15 four witnesses say, I created slides, and then  
16 they show the slides, and they're exactly the  
17 same as the previous person.

18 They didn't create the slides.  
19 The lawyers created the slides. We all know  
20 that. Probably a trivial thing, but nonetheless  
21 it goes to who can you believe.

22 They did use a lot of cartoons and  
23 animations. They showed a picture of the  
24 Facebook website and a fake photo table. We

1 were wondering if you took those cartoons and  
2 actually applied the real evidence, the evidence  
3 that came into trial, the source code, the  
4 technical documents, the testimony, if -- what  
5 would it look like?

6 This is what it would look like.  
7 This is Facebook's slides. He's in the first  
8 context. These are the storage components.  
9 They have the metadata here and storage  
10 component here.

11 First guy wants to upload photo.  
12 What happens? You get some photo is stored  
13 here, and you get some activity log here that  
14 Chris uploaded a photo, and that's the context  
15 information right there in the photo table.  
16 Context information, tracking information.  
17 There you go.

18 Next slide, little guy goes over  
19 to context two. What happens? He's tracked on  
20 the log table. You heard Mr. Cox talk about  
21 this. Metadata is being updated. Him moving A  
22 to B, context one to context two. You have the  
23 fact that he's tracked, additional tracking  
24 information.

1           If he wanted to access the photo  
2           he uploaded in the first context, what happens  
3           in the second context? What happens, metadata  
4           is updated with tracking information. That's  
5           what it would look like if you followed the  
6           evidence.

7           Now, you saw these mock-ups where  
8           they had a mock-up of the website with servers  
9           here as well automatically responding to this  
10          activity, uploading the photo. What happens?  
11          You get tracking information, context  
12          information, about the photo, photo is stored in  
13          the storage component.

14          You go to the second wall, you're  
15          tracked going over there. You take an activity  
16          on the second wall, hit the share button,  
17          metadata is updated with the tracking  
18          information. Once again walking right through  
19          the claims.

20          They also showed these type of the  
21          three server slides. This is the storage  
22          component. Their own expert said storage  
23          components can be distributed. All these -- of  
24          these make up the storage component.

1                   What happens? When you look where  
2 metadata is stored, it's stored on different  
3 logs and tables. They're in the user database.  
4 Tracking information is stored in minifeed table  
5 or news feed, context information stored in the  
6 photo table.

7                   Now, Facebook made a big issue the  
8 context information is not changed. It's not  
9 changed.

10                   Well, the claims don't require  
11 that. Why would you change context information  
12 about the size of the photo when you take  
13 another activity? What the claims require is  
14 that the context information be updated, but  
15 only the metadata be updated.

16                   Look at the claims. Updating the  
17 stored metadata base, unchanged, not changing  
18 the context information. They now based their  
19 whole case on the fact that nothing happens in  
20 photo there. All the changes take place  
21 elsewhere.

22                   That's not what the claims say.  
23 Dr. Kearns was their expert regarding  
24 non-infringement, and Dr. Kearns didn't use

1 technical documents or source code. All he did  
2 was take the claim language. He separated out  
3 the claim language.

4 He didn't like the Court's  
5 construction. He didn't use it. He used a  
6 designation which is in direct violation with  
7 what the Court told you in the instructions. To  
8 put limited definitions into the claim, he  
9 contradicted Facebook's own engineer testimony.

10 Dr. Kearns stated the context  
11 information was separate. Mr. Greenberg and  
12 Mr. Weinstein all say no context information is  
13 captured. You heard three of the witnesses talk  
14 about the fact the metadata is used. The  
15 context information is stored in metadata. You  
16 heard three of their engineers say that.

17 I couldn't get Dr. Kearns to admit  
18 they tracked people. He wouldn't agree to that.  
19 Everyone in this case knows they track people.  
20 The documents, the engineers, everyone.  
21 Dr. Kearns was not going to agree to anything.

22 He didn't challenge the technology  
23 of Dr. Vigna because he couldn't, and the only  
24 thing he could do to give an opinion of

1 non-infringement was manipulate the claim  
2 language, ignore the Court's claim construction,  
3 and contradict Facebook's engineers.

4 Here's the funny thing about it,  
5 if you look at their position that the metadata  
6 has to be updated when you go from one context  
7 to the second context, simply going from one  
8 context to the second context, they still  
9 infringe. The little man, again he's in the  
10 first context. He's going to go to the second  
11 context, and this is based on their own  
12 testimony.

13 What happens? Log table comes in,  
14 metadata is updated. Even under their theory of  
15 the case, which is not correct, infringement is  
16 still there. Metadata is updated by the  
17 tracking of a user from the first context to the  
18 second context.

19 When you go back to the jury room,  
20 you're going to look at all the evidence, and  
21 you have the scales. The judge said  
22 preponderance of the evidence. Just has to tip  
23 a little bit one way or the other.

24 We gave you seven sources, source

1 code, website, three types of documents. We  
2 showed you testimony of the engineers. We  
3 showed you the testimony regarding the  
4 applications.

5 They gave you dummies. That's it.  
6 *e-Bay for Dummies*. That's it. That's all the  
7 evidence they gave you. Their own testimony  
8 proves they infringe.

9 Now, I told you at the beginning  
10 of the case they didn't have a non-infringement  
11 story, and I think we proved they didn't. No  
12 evidence of it whatsoever. When you're  
13 debating, when you're deliberating the  
14 infringement story, we gave you evidence. They  
15 gave you nothing.

16 When it comes to invalidity, the  
17 kitchen-sink mentality. They have a heavier  
18 burden for validity, and they do, but they took  
19 a swing at it. They stepped up to the plate and  
20 tried it under the clear and convincing  
21 standard.

22 They start off by saying that  
23 Leader tried to sell the product before they  
24 filed the patent application or demonstrated the

1 product. I want to talk about sales.

2 First, in order for them to prove  
3 that Leader sold the technology of the '761  
4 patent more than one year prior to that  
5 effective filing date, they had to prove three  
6 things. All three of them. They miss one of  
7 them, they're out. All three have to be shown  
8 in this case. They can't show one of them, let  
9 alone three.

10 They have to show that  
11 Leader2Leader contained the technology of the  
12 '761 patent prior to December 2002. That would  
13 be a neat trick. It wasn't invented until  
14 December 2002.

15 Provisional application does not  
16 teach one of skill in the art to make and use  
17 the invention, and three, an actual offer for  
18 sale took place. They need to prove all three.

19 What evidence did Facebook try to  
20 prove number one? That Leader2Leader had the  
21 patented technology. This is the sole piece of  
22 evidence they showed you in this litigation,  
23 written by the lawyers. They asked us for each  
24 claim of the '761 patent, identify the product

1 that is covered by the patent. We identified  
2 Leader2Leader, powered by Digital LeaderBoard is  
3 covered by the '761 patent. That is their sole  
4 piece of evidence.

5 What is the date of this?  
6 April 17, 2009. April 17, 2009. The '761  
7 technology was in Leader2Leader, powered by the  
8 Digital LeaderBoard. It wasn't there in  
9 December 2002, and they didn't try to prove it.  
10 That's their sole piece of evidence. Nothing  
11 else.

12 Now, when Lisa was taking evidence  
13 regarding this, you saw that she put together  
14 this timeline and handwrote it up there. This  
15 is the date they're talking about, December 11,  
16 2002. Leader2Leader did not include '761.

17 We went through methodical  
18 testimony evidence, documentary evidence,  
19 common-sense evidence, whatever you want to call  
20 it, to prove that it did exist then. It was a  
21 brand name, Leader brand name, and the '761  
22 technology was no more in that brand name before  
23 they invented it than the Corvette with the  
24 Bluetooth wireless phone headset was in a 1957

1 Corvette. It's a different story.

2 You saw testimony of Mr. Lamb. I  
3 loved Mr. Lamb. He reminded me of Kramer in  
4 *Seinfeld*. You liked the guy, knew he was as  
5 honest as they come. This guy could not tell a  
6 lie.

7 He was so specific referring to  
8 Leader2Leader, referred to a collection of  
9 technologies and applications that we were  
10 trying to build. Not a '761 patent.

11 Mr. McKibben testified to the same  
12 thing, you may remember. You may remember this  
13 little flip pad that we had a problem with a  
14 couple times. This was what we were talking  
15 about.

16 What was Leader2Leader? It's a  
17 collection of technologies. That was  
18 Leader2Leader, LeaderPhone Leader Alerts, Leader  
19 Camera. When you're talking about Leader2Leader  
20 before December 2002, it didn't have the '761 in  
21 it. They didn't try to prove it. They didn't  
22 take the engineers' testimony. They didn't show  
23 you documents or anything other than the  
24 interrogatory response from 2009. Even showed

1 you exhibits.

2 When we talk about Leader2Leader  
3 as a brand supplied under the brand name  
4 Leader2Leader, this is this digital  
5 Leader2Leader board, these are brands. They're  
6 trying to get you to say since the brand had the  
7 technology in 2009, it must have had it in 2001.

8 Ladies and gentlemen, undisputed  
9 fact is the patent was filed days after they  
10 completed the technology. Days. Undisputed.  
11 You heard from Mr. Lamb. You heard from  
12 Mr. McKibben.

13 They have the burden of clear and  
14 convincing evidence. They didn't get close to  
15 proving one. They couldn't prove all three.  
16 Didn't prove that.

17 One second thing they had to show  
18 was that the provisional application doesn't  
19 support the claims. Lot of talk about the  
20 provisional didn't have drawings in it.  
21 Nine-and-a-half pages of source code. When they  
22 invented the technology, they took it out,  
23 ripped it out, and put it into the provisional  
24 application with a description, and they went to

1 the Patent Office within days.

2 You heard two experts testify to  
3 it: Dr. Herbsleb yesterday and Dr. Greenberg.  
4 Dr. Herbsleb showed you the code. He had one of  
5 his students go through and say here's a  
6 provisional, build something with it, nothing  
7 else. See if you can build something with it.

8 Dr. Kearns, PTX 1125. He built  
9 it. Ten pages of code, ten hours to build  
10 something that was embodying the claims of the  
11 patent based on the provisional patent only.  
12 That's evidence.

13 That's not Dr. Greenberg  
14 testifying, I don't know what the code said. He  
15 says the provisional didn't have context  
16 information in it. Just read it. It talks  
17 about gathering context information.

18 Dr. Greenberg wouldn't admit to anything. He's  
19 not going to say that provisional application  
20 supported these claims. He wasn't paid to do.

21 So you also heard Mr. Lamb's  
22 testimony regarding the provisional application.  
23 Once again, Mr. Lamb, his integrity cannot be  
24 impugned. He asked him, "What does the code in

1 this application implement?"

2 "By itself, this code doesn't  
3 implement anything." He was consistent  
4 about this every step of the way. The  
5 code doesn't implement anything.

6 "Why was it included?"

7 "We included this because they  
8 were key sections of a larger pile of  
9 code that gave a clear indication to  
10 someone that wasn't us trying to build  
11 the system they needed to do."

12 The code was there. It gives you  
13 a recipe. Add the egg, add the butter, add the  
14 flour, bake the cake. You can't run it on a  
15 machine and then tell someone how to build it.  
16 Mr. Lamb testified can you provide your  
17 understanding of what information is included in  
18 the code in terms of, does it give an overview  
19 such that one can build the technology you're  
20 trying to get a patent for.

21 Mr. Lamb: "Yeah, my  
22 understanding, my intention is the code  
23 would do so. It would give the person  
24 instructions necessary to be able to

1           implement the technology we were  
2           patenting."

3           Mr. Lamb was on the stand live.  
4           Facebook's counsel never challenged him on that,  
5           not once.

