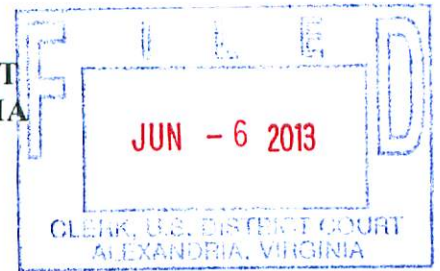


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



REMBRANDT SOCIAL MEDIA, LP,)
Plaintiff,)

v.)

Case No. 1:13cv158

FACEBOOK, INC. and,)
ADDDTHIS, INC.,)
Defendants.)

ORDER

The matter came before the Court for a *Markman*¹ claim construction determination. The matter was fully briefed and argued. The parties appeared by counsel, and counsel confirmed that the parties are in agreement as to a number of claim definitions. Counsel also agreed that the definitions are to be provided to the jury.

I.

The claim definitions on which the parties agree are as follows:

The '316 Patent:

- **Browser**
Definition: A computer program executed by a user system for accessing and viewing web pages.
- **Cohesive Diary Page**
Definition: A diary page in which the content data and the page design are fully integrated for display.
- **Content Data**
Definition: Information that may be displayed to a user that is independent of the page design.

¹ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

- **Cover for a Diary**
Definition: Layout or style information that defines, at least in part, the visual appearance of a cohesive diary page, independent of the particular content of the page.
- **Diary Information**
Definition: Information including at least content data, page design, and configuration information sent from the diary server to the user system.
- **Diary Page**
Definition: A page containing content sent by a server to a user system.
- **Diary Program**
Definition: A computer program for execution by the browser in the user system that generates a cohesive diary page.
- **Page Design**
Definition: Layout or style information that defines, at least in part, the visual appearance of a cohesive diary page, independent of the particular content of the page.
- **Privacy Level Information**
Definition: Configuration information that describes or specifies which user(s) or categories of users are permitted to view particular content data on a cohesive diary page.
- **Server**
Definition: A computer or other data processing system that provides or manages access to a defined resource or service in a network.
- **User System**
Definition: A computer that executes a browser for use by an end user.

The '362 Patent

- **Annotated Universal Address ("AUA")**
Definition: Information consisting of the universal address and one or more annotations associated with it.
- **Annotation**
Definition: Information that governs the presentation of or describes a content object.
- **Applet**
Definition: Program code in any downloadable code format.

- **AUA Database**
Definition: A collection of one or more AUAs.
- **Content Object**
Definition: An identifiable unit of content such as, for example, text, a bookmark, an image, a program or a movie.
- **Content Provider**
Definition: A person or entity that provided the content object.
- **Content Provider Authored Restriction**
Definition: A requirement specified by a content provider.
- **Dynamically Generating a Page Definition**
Definition: Creating a page definition at the client at the time it is needed.
- **Network Data for Dynamically Presenting the Object and the Request Interface**
Definition: Data transmitted over a network used to present the object and the request interface at the time of presentation.
- **Page Definition**
Definition: Information that completely defines the appearance of a page.
- **Presentation Context**
Definition: Layout or style information that defines, at least in part, the visual appearance of a page, independent of the particular content of the page.
- **Request Interface**
Definition: A user interface permitting a user to make a request.
- **Script**
Definition: Instruction(s) executed by a computer program.
- **Transfer Applet**
Definition: An applet that establishes a communications link between a client browser and server memory and transfers an AUA from the client browser to an AUA database stored in the server memory.
- **Universal Address**
Definition: Uniform Resource Locator (URL).

II.

The three terms remaining in dispute are (1) configuration information for controlling the behavior of a cohesive diary page; (2) assembling the cohesive diary page by dynamically combining the content data and the page design in accordance with the configuration information; and (3) transfer script.

For the reasons to be described in a forthcoming memorandum opinion, it is hereby **ORDERED** that the disputed terms are **DEFINED** as follows:

The '316 patent:


- **Configuration information for controlling the behavior of a cohesive diary page**
Definition: Information that determines what information will be displayed to a user who is viewing a cohesive diary page.
- **Assembling the cohesive diary page by dynamically combining the content data and the page design in accordance with the configuration information**
Definition: Forming the cohesive diary page to be displayed by combining, at the time of display, the content data with the page design, to generate a page definition that is in compliance with the configuration information.

The '362 patent

- **Transfer script**
Definition: A script that generates a request for a transfer applet from server memory and that is executed by a browser.

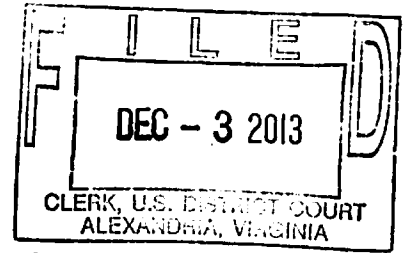
The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, VA
June 6, 2013



T. S. Ellis, III
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**



REMBRANDT SOCIAL MEDIA, LP,)
 Plaintiff,)

v.)

FACEBOOK, INC.,)
 Defendant.)
)

Case No. 1:13-cv-158

ORDER

The matter came before the Court on defendant's motion to exclude the testimony of Dr. Jennifer Golbeck (Doc. 236). The matter has been fully briefed and argued.

Defendant seeks to exclude the testimony of plaintiff's expert, Dr. Golbeck, regarding:

- (1) "privacy level information,"
- (2) whether prior art references are properly combinable, and
- (3) Facebook's commercial success.

For the reasons that follow, defendant's motion to exclude the specified testimony of Dr. Golbeck must be granted.

I.

Under Rule 702 of the Federal Rules of Evidence, a court may permit opinion testimony from an expert only if such testimony is "the product of reliable principles and methods" applied "reliably to the facts of the case." Accordingly, the district judge acts as a gatekeeper, tasked with inquiring whether expert testimony "is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

A.

First, defendant seeks to exclude Dr. Golbeck's expert testimony regarding whether prior art identified by Facebook discloses "privacy level information" as required by the '316 patent, arguing that her testimony is an attempt to reconstrue the term "privacy level information" in a manner inconsistent with the Court's Markman determination. In this Court's June 6, 2013 Order, the term "privacy level information" was construed as "configuration information that describes or specifies which user(s) or categories of users are permitted to view particular content on a cohesive diary page." *Rembrandt Social Media, LP v. Facebook, Inc.*, 1:13-cv-158 at *2 (E.D. Va. June 6, 2013) (Order). Yet, Dr. Golbeck identifies "privacy level information" as:

- (1) a "rule" that "indicates the metes and bounds of who has permission to view particular content;"
- (2) a system that is "not simply a private system where a user