6           If you look at the three sales  
7           that Facebook is going try to allege, they have  
8           one to Boston Scientific, one to Limited, and  
9           one to Wright-Patterson Air Force Base. If you  
10          give Leader the benefit of the provisional date  
11          and move this time line back to where it  
12          belongs, in 2001, one year before it, these  
13          sales go by the wayside, there's nothing there.  
14          Strike two.

15          Now we're going to the third  
16          element they have to prove now. They're  
17          oh-for-two already. There were no offers to  
18          sell to those three companies. They said there  
19          were offers to sell to. They were not offers or  
20          anything.

21          We start off with Wright-Patterson  
22          Air Force Base, where they put in a BAA, broad  
23          agency announcement. This is a funding request  
24          from the government, like putting in a grant

1 application. They put this in, and what they  
2 wanted was to get, the government to fund the  
3 research. This is right after 9/11, and the  
4 government was looking for people to come up  
5 with new ways to communicate.

6 They want their technology funded.  
7 They put in a BAA in 2002. The BAA is very  
8 explicit. This is establishing a partnership  
9 between the government and the recipient, rather  
10 than a buyer/seller relationship. It's not a  
11 sale. This is a partnership where you trade  
12 funding from the government.

13 The offer to sale to  
14 Wright-Patterson is not. By law, it cannot be.  
15 Look at the guidelines. Not an offer for sale.

16 The Limited. Remember The  
17 Limited? Heard a lot about the sweetheart deal  
18 Mr. McKibben was trying to get Mr. Schlessinger  
19 to help him to get some money. They were trying  
20 to get \$10 million financing. Help me out.  
21 We'll give you a sweetheart deal. He said we  
22 will be very flexible in adding Limited's  
23 requested features to the system.

24 Obviously the '761 patented

1 technology had not been invented yet. What was  
2 he going to give The Limited? E-mail, fax, file  
3 exchange, bulletin boards, news ideas, feedback,  
4 security. That's what they were talking about  
5 at The Limited. There's nothing in record that  
6 showed they made an offer to sale to anybody.

7 Go to PTX 773 when they were  
8 trying to finally get the deal to The Limited.  
9 They tried to do Leader beta agreement. You  
10 heard that beta was experimental use. Even when  
11 they finally were getting close to doing a deal  
12 with The Limited, it was experimental use, and  
13 it was in 2003. It wasn't 2002 or 2001. 2003.  
14 Once again not a sale.

15 Finally with Boston Scientific,  
16 there's nothing in evidence to show that Boston  
17 Scientific was ever offered anything until they  
18 entered into an agreement in July 2003. Once  
19 again nothing in 2002 or 2004, as I said. Even  
20 in 2003 with Boston Scientific, everything they  
21 were doing at that time were beta testing  
22 agreements on the DTX 178, the classic beta  
23 customer Leader2Leader broadband platform.

24 '761 was not plugged into that

1 platform until 2003. That's the uncontested  
2 evidence in this case.

3 For three, they can't show that  
4 '761 technology was in Leader2Leader. They  
5 can't show that there was an offer for sale, and  
6 the provisional application applies in this  
7 case. They can't prove one of the three, let  
8 alone all of the three.

9 Talk real quick about the  
10 demonstrations. They say they're public  
11 demonstrations. In order to be a public  
12 demonstration, they had to prove two things:  
13 One, that they were demonstrating the '761  
14 technology, which obviously wasn't around; and,  
15 two, that they didn't have nondisclosure  
16 agreements.

17 When you go to the jury room, you  
18 will see Exhibit 765. They put in all of our  
19 nondisclosure agreements. Thirteen three-inch  
20 binders. Now what they had, they were not going  
21 to disclose their technology or their business  
22 plans in public, period. End of story.  
23 Thirteen binders back in the jury room. I hope  
24 you don't look at them all, but you can if you

1 want to.

2 The first party that Facebook says  
3 it made a demonstration to was Wright-Patterson.  
4 Thought they had them. They said you had a  
5 meeting with Wright-Patterson on April 3, 2001,  
6 and you didn't have a nondisclosure agreement  
7 until April 16, two weeks later.

8 Well, that blew up in their face.  
9 The meeting was with Vincent Russi. They were  
10 talking about the camera system, and that was  
11 dated April 2, 2001. Once again NDA was in  
12 place. The confidential agreement was in place  
13 before they had the meeting.

14 The next person they want to show  
15 the public demonstration to The Limited, Len  
16 Schlessinger. The problem with that is  
17 confidential agreement was signed with  
18 Mr. Schlessinger and the people at The Limited.

19 Peter Gartman, who was also at The  
20 Limited, you can see he signed it June 7th, well  
21 before the meetings. There was fifteen NDAs  
22 signed with The Limited. They asked  
23 Mr. McKibben, why did you sign so many?

24 "We wanted to be careful and know

1 every individual they met with knew."

2 Boston Scientific was another one,  
3 signed a nondisclosure agreement in November.  
4 They had a nondisclosure agreement with them as  
5 well.

6 All three of them went by the  
7 wayside at the beginning of the case. Counsel  
8 for Facebook said they were going to show all  
9 these demonstrations, all these demonstrations.  
10 They were going to show first one back in  
11 Leader2Leader, 1999. Guess what? They didn't  
12 even try. Didn't put any evidence. Let it go.

13 They also talked about University  
14 of Dayton. They were going to put in all this  
15 evidence. They didn't try. Forgot about it.

16 They said they were going to show  
17 a demo to the State of Ohio Police and Ohio  
18 Education Association. Nothing.

19 You also heard about the Columbus  
20 Police Department. Once again nothing.

21 And you also heard about a  
22 demonstration to apply material. No evidence of  
23 it. They didn't mention it.

24 These are ones they didn't try.

1 The ones they did try: Wright-Patterson, NDAs;  
2 Boston Scientific, NDAs. Once again nothing  
3 there. It's all smoke. There's no substance.

4 Finally talk about the prior art  
5 real quick. You heard Dr. Greenberg talk about  
6 the prior art, and you also heard Dr. Herbsleb.  
7 One thing is very clear about this case: What  
8 the '761 patent is about. It's about tracking  
9 users and being user-centric.

10 When you look at the '761 patent,  
11 the highest contextual assumption is there  
12 exists an entity that consists of one or more  
13 users. That's it. It's about the user.

14 The three pieces of prior art they  
15 brought forward are about documents. You heard  
16 Dr. Herbsleb say that was the problem they were  
17 trying to solve.

18 Go to the people. Look at the  
19 iManage manual. Their expert couldn't tell you  
20 if it was public or not. It has to be a  
21 publication. We don't know if it's public or  
22 not. As far as we know, it's confidential.

23 When I asked him, do you know one  
24 way or the other is it is this public document?

1 He said, I don't know.

2 Clear and convincing evidence is  
3 better than, I don't know. That's not enough.  
4 You have to do better than that. It's not even  
5 prior art and definitely not enabling prior art.  
6 A user manual? Are you kidding me? That's like  
7 getting a user manual to your car and saying, I  
8 can build a car from my user manual. It's the  
9 same thing in computer science.

10 Nonetheless, it was a  
11 document-managed system development. All they  
12 did was look at the documents, keeping track of  
13 documents.

14 Swartz reference, same thing.  
15 Middleware. They tracked documents. Knowledge  
16 path is following the documents. This is all  
17 about being regulatory compliant.

18 And finally, the Hubert reference  
19 metadocument. It's a document itself. They're  
20 saying a document flows in space. It's the  
21 system of the '761 patent which is user-centric.  
22 That was one of the most incredible pieces of  
23 testimony, was saying a metadocument is the same  
24 thing as the '761 patent. There was nothing in

1 the Hubert reference that indicated in any way  
2 it could invalidate the '761 patent.

3 When you look at the problem '761  
4 was trying to solve, they're trying to get rid  
5 of these hierarchy tables. This was the  
6 problem. People had to stick things in files.  
7 The '761 solved that. This was what the prior  
8 art covered.

9 Finally, secondary considerations  
10 of nonobviousness. You heard Dr. Herbsleb talk  
11 about it. People wanted a solution to the  
12 problems, and the '761 patent provided it, and  
13 nobody else talked about secondary  
14 considerations of nonobviousness.

15 Now, my time is about up. So  
16 stored in metadata. Going to wrap it up real  
17 quick.

18 I want to be really clear that  
19 Leader is not claiming to have invented the  
20 internet. They're not. They didn't invent  
21 social networking.

22 What they did invent was a really  
23 great way, a fantastic, web-based platform that  
24 permits people to collaborate and network

1 better. That's what they tried to do in '97.  
2 That's what they achieved. Facebook is using  
3 that platform to manage their 50 billion page  
4 hits a day.

5 There are other social networks  
6 out there. They're not nearly as successful as  
7 Facebook. There's a reason they're that  
8 successful. The technology works that well.  
9 It's that simple.

10 Now, when you finish your  
11 deliberations, you're going to get a verdict  
12 form, and you'll see when you go back to the  
13 room what we're going ask is you to fill out the  
14 verdict form in this way.

15 They ask literal infringement, do  
16 you find that Leader has proven by a  
17 preponderance of the evidence that Facebook has  
18 literally infringed? Preponderance of the  
19 evidence. Tip the scales a little bit. The  
20 evidence.

21 You're going to weigh the  
22 twenty-four documents, source code, website, and  
23 testimony of their engineers. All you have to  
24 weigh that against is their paid expert and

1 e-Bay for Dummies. That's it. That's an easy  
2 call. Every one of those boxes are checked with  
3 at least five sources of infringing information,  
4 so I ask you to check yes on question one, are  
5 all the claims literally infringed.

6 Question two talks about doctrine  
7 of equivalents. We don't think you want to  
8 check that box yes. We can uncheck it no  
9 because it's literally infringed.

10 But if for whatever reason you  
11 think there's some small thing that was not in  
12 the Facebook website that was in the claims,  
13 then we want to check yes here and check all  
14 those boxes, assuming you find literal  
15 infringement.

16 Check no control or direction.  
17 This is regarding the method claim 9. Do you  
18 find that Facebook has control or direction over  
19 their end users? They do. We showed you the  
20 terms of use. We showed you the help files. We  
21 showed you everything they do to make sure the  
22 people that use this website use it  
23 appropriately, and they do it in a way they  
24 provide the website for them to do exactly those

1 actions.

2 Facebook employees obviously have  
3 a contract. They're contracted to do what  
4 Facebook tells them to. That's direction and  
5 control as clear as it gets. Yes for both of  
6 those boxes.

7 Priority date for the '761 patent.  
8 Have we proven that we're entitled to the  
9 provisional patent application? You saw the  
10 evidence. Once again you saw the source code in  
11 the provisional. You saw the experiment done to  
12 see if that source code would let you build the  
13 system. It was there.

14 The only evidence they had to the  
15 contrary was an expert on the stand who said, I  
16 couldn't tell what the sort code said. The  
17 source code is kind of confusing. Not enough.  
18 We put forth evidence that showed that we were  
19 entitled to the priority date and all the  
20 claims. We went through each and every claim,  
21 and every single one of those claims are  
22 entitled to the priority of the provisional  
23 application.

24 On-sale bar. This is clear and

1 convincing evidence that -- has Facebook proven  
2 that we have put the '761 technology on sale?  
3 Well, if you check yes to that, you have to  
4 check no to that. That's just the way it is.

5 More importantly even if you don't  
6 say yes to that, you still have to check no  
7 because they didn't show any evidence that '761  
8 patented technology was in Leader2Leader. None.  
9 They showed a 2009 document. That's it.

10 No public prior use. They didn't  
11 show a single use of any technology, let alone  
12 '761 technology, without a nondisclosure  
13 agreement. That's a check no, and go through  
14 the prior art references. IManage DeskSite, not  
15 even prior art. Don't know if it's  
16 confidential, public. We don't know. Their  
17 expert couldn't tell us. Clear and convincing  
18 evidence? No, it's a user manual.

19 Swartz. Same way.  
20 Document-centric document management system.  
21 Nothing do with the '761 technology.

22 Hubert metadocument. The  
23 metadocument, it's not even in the same  
24 ballpark. As you heard the expert talk about,

1 Dr. Herbsleb, not even close.

2 And finally obviousness. You  
3 heard the secondary considerations of  
4 nonobviousness. Facebook is a successful  
5 website. You heard this is a long-felt need  
6 otherwise taught away. Not even close.

7 I will conclude my initial remarks  
8 now and let Mr. Rhodes have a shot at it. Thank  
9 you for your time, and I'll talk to you in a few  
10 minutes.

11 THE COURT: Thank you.

12 Mr. Rhodes.

13 MR. RHODES: May I proceed, Your  
14 Honor?

15 THE COURT: You may.

16 MR. RHODES: Good morning. I  
17 always appreciate a good fight in court. It's  
18 what we do, and you may have noticed during the  
19 day-to-day exchanges there were some funny  
20 moments and tough ones, a little back and forth,  
21 but lawyers are competitive actors too, and we  
22 like to keep track of things, and we have our  
23 own little score cards between us ourselves.

24 But sarcasm is not truth, and

1 sarcasm is not evidence, so I'm going to walk  
2 with you through how we see the world.

3 And I was struck by Mr. Andre's  
4 comments at the beginning before I launched into  
5 my presentation by a couple things. Our  
6 animations are cartoons; right? Cartoons are  
7 the things that I used to watch when I was a kid  
8 on Saturday morning. That's meant to say, don't  
9 pay attention to those, I guess.

10 And all the metadata. Did you  
11 notice how it all got jammed into one big place?  
12 Come back to that.

13 And that this thing called  
14 Facebook was created by a bunch of grade school  
15 kids. These guys are the best and brightest in  
16 America today. Harvard, Stanford. These are  
17 the kids that are inventing the future, and the  
18 question you have to ask yourself right now,  
19 that was pretty persuasive.

20 You're thinking, Mr. Rhodes,  
21 you're out of luck. Here this is a very, very  
22 serious charge here that Facebook infringes this  
23 patent that was conceived in 1999, and he just  
24 told you the final part of his argument, the

1 final part. I wrote it down. There was a great  
2 problem, and the '761 solved it. Did you hear  
3 that? He just said it.

4 Yesterday when Dr. Herbsleb was on  
5 the stand, we asked him a real simple question.  
6 Ms. Keefe did. Can you think of one company or  
7 person that's using it today? He's an expert in  
8 the field. What did he say? Do you remember?  
9 He said, I can't think of one.

10 The '761 solved the problem, and  
11 eleven years later you're being told that  
12 Facebook's using it, but no one else is. It's  
13 really that simple. Think about it.

14 Now, I want to take you back to  
15 the opening statements. Remember we were here a  
16 week ago -- seems like an eternity, doesn't it?  
17 I told you to keep your eye on the ball.

18 You know, maybe it was an awkward  
19 way of thinking about it. That was mine. I'll  
20 own it. That was mine, but I went back and  
21 looked at what I said to you, and I want to  
22 remind you I said what they were going to do.  
23 This is my words.

24 They're going to take a, quote,

1 bunch of metadata and say something changes  
2 something, gets written, and they're going to  
3 lump it all together. Remember that?

4 And then I asked you to do me a  
5 favor. I said, keep your eye on one type of  
6 metadata. Here's what I said. The stored  
7 metadata. Did you notice that? During the  
8 entirety of what he was talking about, that word  
9 "stored" just kind of ran over. It just jumped  
10 right over it like a hurdle. That's the problem  
11 with their case.

12 Remember Dr. Kearns and I were  
13 talking? I said, straight-up, we're not saying  
14 everything is missing, but there are some things  
15 missing, and I used that stupid analogy of the  
16 bowling pins. Even if one's up there --

17 Before we start walking through my  
18 slides -- and guess what? I have a lot of  
19 cartoons today, a lot of diagrams, because I  
20 think this is stuff you can see if I show it to  
21 you, and we're going to get real specific,  
22 folks. We're going to get down into the weeds  
23 of what the language of the claim is.

24 Jury instruction 3.2 says what you

1 have to do at the beginning of your journey.  
2 The starting point is before you can decide any  
3 issues in the case, you would have to understand  
4 the patent and the patent claims, so that's  
5 where we're going to start.

6 And then the jury instructions  
7 tell you if the system or method omits even a  
8 single element, then you must find the Facebook  
9 system or method has not literally infringed the  
10 claims. That's the bowling pins. Even at the  
11 end of the day, I got one wobbling, if it  
12 doesn't go down, I win. So that's where we're  
13 going to go.

14 I reminded you in opening what  
15 metadata, the stored metadata. Now let's go  
16 find it. Here is our framework. What did I  
17 tell you at the opening?

18 I told you two things about my  
19 credibility. I told you take me with a grain of  
20 salt; lawyers are lawyers. And I told you find  
21 the truth for yourself; find it on your own.  
22 This is what we ask of you.

23 That invention that was allegedly  
24 created in the a-ha moment in 1999 that no one

1 in the world is practicing today, Facebook does  
2 not infringe it. And why? Because Facebook  
3 never updates the stored metadata. The stored  
4 metadata. We'll talk about that.

5 And then these three claims here  
6 have a unique defense to them. These are the  
7 ones that require one of the Facebook users to  
8 do something, to practice one of the necessary  
9 steps, and the question is whether we control or  
10 direct the Facebook users, and I'm going walk  
11 you through that.

12 And then I'm going walk you  
13 through the invalidity arguments, and then I'm  
14 going to end with this whole discussion that  
15 we've been having in this case about whether  
16 they sold or offered to sell something. That  
17 touches on a pretty important point of  
18 credibility that I want to come back to.

19 This is our position. Obviously  
20 we do not infringe. Remember the relationship  
21 of independent claims to dependent claims. The  
22 dependent claims simply are everything in the  
23 independent claim plus something else. You add  
24 one more step to it, so if you find that there's

1 no infringement of the independent claims, by  
2 definition the dependent claims fall.

3 So let's take these method claims  
4 first. The independent claim is 9; 11 and 16  
5 are the dependent claims. Each of these claims  
6 has an essential element that a user has to  
7 practice, and I'll show them to you.

8 Here's 9. You'll see the  
9 language. It says "creating data within a user  
10 environment by a user using the application,  
11 wherein the user employs. . ." What this is  
12 intended to convey is with regard to these  
13 method claims, these steps over here are done by  
14 the user, and these are allegedly done by the  
15 website.

16 And what the law says is, you  
17 can't hold the website liable for the actions of  
18 users unless the website controls and directs  
19 the user.

20 So remember the dependent claims?  
21 They're the same as 9. You just add everything  
22 of 9 to 11 and 16, so they all require an  
23 affirmative act by a user.

24 This is your jury instruction.

1 You can go back and get guidance from it. It  
2 tells you what is, under the law, control or  
3 direction.

4 What was the evidence on that?  
5 What Mr. Andre showed you was a set of rules for  
6 Facebook. Now, he's right. Nobody puts a gun  
7 to your head, go to Facebook. But if any of  
8 your have used Facebook or use websites, what  
9 happens, you log in. Very minimal piece of  
10 information is required, and then you're in.

11 And what happens then? Do you  
12 have to put a photo on your profile page? No.  
13 Do we tell you where to go? No. Do we tell you  
14 whether you have to join a group page or become  
15 a fan or upload photographs? No. It's up to  
16 you.

17 It's like a great, big park, like  
18 a state park where people go and grab a hiking  
19 trail guide. You can pick any trail you want  
20 to, walk on what we provide. If you do certain  
21 things in our environment, we might kick you  
22 out. Are we directing and controlling your use  
23 of the website? That's the question.

24 What do we say? We warn people.

1 We don't direct or control. This is from the  
2 same document that you were just shown. This is  
3 what Facebook says. The terms of service. This  
4 is the rules of road.

5 We do not control and are not  
6 responsible for what users post. Of course not.  
7 There's 500 million of you people out there. We  
8 can't control it. All we can do is react after  
9 the fact if somebody has done something  
10 inappropriate. That's not direction or control,  
11 and the company explicitly says it's not  
12 responsible for the conduct of any user. That  
13 makes sense. That would be pretty tough, to  
14 direct and control the activities of users.

15 So with respect to claims 9, 11,  
16 and 16, a necessary step is required of a user,  
17 and Facebook does not direct or control. What  
18 was the testimony on that point? Mr. Cox: We  
19 don't correct or control. That takes care of  
20 independent claim 9 and dependent claims 11 and  
21 16.

22 So, yes, I want to talk about what  
23 the '761 patent is and is not. I know it seems  
24 somewhat simple to ask the question of whether

1 you invented the internet when you talk about  
2 how the '761 patent has been applied here and  
3 how broadly it has been stretched. If you  
4 accept this interpretation of the patent, you  
5 really are talking about e-Bay and Yahoo!

6 Now, these books are the kind of  
7 books I would buy. The point of these books is  
8 this was on the shelf of every bookstore in  
9 America ten years ago describing these kinds of  
10 systems. I didn't mean it to imply you could  
11 build a system from these documents, but to  
12 indicate to you what was out there at the time  
13 of the invention.

14 If this invention really  
15 encompasses Facebook and what Facebook does, it  
16 encompasses what these people were doing before  
17 the invention was created. That's the point.  
18 They didn't invent metadata. They didn't invent  
19 e-commerce, and they didn't invent tracking.  
20 That they agree. That was all.

21 Now, remember the number of the  
22 patent? 7 million something. Remember the name  
23 of the patent? Work flow. There's a lot of  
24 patents, so now what I want to do is spend a few

1 minutes, as the jury instructions tell us, to  
2 look at the claim language. The first step of  
3 the process is understand what the claim is and  
4 apply it to the website.

5 There are all of these elements.  
6 Those are my bullet points. If even a single  
7 element is missing, you must find no  
8 infringement. As you've seen before, the case  
9 -- the Court construes some of the claims of the  
10 -- construes some of the terms of the claim, and  
11 you have to accept these definitions.

12 This is the one that I've been  
13 focused on from the beginning and through the  
14 case because I think when you get down into the  
15 specifics of the claim language, you will see  
16 that there is a step that is required that is  
17 not present, so we have to look a little deeper.

18 This is where that phrase is  
19 expressed two times in the first claim, and I'll  
20 show you in a minute this is in every single  
21 claim. What does "dynamically" mean? Again  
22 there it is, "automatically and in response to  
23 the preceding event." Let's take the first  
24 paragraph first. That's the definition you have

1 to apply.

2 What's the preceding event? Let's  
3 start there. In the first context, what's  
4 called user-defined data, you upload a  
5 photograph. Let's say context information is  
6 stored in metadata.

7 Remember, the metadata is not the  
8 table. It's the information in the table. This  
9 cartoon is better because this is the actual  
10 metadata table. There is the metadata. That's  
11 the user-defined data, one created here, and the  
12 system, see how it automatically -- by simply  
13 doing that, the system automatically and in  
14 response to the preceding event --

15 What's the preceding event?  
16 Uploading the photograph, and it automatically  
17 -- that means the user is not manually doing  
18 something. It happens. That's what the system  
19 is doing. It creates this metadata and then it  
20 associates it. That's the first element.

21 Let's look at the second one.  
22 This is where dynamically appears in the second  
23 piece, so what is the preceding event in the  
24 second piece? Are you following me?

1           Let's break it down. What does  
2 preceding mean? Does it mean past, now, or  
3 future? Of course it means past, so when you  
4 say what is the preceding event, it's the event  
5 that has already occurred because if it's in the  
6 past, it's already occurred.

7           So what is the event that has  
8 already occurred? It's right before it. The  
9 event is a change of the user from the first  
10 context to a second context, so in the second  
11 element of these claims, the "dynamically"  
12 language means in response to the preceding  
13 event. The event has already occurred: The  
14 user moving from one context to another.

15           The system will do something  
16 automatically. What is it going to do?  
17 Updating the stored metadata on the change, and  
18 now we see this word here. The stored metadata.  
19 The thing I asked you to keep your eye on from  
20 the beginning.

21           Based on the change, what is the  
22 change? The change is the user moved from  
23 context to context, and based on that change,  
24 which is the preceding event, the movement, we

1 are going to be updating the stored metadata  
2 based on that change.

3 What is updating? You ever had a  
4 job where you were getting unhappy and thinking  
5 about moving on, and you say, I better update my  
6 resume? So you pull it out of the drawer and  
7 look at it. How would you update a resume? Add  
8 something to it or delete something. If you  
9 didn't have a resume, what would you do? You  
10 would create one. Updating and creating are  
11 different things.

12 The claim language is "updating."  
13 Updating does not equal creating. Different  
14 word.

15 What are you going to be updating?  
16 The stored metadata. Now, does the word "the"  
17 mean some or any, or does it mean something  
18 particular? The thing is not the same as some  
19 things or any things. "The" is one. It's  
20 something particular.

21 What is it? It's the thing that  
22 was stored. It is stored already. Occurred in  
23 the past. Is it happening in the present, the  
24 now, or is it going to happen in the future? We

1 know how to say this. If it's in the future, it  
2 will store. If it's in the now, it is storing.  
3 Stored. We all know that because it's got -ed  
4 at the end. That's past tense.

5 "The updating of the stored" means  
6 it's something that's already occurred. What is  
7 it? It's the stored metadata. That's when it  
8 occurred. It has already happened; right?  
9 Because in the first context, when you uploaded  
10 that photograph, you were storing the context  
11 information in metadata.

12 You uploaded the photograph. The  
13 photo table comes up. That's where you were  
14 storing it, in the present tense. Now that it's  
15 been stored, in the present tense, it is stored.  
16 It's already there, stored in the metadata. The  
17 metadata.

18 Now you have to ask yourself, is  
19 it the same metadata or different metadata? Is  
20 it any metadata, or is it the stored metadata,  
21 the metadata that was stored in the prior step?

22 The last clause wherein the judge  
23 instructs you this morning it means "in which,"  
24 "in which" does not mean "when." Remember those

1 things from grade school? Who, what, when,  
2 where. When and where. They're different. "In  
3 which," "wherein." It's a place. It's not  
4 when.

5 And remember when Mr. Andre showed  
6 you those excerpts during case of the  
7 prosecution history with exchange between the  
8 Patent Office and Leader about how the language  
9 changed? Remember it said "automatic" and  
10 crossed out and the word "dynamically" added.  
11 The jury instruction says you can't consider  
12 that. That's jury instruction 3.4.

13 Here's my cartoon. Let's  
14 illustrate what the claim language actually says  
15 and requires. I upload my photograph, my smiley  
16 face. User-defined data is created by the user  
17 interaction in a first context. The man is the  
18 user. The happy face is the user-defined data.

19 What happens automatically and in  
20 response to that which is the now preceding  
21 event, it's stored and wrapped with metadata  
22 dynamically. That means automatically, and in  
23 response to the prior event. It's storing the  
24 context information, metadata, and there it is.

1 It's stored on a storage component. So far so  
2 good.

3 Then we move to a second context.  
4 That's the action of this patent. That's what  
5 we're talking about. We move to the second  
6 context, do it again. Is that the preceding  
7 event in the second element of the claim? It's  
8 the preceding event, movement from one context  
9 to another.

10 And then the language says  
11 "dynamically updating the stored metadata."  
12 What does "dynamically" mean? Automatically.  
13 Nothing else has to happen, and it's in response  
14 to the preceding event. The preceding event is  
15 I went there. In response to the preceding  
16 event, what happens? Tracking a change and  
17 dynamically updating the stored metadata.

18 What is happening that they're  
19 talking about? The metadata that was being  
20 stored in the prior step isn't the prior context  
21 because the purpose of the invention is, when I  
22 move, my stuff follows me. That's the purpose.  
23 That's what the last clause means, "in which the  
24 user accesses the data." Not when he does. In

1 which.

2 And that's the fundamental  
3 difference between our position and their  
4 position. Dr. Vigna described our system pretty  
5 correctly. Our dispute is really starting with  
6 what the claim language requires this act of  
7 updating the stored metadata and not any  
8 metadata.

9 What is metadata? Dr. Vigna tells  
10 us it's not the table in which the photograph is  
11 created. It's the actual data about the  
12 photograph that is the metadata, and you can  
13 read it to yourself, but I just put up a  
14 question and answer from the trial testimony  
15 here.

16 That's the stored metadata in our  
17 example, and what we saw was the Facebook system  
18 has lots of metadata about lots of different  
19 things. Remember this? Photos, minifeed  
20 stories, wall tables, and they're not the same.  
21 They don't have the same number of columns, and  
22 they're stored in different places.

23 What they want you to believe is,  
24 can you imagine amount of computers you need to

1 have a website like this with this many users  
2 and this much activity, all those computers?  
3 They want to put their arms around the whole  
4 thing, one big user database.

5 But you have to be specific.  
6 These items of metadata are not all stored at  
7 one time. They are created by virtue of various  
8 interactions, and they're placed in different  
9 places.

10 When you use the phrase "stored  
11 metadata," you need to be very careful about  
12 which metadata we're talking about. We're  
13 talking about what's in the claim language being  
14 compared to the system.

15 What Dr. Vigna has done, as I  
16 suspected he did, as I suspected they would in  
17 the opening when I warned, I said -- I warned,  
18 they'll say that there's a bunch of metadata and  
19 something changes and something gets written.  
20 They're going to lump it all together. That's  
21 what I said to you on the opening statement, and  
22 that's what happened.

23 They stuck them all together  
24 because the problem they have is that when you

1 move from one context to another, the stored  
2 metadata doesn't get updated by virtue of that  
3 action alone, but the system language requires  
4 automatically. That means it happens just  
5 because you do it, and Dr. Vigna and the  
6 engineers and everybody agreed that's not  
7 present, so to get around that they have to  
8 convince you that the language is any metadata.

9 "The" does not mean some or any,  
10 and "stored" means something specific in the  
11 context of this claim. I need you to work with  
12 me on that claim language when you go back in  
13 there and study for yourself. Remember what I  
14 said you, to find the truth for yourself.

15 So let's look at the example and  
16 then I'll show you once again this was one of  
17 the use cases that Dr. Vigna testified you --  
18 we're in Facebook. We're at the profile page  
19 with no photograph, and some of you may have  
20 this experience. You're not required to have a  
21 photograph on your profile. It's your choice.  
22 If you do you upload it, you pick a file and  
23 voila, that has now become the user-defined  
24 data.

1                   And if you accept that this is a  
2                   context, that's context one. You saw this  
3                   before. It gets stored on a thing called a file  
4                   and, separate and apart from that on a different  
5                   storage component, metadata is created about the  
6                   photograph. The system did it automatically in  
7                   response to the prior event. Event two.

8                   Event one. Event one takes place.  
9                   The system automatically and in response to  
10                  event one creates event two. This is the  
11                  sequence of steps. Data one, metadata one.

12                  I go over to Ms. Keefe's profile.  
13                  I have change contexts from context one to  
14                  context two. What does the claim require?  
15                  Automatically and in response to the prior  
16                  event. The prior event is me going there.  
17                  Automatically by going there, did the stored  
18                  metadata get updated? No. Everybody agrees on  
19                  that. Everybody agrees on that including  
20                  Dr. Vigna.

21                  I don't dispute his interpretation  
22                  of how this works. He's right. It doesn't get  
23                  updated. The stored metadata -- I told you to  
24                  keep your eye on that ball during this case.

1                   Now they made a big deal about  
2                   what happens when you interact with this wall  
3                   posting. Let's find out. I write in something.  
4                   Remember? See, I'm typing in there. Remember  
5                   the discussion that Ms. Keefe had with Dr.  
6                   Vigna, what happens if the phone rings here, and  
7                   you leave? What happens? If you write maybe a  
8                   hundred different messages because you're mad at  
9                   somebody, and you're not sure what to say, but  
10                  you don't push the share button?

11                  You could spend an hour writing  
12                  text in the box. If you don't press "share,"  
13                  what happens to the stored metadata? Nothing.  
14                  Nothing happens to it, and my photograph is not  
15                  there. Nothing has been brought forward to me  
16                  to the second context.

17                  This is the heart beating in every  
18                  claim of this patent. This was the entire  
19                  purpose of the patent, to bring with you  
20                  automatically as you went from context to  
21                  context all of your information, like a backpack  
22                  would just come with you automatically. But in  
23                  Facebook, things don't happen that way.

24                  So I push "share," and now my

1 photograph appears in this second context, but  
2 you see this language right here? That's a body  
3 of new data. That data did not exist in the  
4 prior context, did it? What is it? It's a new  
5 piece of data stored in a server which  
6 automatically generates a piece of metadata  
7 stored in the wall table, but the photo table  
8 where the stored metadata from the first context  
9 was created remains untouched. It did not  
10 update.

11 They want you to believe that this  
12 is the update. You can't update that which did  
13 not exist. That's called "create." The system  
14 created new metadata, and new data. It did not  
15 update that which already existed. Update and  
16 create are different, and that's the answer.

17 We never do the fundamental  
18 teaching of this patent. It's that simple.  
19 It's in every single claim. By virtue of  
20 automatically arriving in the second context,  
21 the system does not update the stored metadata.  
22 It might create new metadata based on what you  
23 do in the second context. It might create no  
24 data, but it does not update automatically the

1 stored metadata.

2 That's the key. That's why we  
3 don't infringe. That's why we told you at the  
4 beginning keep your eye on the specifics, not  
5 the generalities. Where is the stored metadata,  
6 and where is it being updated, and this is the  
7 heart beating in every independent claim.

8 And I'll show that to you right  
9 now. Here's claim 9. There's a movement, and  
10 there's the dynamically updating the stored  
11 metadata. There's a prior event. This is what  
12 the system has to do. Facebook doesn't do it.

13 Here's independent claim 21.  
14 There's the movement. There's the requirement  
15 that the system automatically and in response to  
16 movement update the metadata, the stored  
17 metadata. Same thing.

18 Now, we did this kind of silly  
19 example with Mr. Cox. We asked him what would  
20 happen if Facebook actually did practice this  
21 patent? Remember that this is what he said. As  
22 you moved around Facebook -- because this is  
23 what people do on Facebook, they move around --  
24 we would be having to create -- every time we

1 moved around, we would have to update the stored  
2 metadata to reflect you're over here now. What  
3 would we get out of that? What would you, the  
4 user, get out of that? Nothing really.

5 If you don't interact with the  
6 second context, why does the system need to know  
7 you looked at the page and bring forth the  
8 content from the first context? That's not how  
9 the website is designed to work.

10 There's a simple reason for that.  
11 Here it is. Can you imagine the processing that  
12 would have to take place every day, every  
13 second? How many of these metadata updates  
14 would be going on all the time? That's why he  
15 said it wouldn't make sense for us to do that.  
16 That's what the patent teaches.

17 I know it's silly, but they had  
18 to -- as I said with Dr. Kearns, I agree with  
19 you there are elements of the claim that are  
20 there. A computer system? Yes. It's  
21 web-based, yes. But the key elements are not  
22 there. That's the story on infringement.

23 Now you're instructed on something  
24 called the doctrine of equivalents, and this is

1 what this says is, okay, there's something  
2 missing from each of the asserted claims of the  
3 patent. We can substitute something else in  
4 there if it's really insubstantially different.  
5 It's a fudger. This is how you fudge.

6 Even he admits you don't. They  
7 can put that box on the form. The problem is  
8 there's a fundamental step that goes to the  
9 heart of the invention. If you believe me on  
10 that, you can't supply that missing element here  
11 because there's nothing substantially the same  
12 the system is doing.

13 If you're going to stretch this  
14 patent beyond all recognition to wrap around  
15 Facebook, then I would point to you -- let's  
16 time machine back to 1998, '99, 2000. There  
17 were other people doing this long time ago, and  
18 I would respectfully submit that this patent had  
19 been invented.

20 Let's talk about invalidity. We  
21 have a right as a defendant in this case -- we  
22 didn't bring this lawsuit. They brought it  
23 against us, and we have a right, even though the  
24 Patent and Trademark Office issued the patent,

1 to argue that it's invalid.

2 What did I tell you in opening?

3 Remember, I said up to this point, the burden  
4 has been on them, and now the burden is on me,  
5 and I said at the beginning my burden is higher.

6 So what do I have to show you?

7 Let's start with the prior art. First of all,  
8 on the dates there's no dispute everything  
9 before the time they filed the patent  
10 application in December of 2003 -- and if you  
11 give them the benefit of the provisional,  
12 December of 2002 -- and you've seen these  
13 before.

14 I want to remind you what they do.  
15 The Swartz reference invalidates everything but  
16 claim 16. That's why 16 is not redDED out  
17 there. IManage invalidates everything, as does  
18 Hubert, with the exception of 16.

19 Claim 16 adds this element. It's  
20 the same system, but on a portable device like  
21 your iPhone or PDA. That's anticipated by  
22 iManage because it explicitly talked about  
23 having wireless communication devices to use  
24 with that system, and it would have been

1 obvious, as experts testified, in light of those  
2 over references.

3 And if you combine any of them  
4 with Ausems, which you're allowed to do --  
5 you're not allowed to combine for purposes of  
6 anticipation. You are for obviousness, and the  
7 jury instruction permits that and will explain  
8 it to you.

9 And there's the timeline. This is  
10 one year before the patent application was  
11 filed. I gave them for this purpose the benefit  
12 of the provisional, even though I'm going to  
13 convince you in a moment, I hope, that the  
14 provisional shouldn't stand.

15 These are all in the right time  
16 period. They all apply now. This testimony is  
17 fresh to you because you had it yesterday with  
18 Dr. Herbsleb and Friday with Professor  
19 Greenberg. I'm not going to go at length. I  
20 know you want to get to deliberations.

21 Let me remind you quickly, here  
22 are the dates of Swartz, and this is the easiest  
23 way to remind you what it's shown. Try as they  
24 might, this is absolutely the same thing. Just

1 compare them. Look at the language. Just take  
2 a moment to look at the language.

3 Trying to solve the same problem  
4 in the same way is one thing, but imagine the  
5 coincidence of two different inventors in two  
6 different places -- and remember Swartz is prior  
7 expressing the problem with the same language,  
8 tracking metadata, data storage context. That's  
9 more than a coincidence.

10 Here's more language.  
11 Dynamically, dynamic user-accessed data context.  
12 Look at the language. Swartz is spot on. This  
13 is clear and convincing evidence. It  
14 invalidates the patent.

15 IManage is actually a system.  
16 It's a product that a company sells, and we had  
17 our experts look at their user manual because  
18 the best thing that will describe what's in a  
19 system is how you use it. That's the  
20 functionality of the system. It's from the  
21 right date period.

22 I want to remind you of the  
23 animation that our expert used to show you how  
24 it worked and how it mapped absolutely the same

1 to the '761. That was pretty fast.

2 This is what you end up with. You  
3 have users, different applications, activity,  
4 different times, different contexts, and then  
5 down here you have a whole series of ways to  
6 access the information. That's what the '761  
7 was trying to solve: Creating information in  
8 one context, accessing it in a second, and  
9 tracking the movement, and without the user  
10 having to do anything. Automatically bringing  
11 all the information to the second context.  
12 That's what iManage teaches.

13 Hubert is very much the same  
14 thing. This was published initially in Europe,  
15 and the reason we brought back the American  
16 patent behind it is because that American patent  
17 that he got takes priority to this date. This  
18 is owned by Xerox. Pretty big company. There  
19 are others out there doing the same stuff  
20 Mr. McKibben was doing. Xerox owns two of the  
21 patents we're looking at. They invented this  
22 stuff too.

23 This is the '761 patent on the  
24 left; Hubert on the right 'isn't it coincidental

1 that two different inventors in different  
2 continents are expressing the same ideas with  
3 the same language? It's spot-on.

4 Remember the bee? They were  
5 arguing yesterday with Dr. Herbsleb that, well,  
6 it's not really internet-based. The whole  
7 premise of Hubert is you move the documentation  
8 through the internet, and then he said it's  
9 about user-based. Who creates the document?  
10 The users of course.

11 And the bee was the metaphor in  
12 the patent itself to describe the idea of  
13 pollination. You think what a bee does in a  
14 field of flowers. He flies from flower to  
15 flowerer. Those are the contexts. And he  
16 interacts with the flower, and the idea of this  
17 patent is you bring the context information and  
18 the document together. The same idea in the  
19 '761. Completely invalidates it.

20 And then the last piece of the  
21 puzzle is at the same time period, people are  
22 talking about moving things to wireless and  
23 mobile, and all you have to do in 1999 is ask  
24 yourself, would engineers of the type and

1 quality we've seen in this courtroom, the  
2 experts, the Facebook folks, would they have  
3 thought to make this wirelessly? If you think  
4 they would have, it's obvious.

5 Then for obviousness we can  
6 combine their summary of the invention,  
7 wireless, be able to access data remotely via  
8 wireless. This is the last piece of the story.

9 The piece I want to focus on for a  
10 minute, this is the piece of the story that's  
11 really a classical jury issue because you have  
12 to believe somebody on this one. This is the  
13 story that involves what people are really good  
14 at, ordinary people. Is someone's story true?

15 So let me explain what the issue  
16 is. The law says that you can't jump the gun.  
17 If you're going to file for a patent, the law  
18 says that you can't jump the gun. If you need  
19 to file a patent, then you need to file it, and  
20 for one year beforehand you're given a grace  
21 period, but if more than one year before the  
22 filing you're out in the market trying to offer  
23 it for sale or demonstrating it, all bets are  
24 off. The inventor is completely in control of

1 this process.

2 I have to prove three things to  
3 you. The first step in the process is I have to  
4 convince you that they shouldn't get the benefit  
5 of the provisional filing date. I have to blow  
6 that up first. If I do, then I have to convince  
7 you that there were offers to sell, and that  
8 what was offered involved the invention.

9 Okay. Let's walk through this.  
10 An offer doesn't have to be -- a sale doesn't  
11 have to be accepted. Doesn't even have to be  
12 specifically for money. This is jury  
13 instruction 4.7. As long as what they were  
14 trying to get was commercial benefit, it  
15 qualifies, and \$54 million from federal  
16 government constitutes a commercial benefit. Do  
17 you think 2,000 licenses from The Limited is a  
18 commercial benefit?

19 And even if the offer is done  
20 under the cloak of secrecy under an NDA, it's  
21 okay. It's still an offer even if they tried to  
22 keep it secret. If it happened, it's an offer.  
23 That's the jury instruction.

24 Here's the timeline. This red

1 line, the one year before the actual patent  
2 application was filed. Remember the application  
3 was filed in December of 2003. The provisional  
4 was filed literally 364 days before. You got  
5 December 10, '03 versus December 11, '02, so the  
6 first question is where does the one-year period  
7 end? Does it end with the red line as I said,  
8 or does it end with the yellow line as they say?

9 If you look up here, see the  
10 exhibit number there? Write that one down, and  
11 take a look at that one in the jury room because  
12 that one right there was an offer to sell, and  
13 it's even before their line. I quoted it.  
14 Leader2Leader is complete and I'm going to  
15 charge a minute that no reasonable person would  
16 think that the thing he's been trying to sell  
17 since he invented it in 1999 was the 1965  
18 Corvette without the Bluetooth. He was trying  
19 to sell the one with the special sauce in it.

20 The starting point of the analysis  
21 is, how do I convince you that the provisional  
22 shouldn't be the operative filing? We looked at  
23 this in the opening. This is the jury  
24 instruction you've been given. He's only

1 entitled to the date of the provisional if every  
2 element. Stop there. Not most. I'm precise.  
3 I like the actual words of things, and I want  
4 you to look at the words of things, like the  
5 stored metadata. Not any metadata.

6 Every element of the issued claims  
7 of a patent, and it's disclosed what kind of  
8 disclosure. Fully disclosed. Not partially.  
9 Not substantially. Not hinting at it. Fully  
10 disclosed. Why would that be the case? Because  
11 that's the document that gets filed with the  
12 federal government. You have to make full  
13 disclosure if you want that date, and you have  
14 to describe every element.

15 I showed you this one in opening.  
16 I asked you to look at it again. Is full  
17 disclosure achieved by difference of twenty  
18 pages of text? Is full disclosure referred to  
19 as Hubert when that's not figured in the  
20 provisional?

21 And twenty-two in the final is  
22 full disclosure with no mention of storing  
23 context data or metadata, yet there is in the  
24 final. Is full disclosure achieved with no

1 mention of updating metadata in response to  
2 tracking user movement in everything?

3 That's the heart beating in every  
4 claim of the patent. Hold the thought. Here's  
5 the provisional.

6 I like Mr. Lamb too, thought he  
7 was an interesting guy, and Mr. Lamb said three  
8 times -- three times the cock crowed about this.  
9 He's honest. Okay. Let's take that. Let's  
10 agree that he's honest.

11 So before the trial we sat him  
12 down, raise his right hand, took an oath,  
13 reporter was talking to him, and we gave him the  
14 provisional. Here it is. Take a look at it.  
15 You're the guy that wrote the code.

16 Remember, Mr. McKibben said, I  
17 don't write code. I hire people to write code.  
18 Lamb is the guy he hired to write it. He asked  
19 Lamb a simple question: Is something missing?  
20 Is there anything missing?

21 "The paragraphs that we reviewed  
22 earlier -- and you are free to go back  
23 to any of them -- did you see anything  
24 in those paragraphs that disclosed

1 tracking movement of a user from one  
2 board to another board?"

3 "While reading this? Our time  
4 together, I don't remember running  
5 across anything that was -- this said to  
6 me there was an indication of tracking a  
7 user switching from one board to another  
8 board."

9 No tracking. We wanted to check  
10 though, so remember the so-called pseudocode  
11 that's attached to the provisional? They talked  
12 about it. Do you remember that pseudocode is  
13 not supposed to work? Supposed to be a  
14 placeholder.

15 They made a big deal about one  
16 line of code. It was this line of code from  
17 page sixteen. Remember this line? So we said  
18 to Mr. Lamb in his deposition before trial, does  
19 that one, is that where the tracking -- tracking  
20 is the heart of the invention, and he just got  
21 done saying to you that it's not in full  
22 disclosure of each and every element.

23 Here's what he has to say about  
24 whether tracking is found in that specific piece

1 of code they showed him at trial.

2 "Can you go to page sixteen.

3 Toward the middle of the page, there is  
4 a line of code that begins with action  
5 dot add action listener open parentheses  
6 remove web relationship action listener  
7 document global close parentheses. Do  
8 you see that?"

9 "I do."

10 "Is there anything in this code,  
11 the code you've been talking about on  
12 page sixteen, that implements tracking  
13 movement of a user from one board to  
14 another board?"

15 "No."

16 He's the guy that wrote the code.  
17 A critical element is missing from the  
18 provisional.

19 And then there was some fuss about  
20 whether he changed his testimony. We asked him  
21 right here in court. I made a few one-word  
22 clarifications at the deposition, but the  
23 deposition I gave was accurate. He stands by  
24 it. That's it. That's the end of the story

1 right there, folks. The inventor himself says a  
2 critical element of tracking is not in the  
3 provisional.

4 Under the jury instructions, the  
5 provisional, therefore, does not fully disclose  
6 each and every element of the patent. It  
7 cannot, therefore, be the effective filing date.

8 There's more. Look at all these.  
9 This was fascinating. These are these import  
10 statements, and every one of those import  
11 statements is a separate module of code that  
12 gets dropped in there, but no one knows what it  
13 is. Educated people can kind of guess or  
14 speculate, as Dr. Herbsleb did, but you have to  
15 supply all of those missing pieces.

16 Everybody agrees that's not there.  
17 That's why it says import it. You have to read  
18 it. If you have to import all of that level of  
19 functionality, that's not, by definition, fully  
20 disclosed in each and every element.

21 Where does that leave us? The  
22 provisional is just not the same as the final.  
23 It's missing a lot of information, and one  
24 critical element of tracking, so if you take the

1 provisional and map it to the final, what does  
2 it look like? This is what's missing from the  
3 provisional. What I'm showing you is the final.  
4 That's not full disclosure, and it's a  
5 requirement because you're asking the federal  
6 government to give you the monopoly of a patent,  
7 so you have to disclose it fully.

8 Now there's a timeline. This  
9 becomes the effective date because now that's  
10 one year before they actually filed the  
11 application because the provisional is gone.  
12 Look at all this activity right up to the  
13 deadline here, so now the story is, we weren't  
14 offering to sell the thing that had the special  
15 sauce in it. We weren't offering to sell  
16 Leader2Leader that had the invention in it. We  
17 were offering to sell something else.

18 Mr. McKibben was on the stand  
19 twice, and twice he did not put before you the  
20 versions of the product. He never showed you  
21 the product, did he? And he didn't say it has  
22 this one or this one or this one. It's just  
23 sort of on December 11, 2002, the very moment in  
24 time they filed the provisional, that's the

1 date. That date is engineered to get around  
2 this problem, so let's look at this evidence and  
3 the construction.

4 Did he offer to sell it more than  
5 one year before the patent application, and did  
6 it practice the invention? The product is  
7 Leader2Leader. Now again look at the jury  
8 instructions. This is 4.7. An offer to sell  
9 need not be accepted to trigger, so it doesn't  
10 have to be accepted by the other side to trigger  
11 this bar.

12 Even if accepted, the fact that it  
13 didn't lead to an actual sale, not relevant.  
14 The essential question is whether or not there  
15 was an attempt to obtain commercial benefit from  
16 the invention. Bingo. That's the law. An  
17 offer to sell can invalidate the patent even if  
18 it was secret, so when we took his deposition,  
19 we said to him, did you ever offer to sell it.  
20 It's a simple question. Look what he said.

21 "In 2001, had you offered to sell  
22 Leader2Leader to anyone?"

23 "Can you repeat that question."

24 "In 2001, had you offered to sell

1 Leader2Leader to anyone?"

2 "I don't understand what you mean  
3 by 'sell.'"

4 "In 2001, had you ever offered  
5 anyone the opportunity to use  
6 Leader2Leader in exchange for payment?"

7 "I don't understand that  
8 question."

9 "Had you ever offered anyone the  
10 opportunity to use Leader2Leader in  
11 exchange for a fee?"

12 "In exchange for a fee? Do you  
13 mean sell the product?"

14 "Yes, sir."

15 "No, not that I can recall."

16 Not that he can recall. Let me  
17 show you three exhibits, please. This is a  
18 moment in history that we'll all remember. A  
19 few months after 9/11, the government reaches  
20 out to industry and says, give us ideas to how  
21 to make us safe.

22 He submits a proposal in  
23 January 2002. What is the word he uses to  
24 describe himself? Offeror. He wrote it. He

1 copyrighted it. And the date. What does he say  
2 that he's selling? What's the goal? To  
3 implement a Leader2Leader to  
4 enterprise-collaboration environment. Okay.  
5 Never offered to sell.

6 He has an extensive body of  
7 financial information. He's going to try to get  
8 \$8.5 million of the government's money based on  
9 that change? DTX 184 at the bottom. He's  
10 saying he didn't offer to sell a product that  
11 has the product in it because if you believe he  
12 sold it on December 10th or 9th or 8th of 2002,  
13 this lawsuit that he brought isn't going to fly,  
14 but look what he's saying at the time, not when  
15 he's in trial, but eight years ago. In writing,  
16 people.

17 This is October 10th. We have  
18 verbally committed to selling a system. What  
19 system was he trying to sell? So based on that  
20 change two months before the invention is  
21 completed, is he selling last year's Corvette or  
22 the one with the Bluetooth, the secret sauce?  
23 Do you really believe he would be trying to sell  
24 these guys the system that doesn't have this

1 great invention? Does that make sense to you?

2 It's your call. You make the  
3 decision, but nonsense he invented this thing in  
4 1999 and he's invested \$10 million into it, and  
5 we're right on the cusp of the invention, and  
6 he's not talking about the one with the patented  
7 technology in it. He's selling last year's  
8 model without the Bluetooth. That what he says.

9 The Limited. This is the -- this  
10 is an interesting one. He needs  
11 Mr. Schlessinger to confirm that they've got a  
12 deal so he can go over the to the VC and get the  
13 deal and then he'll get money. Investment  
14 money. That's what he's doing with this one.  
15 This one is getting closer to the strike of  
16 midnight, when this lawsuit turns into a  
17 pumpkin. November 21st.

18 And, Your Honor, I'll finish  
19 within ten minutes.

20 I'd like to offer the sweetheart  
21 deal. Sweetheart deal. That's an offer. Only  
22 question is, what is the offer?

23 And there was a lot of effort to  
24 separate out Leader2Leader to LeaderPhone, but

1 he's got a price for Leader2Leader 2000 of these  
2 seats for three years down to \$20.84 a month.  
3 And you see the document. He separates out  
4 LeaderPhone to Leader2Leader. Leader2Leader is  
5 some kind of standalone product. He's selling  
6 something. He's offering something for a  
7 commercial benefit.

8 The only thing standing in the way  
9 of invalidating his patent now is just whether  
10 or not it practices the invention. This is the  
11 jury instruction you're going to look to to help  
12 you get there. There is the idea of ready for  
13 patenting, whether the inventor has enabled the  
14 invention.

15 Remember Lamb? That video we  
16 played you? He said it was demonstratable in  
17 August of 2002. What did he tell the federal  
18 government when he was trying to get funding in  
19 the aftermath of 9/11 in January of '02?  
20 Operational. Operational, but he wants you to  
21 believe that he wasn't ready yet.

22 Compare what he says in court to  
23 what he told other people eight years ago in  
24 these documents. Don't take my word for it.

1 Make your own comparison and come to your own  
2 understanding.

3 By preparing drawings sufficient  
4 to allow someone skilled in the art to make it,  
5 it's ready for patenting, which there is reason  
6 to believe it is ready to work for its intended  
7 purpose, and, yes, I asked them before trial,  
8 did Leader2Leader practice the invention, and  
9 they said, yes.

10 But now what they say is, you  
11 didn't ask the question correctly. You didn't  
12 ask me about the version in 2002, even though  
13 the purpose of asking the question is to figure  
14 out whether it did, so now they're dancing. Now  
15 they're dancing. This is 2009. Why? Because  
16 that's when I asked them the question, in 2009,  
17 and he swore to it under penalty of perjury.

18 Mr. McKibben, when he comes to  
19 court, he has a really good recollection,  
20 doesn't he? At some point, you had it, I had  
21 it, on the December 11. At his deposition  
22 before trial, we asked him a real simple  
23 question: Can you think of any iteration of  
24 Leader2Leader, the product, that did not

1 practice the patent? He's the inventor. Can  
2 you think of any one that does not practice the  
3 patent? Did they also practice it? This year's  
4 version. Simple question. Can you think of any  
5 iteration that didn't practice the patent? This  
6 is what he said.

7 "Can you identify any iteration of  
8 the Leader2Leader product that in your  
9 opinion did not implement what's claimed  
10 in the '761 patent?"

11 "That was a long time ago. I  
12 can't point back to a specific point."

13 He can point a to specific point  
14 now though in court. There it is, but if you  
15 look at what he was telling people at the time,  
16 this is from the government funding document,  
17 and if you look at this page from DTX 178, 179,  
18 that is his description of what it's going to  
19 do. He's got these diagrams. This is the  
20 thing. You don't have to read it now. Take a  
21 look at it and then compare it to the document  
22 that Mr. Andre just got done telling you is the  
23 document from 2000 in which he described the  
24 patent.

1                   Just do me a favor and compare  
2                   them yourself. Get them side by side because if  
3                   you think what's being disclosed and discussed  
4                   and proposed to the federal government -- why  
5                   would you be trying to sell last year's Corvette  
6                   with no Bluetooth to the federal government?  
7                   Does that make sense?

8                   Compare what he's telling the  
9                   government and map it to what he describes and  
10                  look at the commonality of the language. It's  
11                  clear that what he's trying to sell is his  
12                  invention, and this is what he tells the  
13                  government. It's operational, but now he's  
14                  saying it's operational, but not the one that I  
15                  invented. It's a different one. To get money,  
16                  this is what he tells people. To preserve a  
17                  lawsuit, he might say something different.

18                  November, you see how he separates  
19                  out Leader2Leader from LeaderPhone. Over here  
20                  it is a suite of products. You see that when  
21                  you're trying to sell it and commercialize it.  
22                  Back in the day, it's always separated, and this  
23                  is to The Limited, and this document, in the  
24                  ones around it, he's talk about running the

1 entire company on this platform.

2 When he's talking to them about  
3 it, it doesn't practice the invention. It's  
4 another version, but the dates are starting to  
5 be a problem because that's pretty close to  
6 December 11.

7 Few days later, this is an update  
8 to his shareholders, DTX 776. Look what he  
9 says. We were demoing the functionality. He  
10 wants you to believe he was demoing last year's  
11 functionality, not the Corvette with the  
12 Bluetooth. That's what he's selling to The  
13 Limited two weeks before the provisional is  
14 filed. Last year's model without Bluetooth.

15 And look what it does. It's a  
16 tool to support national clinical testing based  
17 on the changes in the business, I guess of  
18 making method products. They're going to run  
19 their entire clinical testing on this  
20 functionality because it's last year's Corvette  
21 because you don't want to offer them the a-ha  
22 moment from 1999, full document management  
23 functions.

24 And look at the language.

1 Collaborative. This is the heart. What he  
2 says, it is in a nutshell looking for  
3 Leader2Leader, but they're looking for the one  
4 that doesn't practice the patent. They're  
5 looking for last year's model. They're looking  
6 for the one without the Bluetooth. Do you  
7 believe it?

8 The dates are becoming a problem.  
9 We have to thread this needle. This is three  
10 days before the provisional. Three days now;  
11 right? Remember I have to convince you that a  
12 moment before that year period, he made an offer  
13 to sell the patented technology. That's my  
14 burden. Three days before the provisional was  
15 filed, timing is getting tight. We really have  
16 to thread this needle.

17 Look what he says. The Limited,  
18 this is the big letter. This guy Schlessinger  
19 lined this up and got the NDA. He's confirming  
20 now from Schlessinger that they have the sale,  
21 and they're going to get the contract in January  
22 on December 8, 2002, three days before the  
23 provisional. He's selling the elements for a  
24 contract that gets signed a month later. Last

1 year's model with no Bluetooth. Do you believe  
2 it? Last year's model with no Bluetooth.

3 Or is he trying to sell the most  
4 important invention of his life for the first  
5 time? You decide. You decide.

6 Look what he actually said at  
7 trial. I pulled this up last night, and I was  
8 struck. Their lawyer asked them, you never did  
9 it before. Look at his answer. "It couldn't  
10 have been before December 11. That technology  
11 wasn't done until days before."

12 Now he admits it wasn't exactly on  
13 December 11. It's days before, December 8. He  
14 sold it. That's three days before. If you find  
15 December 8 is within this, the on-sale bar is  
16 now there, and remember it starts in 1999, and  
17 it goes all the way here, and yet he wants to  
18 say at the strike of midnight is when it  
19 happened; right?

20 This is an extraordinary amount of  
21 work. I did the math. It's twenty engineers  
22 forty hours a week for three years at  
23 fifty weeks a year, but he's got to thread that  
24 needle. Why does he have to thread the needle?

1 Because he offered it. His lawsuit is over.

2 Public demonstrations. I'm not  
3 going to talk about them, but there's a jury  
4 instruction that defines it. If he made one  
5 demonstration of the functionality to any one  
6 person, even if it wasn't widely disseminated,  
7 separate grounds for invalidation. That's how  
8 many times he was talking about it because if  
9 he's not talking about the Corvette with  
10 Bluetooth. You don't need 2,000 separate  
11 contracts of secrecy.

12 Look at that. Are you telling me  
13 is it really the position that a thousand  
14 different times with a thousand different  
15 contracts a thousand different employees and a  
16 thousand meetings with a thousand different  
17 people he never once, not one time, ladies and  
18 gentlemen, not one time did he offer it for a  
19 commercial benefit? Never happened?

20 Look at that chart. Imagine all  
21 of the conversations he had. Imagine them and  
22 then look at that chart and ask yourself not one  
23 time, never? The most exciting thing that's  
24 ever happened to him in his life. He invented

1 the thing that's going to change everything, and  
2 not once up there, ladies and gentlemen, did he  
3 offer it for sale. Not once. Do you believe  
4 it?

5 And there's their timeline. He  
6 invented it in 1999, and from that point forward  
7 look what he was talking about. He was talking  
8 about it a lot because he needed these contracts  
9 to protect it because he said it was a secret  
10 and made his children sign them, so that leaves  
11 us with my concluding remark on this point.

12 I was really struck by this  
13 comment. This was a communication he sent just  
14 about a month before the provisional was filed,  
15 and then the report to the shareholders. We had  
16 a phenomenal selling week last week. Not  
17 selling the invention, folks. He's selling you  
18 the last year's version without the Bluetooth,  
19 and they had just committed to contracting with  
20 The Limited.

21 So we asked a real simple question  
22 at his deposition because he put his hand up in  
23 the air and took the oath. Is that statement  
24 accurate? That's not a big question of the

1 lawyer. If I ask you if something is accurate,  
2 it's either yes, it's accurate, or no, it's not.  
3 This is what he told us.

4 "Sir, if you look at the second  
5 full paragraph of the e-mail from you,  
6 toward the middle there is a paragraph  
7 that begins 'we had a phenomenal selling  
8 week last week. The Limited,  
9 www.limited.com just committed to  
10 contracting with Leader for LeaderPhone  
11 and Leader2Leader.'

12 Do you see that, sir?"

13 "I do."

14 "Was that an accurate statement as  
15 of November 3rd, 2002?"

16 "Again I don't know who I'm  
17 communicating with here. I don't recall  
18 this person, and I don't recall  
19 specifically writing this, but it's  
20 referring to -- we met with their COO,  
21 CEO, and CTO, and do I have some memory  
22 of that meeting? And in that meeting  
23 the COO -- and I believe that would be  
24 Len Schlessinger that we talked about

1 earlier -- came in the meeting and in a  
2 strategic sense committed to moving  
3 forward with a relationship with us  
4 regarding Leader's company, Leader's  
5 products, and so I was probably giving  
6 more detail to this person based on a  
7 positive meeting."

8 "So the sentence that says The  
9 Limited just committed to contracting  
10 with Leader for LeaderPhone and  
11 Leader2Leader, was that sentence  
12 accurate when it was written on November  
13 3, 2002?"

14 "I would say accurate in the sense  
15 it was hyperbole."

16 "Which portion of it was  
17 hyperbole?"

18 "The entire statement."

19 "And by hyperbole, what do you  
20 mean by that?"

21 "Well, I would have to get a  
22 definition or get a dictionary to define  
23 hyperbole, but in general it means  
24 an overstatement to make a point, that

1 we had a good meeting. But again I  
2 don't know who my audience because I  
3 don't remember who this person is."

4 Do you get my point? When he has  
5 a purpose, a commercial purpose, he sometimes  
6 uses something called hyperbole, which is an  
7 overstatement to make a point. He has every  
8 reason to thread this needle, ladies and  
9 gentlemen, because if he doesn't, the lawsuit he  
10 brought against Facebook, that dog won't hunt.

11 And this jury instruction, I'd ask  
12 that you look at this because this is the  
13 instruction you have to look at to assess  
14 credibility. What it tells you is if there are  
15 parts of the story that are contradictory and  
16 inconsistent, you can ask yourself whether you  
17 want to leave the whole story. That's what it  
18 says. That's 1.7.

19 So I'll leave you with this. This  
20 is a very serious case to Facebook. This is an  
21 invention which counsel says solved everything  
22 which nobody else is using. Facebook is not  
23 using. Facebook does not infringe. This patent  
24 -- this patent is invalid, and Facebook takes it

1 very seriously.

2 I've had at counsel table senior  
3 executives of the company. They're watching,  
4 and I told you at the beginning of this case we  
5 picked you. We've given you a solid task, and I  
6 ask that you do that task based on the evidence,  
7 based on your judgments, your truth. I ask that  
8 you give me your verdict when you go through  
9 those questions in verdict form A. Do we  
10 infringe? It's noes when you go through the  
11 verdict form B. Is the patent valid invalid?  
12 The answer is yes.

13 I appreciate your patience. I  
14 know it's gone long. Thank you.

15 THE COURT: Mr. Andre, you have up  
16 to fifteen minutes.

17 MR. ANDRE: Hi again. Very  
18 dramatic.

19 Lawyer advocates talk about  
20 executives being here, both lawyers in-house  
21 lawyer. In-house lawyer. That's what this is  
22 about. Lawyers on their side of the table.  
23 It's all about lawyer argument.

24 They propose to call Mr. McKibben

1 a liar because they show a videotape under two  
2 solid days of his deposition. They spent almost  
3 all their time on this on-sale issue because  
4 they have nothing else. They can't beat the  
5 technology. There's no evidence of it.

6 Mr. McKibben was on the stand.  
7 You saw him live. You judge the credibility of  
8 the man.

9 It's their burden of proof to show  
10 that there were these sales. What did they  
11 show? They didn't try. They didn't even try to  
12 show that '761 patented technology was in  
13 Leader2Leader. They said Mr. McKibben should  
14 have brought the product up and showed you it.  
15 Didn't have to. That's not his job. It's their  
16 job.

17 One thing that was undisputed in  
18 this case, no one argued about it, was the  
19 moment that invention was done, within a day,  
20 two, it was in the patent office. They could  
21 not have sold it before they got it done.

22 Look at the jury instructions.  
23 Was it ready for patenting? It had to be done.  
24 It wasn't. They showed Mr. Lamb's video. He

1 proposed Mr. Lamb gave inaccurate testimony. We  
2 showed you his live testimony just as well. He  
3 said the code could not implement the  
4 technology. That's written in that provisional  
5 he did.

6 He said it live on the stand. It  
7 doesn't. It's a piece of the code that gives  
8 the recipe. You can't run it in the machine.  
9 It gives the recipe. He said the same thing  
10 live. They showed you his videotape to indicate  
11 that somehow he made a comment or omission that  
12 the provisional patent application wasn't in the  
13 technology.

14 That's not true. Every bit of  
15 evidence shows that the provisional patent  
16 application supports the claims. You saw an  
17 experiment. You saw results of that experiment,  
18 real evidence.

19 Mr. Rhodes's closing arguments.  
20 He's a very skilled attorney. What he did not  
21 show you was evidence. You can spin the story.  
22 As a lawyer, that's what they train you as a  
23 lawyer to do. I mean, when I left science to  
24 get into the practice of law, one thing that

1 still boggles my mind, to be honest with you, is  
2 how lawyers can argue about what a comma means,  
3 how one word means this. They can twist words  
4 in such a way they can take a letter I wrote to  
5 my mother and deconstruct that letter in such a  
6 way and manipulate the words in such a way that  
7 it would look like. I did not love my mother.  
8 They can do that. That's what lawyers do.

9 People, I love my mother. That's  
10 what lawyers do. He goes through the words of  
11 these claims and twists them all around. "The"  
12 means this and that and everything else. These  
13 are functional claims, functional language for  
14 scientists, computer scientists.

15 The one computer scientist who  
16 tried to show what these words meant is  
17 Dr. Vigna. They don't contest that he's right  
18 on the technology. They talk about the word  
19 "update." Does it update the metadata? In  
20 order for them to update something, you have to  
21 change it. He used it as resume. You have to  
22 update your resume. What if you add something  
23 onto it? I don't change what's there. I just  
24 add more stuff to it.

1                   That's updating the metadata. You  
2                   add no metadata to it. I gave the example at  
3                   trial of update my CD collection. I like music.  
4                   I have 200 CDs. If I buy more, I update. I  
5                   don't change the 200 I have. I add new ones.  
6                   That's what updating the metadata is about.

7                   They have no non-infringement  
8                   case. That's clear, so they have to rely on the  
9                   invalidity from prior art that they show, and  
10                  they show these charts and snippets same words.  
11                  Same words. They match the words up. They  
12                  don't match the concepts.

13                  When computer scientists write new  
14                  technology, they don't invent new words. They  
15                  all use the same words. These are common terms  
16                  in the art, but anyone who saw Dr. Herbsleb's  
17                  testimony about the prior art, anyone who saw it  
18                  knows the concepts are apples and oranges. One  
19                  is about managing documents, tracking documents.  
20                  The other is about people and users. Completely  
21                  different.

22                  They talk about demonstrations.  
23                  We had a question on the verdict form. Did they  
24                  make public demonstrations? He didn't try to

1 answer because it was blown out of the water  
2 with the NDAs. The implication was this whole  
3 company was about one thing: Building this  
4 patented technology.

5 One thing you heard was the  
6 company was a technology suite of companies back  
7 in those days. Microsoft was the model.  
8 Microsoft didn't sell one product. They sold a  
9 suite of products. You buy Microsoft Office,  
10 you get Word, e-mail, the groups, Excel  
11 spreadsheets. You get all these different  
12 products within the product suite.

13 Leader calls their product suite  
14 Leader2Leader, and they went out and they were  
15 trying to develop that product suite. It's  
16 undisputed. Undisputed. There's not a single  
17 piece of evidence they can provide that shows  
18 the '761 technology and Leader2Leader.

19 When they finally got around to  
20 having the product work in 2003, you saw the  
21 agreements with Limited based on that changes  
22 and others when they got it close to working.  
23 Not '761 necessarily, but the product suite  
24 altogether. Beta agreements. They're still

1 doing experimentation of it. They need to see  
2 if it will work in the field. Every time it was  
3 beta agreements.

4 By definition -- look at the jury  
5 instructions -- if you're doing experimental  
6 testing, it's not a sale. It's not invalidated.  
7 That was in 2003.

8 Every single time -- the BAA.  
9 That's one that kills me. That's a funding  
10 request from the government. Give us a grant.  
11 Doesn't mention the '761 technology. They talk  
12 about smart cameras and -- but it's not about  
13 the '761. They're trying to get funding, grant.  
14 The BAA instructions say this is not a  
15 buyer/seller relationship. They can try to spin  
16 it that way, but by law, it's not. The  
17 agreement itself said it's not.

18 It talks about the fact that this  
19 invention was the most important, exciting day  
20 of Mr. McKibben's life. This was it. I know  
21 Mr. McKibben now. He has a wife and five kids.  
22 I can swear this was not the most important day  
23 of his life. Not close.

24 He took a risk in 1997. He took

1 his -- quit his job and started a company based  
2 on an idea, some invention he wanted to come up  
3 with, and his wife and five kids supported him.  
4 That's what innovators do. To sit here and have  
5 lawyers cast any kind of aspersion on that  
6 activity or anything he would say is hard for  
7 me.

8 I know lawyers do, and that's his  
9 job. I get it. It's hard. The fact of the  
10 matter is on our burden of proof, which is  
11 lower, we gave you evidence of infringement and  
12 tons of it.

13 On Facebook's burden of proof  
14 about invalidity, which is much heavier, it's  
15 clear and convincing, they didn't give you  
16 anything. They give you innuendo. They said  
17 since Leader2Leader has '761 in it in 2009, it  
18 was there. Come on. We know, don't we?

19 Not true. There's no evidence.  
20 This is about truth, finding out what the truth  
21 is, and that's based on evidence. They didn't  
22 give you any. We did. When you deliberate,  
23 look at the evidence. Remember the people who  
24 took the stand and gave the testimony. You'll

1           come to the right decision.

2                           Thank you. Thank you, Your Honor.

3                           THE COURT: Thank you, ladies and  
4 gentlemen of the jury. I have two more very  
5 short instructions to read to you which you will  
6 see at the end of the instructions in the copies  
7 that you'll get when you're in the jury room.

8                           First is jury instruction number  
9 5.3, entitled Duty to Deliberate. Now that all  
10 the evidence is in and the arguments are  
11 completed, you are free to talk about the case  
12 in the jury room. In fact, it is your duty to  
13 talk with each other about the evidence and to  
14 make every reasonable effort you can to reach  
15 unanimous agreement.

16                           Talk with each other. Listen  
17 carefully and respectfully to each other's  
18 views, and keep an open mind as you listen to  
19 what your fellow jurors have to say. Try your  
20 best to work out your differences. Do not  
21 hesitate to change your mind if you are  
22 convinced that other jurors are right and that  
23 your original position was wrong, but do not  
24 ever change your mind just because other jurors

1 see things differently or just to get the case  
2 over with.

3 In the end, your vote must be  
4 exactly that: Your own vote. It is important  
5 for you to reach unanimous agreement, but only  
6 if you can do so honestly and in good  
7 conscience.

8 No one will be allowed to hear  
9 your discussions in the jury room, and no record  
10 will be made of what you say, so you should all  
11 feel free to speak your minds.

12 Listen carefully to what the other  
13 jurors have to say and then decide for yourself.

14 The final instruction is entitled  
15 The Court Has No Opinion. So I want to finish  
16 by repeating something I said earlier, which is  
17 that nothing I have said or done during this  
18 trial is meant to influence your decision in  
19 favor of either party. You must decide the case  
20 yourselves based on the evidence presented, and  
21 that concludes the instructions.

22 With any luck your lunch will be  
23 waiting for you, and we're going to excuse you  
24 now to begin your deliberations.

1 THE CLERK: All rise.

2 (The jury exited the courtroom at  
3 12:56 p.m.)

4 THE COURT: So I think as long as  
5 you stick around and make sure Mr. Golden knows  
6 how to reach you if the jury has a question or  
7 anything, other than that I think you're all  
8 free to go at the moment, and we'll ask the  
9 court security officer who is going to be around  
10 the jury to come and be sworn. Let's do this on  
11 the record and swear her.

12 THE CLERK: Please state your full  
13 name for the record.

14 (Andeniece Houston was sworn in by  
15 the clerk.)

16 THE COURT: Thank you. Is there  
17 anything else before we break, Mr. Andre?

18 MR. ANDRE: Two things, Your  
19 Honor. These are actual exhibits that need to  
20 go back to the jury room. Pass them up?

21 THE COURT: Please do. Anything  
22 else, Mr. Andre?

23 MR. ANDRE: Just if Mr. Golden  
24 could notify us if the jury leaves for the

1 night.

2 THE COURT: We'll make sure he  
3 does that.

4 Mr. Rhodes, anything?

5 MR. RHODES: I have to messenger  
6 up, I think, what is the binder of your  
7 exhibits, Your Honor. May I hand it to your  
8 clerk?

9 THE COURT: Is it the admitted  
10 evidence?

11 MR. RHODES: Yes.

12 THE COURT: Please pass it up. I  
13 see further stuff coming.

14 MR. ANDRE: Your Honor, we also  
15 have the boxes of that one massive exhibit as  
16 well.

17 THE COURT: Make sure you deliver  
18 all that to Mr. Golden, and he'll make sure all  
19 the evidence gets where it needs to be.

20 MR. RHODES: Your Honor, again on  
21 when the verdict comes in and who comes back  
22 from our side, there may not be the entire cast  
23 of characters. It's been a privilege being  
24 here, and if someone isn't here, no disrespect

1 is intended.

2 THE COURT: No offense will be  
3 taken. Thank you very much. Good-bye.

4 (A recess was taken at 12:58 p.m.)

5 (The proceedings reconvened at  
6 3:22 p.m.)

7 THE COURT: Good afternoon  
8 everybody. This is Judge Stark. Who's there  
9 for Leader, please?

10 MR. ROVNER: Your Honor, it's Phil  
11 Rovner and Paul Andre.

12 THE COURT: Okay. And who's there  
13 for Facebook?

14 MR. RHODES: Your Honor, it's Mr.  
15 Rhodes, I have everybody here.

16 THE COURT: For our record here,  
17 of course, I have the court reporter. It's our  
18 case 08-862-LPS. I wanted to update you.

19 There have been a few, I guess,  
20 inquiries from the jury, including one that I  
21 wanted to confer with you all on before I  
22 respond to them, so let me tell you where we are  
23 and what I propose to do, and then I certainly  
24 am very interested in what the parties say, what

1 your views may be.

2 So very shortly after the  
3 deliberations, began the CSO, the court security  
4 officer, called my deputy to say that the jury  
5 wanted copies of the jury instructions and the  
6 verdict form, and since we had not previously  
7 provided those copies and said that we would do  
8 that, we did go ahead and provide copies of  
9 those.

10 Then about ten minutes after that,  
11 the CSO told my deputy that the jury wanted a  
12 whiteboard or a large pad so that they could  
13 write some things down. We thought that was  
14 okay, and so we've provided them with a  
15 whiteboard.

16 Then within the last half hour,  
17 the CSO told my deputy that the jurors were  
18 requesting individual copies of a particular  
19 document that's in evidence. The CSO showed the  
20 document to my deputy. He believes it's the  
21 patent in suit which was admitted, I think, as  
22 PTX 1, but he's not sure. He didn't want to  
23 linger and spend any time looking at it.

24 We have not responded yet to that

1 last request about getting individual copies of  
2 a particular document, but I think there are two  
3 issues.

4 The first one is that it seems the  
5 jury and the CSO do not understand that the  
6 questions and messages, if any, need to be  
7 conveyed in writing.

8 And second, that we may have an  
9 issue of should we be giving multiple copies of  
10 a particular document that's in evidence to the  
11 jury.

12 What I propose is that on the  
13 first issue, what I propose is I've written down  
14 a few sentences which I will read to you in a  
15 second which I propose to have my deputy go tell  
16 -- that is, go read to the jurors and to the CSO  
17 -- indicating that questions and messages need  
18 to be written down, and here's what I came up  
19 with that I would have him read to the jury:

20 "The jury is reminded that any  
21 messages or questions for the Court must  
22 be in writing. If you have a message or  
23 question, write it down and give it to  
24 the CSO. Messages and questions cannot

1 be conveyed verbally through the CSO."

2 That would be my proposal on issue  
3 one.

4 And issue two, if I did get a  
5 written question shortly thereafter asking for  
6 eight copies of the patent in suit, I would plan  
7 to give those copies to the jury.

8 As I said, it seemed clear to me I  
9 need to bring you all in the on the loop at this  
10 point, and I'm open to other ideas and comments.  
11 Let me ask Leader what your view is.

12 MR. ANDRE: Your Honor, we concur  
13 with your view.

14 THE COURT: And Mr. Rhodes?

15 MR. RHODES: Your Honor, what you  
16 propose is absolutely fine with us, and I  
17 appreciate your suggestion of it. We agree.

18 THE COURT: All right. We'll go  
19 ahead and do that. If we do get messages in  
20 writing, we'll endeavor to keep you in the loop  
21 on that.

22 Thank you all very much.

23 (A recess was taken at 3:26 p.m.)

24 (The proceedings reconvened at

1 3:57 p.m.)

2 THE COURT: Good afternoon again,  
3 everybody. This is Judge Stark. Who's there  
4 for Leader?

5 MR. ANDRE: Paul Andre again.

6 THE COURT: And for Facebook?

7 MR. CAPONI: Your Honor, Steven  
8 Caponi. Ms. Keefe and Mr. Rhodes are sitting  
9 next to me.

10 THE COURT: Again for the record,  
11 it's our case number 08-862-LPS.

12 So I sat my deputy down. He read  
13 the instruction as he was directed to do, and in  
14 response we've gotten four written questions  
15 which I will read to you and then I'll tell you  
16 what I propose to state back to the jury as  
17 answers.

18 The first question is, "Can we  
19 maybe -- can we make eight copies of provisional  
20 patent PTX 3?"

21 Next question, "Can we have eight  
22 copies of pages twenty-nine to thirty-one of  
23 patent, PTX 1?"

24 Next question, "How do we have to

1 stay?"

2 And last question, "Can we have a  
3 smoke break?"

4 What I propose --

5 MR. RHODES: Your Honor, I'd love  
6 to hear the last question answered first.

7 THE COURT: Let me do it in order.  
8 I'm sure you would. I'm surprised they didn't  
9 list the last question as the first question.

10 In response to "can we make eight  
11 copies of provisional patent," I interpreted  
12 that to be, can we have eight copies of PTX 3,  
13 and my proposed answer is yes.

14 "Can we have eight copies of pages  
15 twenty-nine to thirty-one of the patent, PTX 1?"  
16 I propose to say yes, you can have eight copies  
17 of the complete patent and provide them to them.

18 "How do we have to stay?" I read  
19 as how long do we have to stay, and I propose to  
20 write back to them if you are still  
21 deliberating, which is fine, at 5:00 p.m., you  
22 may leave at that point and be back at 9:00 a.m.  
23 tomorrow to continue your deliberations.

24 And then on the smoke break, I

1 propose to say yes, but a CSO will need to  
2 escort you.

3 What does Leader have to say about  
4 any of this?

5 MR. ANDRE: We concur with Your  
6 Honor's suggestions.

7 THE COURT: And Facebook?

8 MR. CAPONI: We concur as well,  
9 Your Honor.

10 THE COURT: All right. Okay.  
11 Thank you very much.

12 (The proceedings ended at 4:00  
13 p.m.)

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C E R T I F I C A T I O N

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

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DEANNA WARNER  
Professional Reporter and Notary Public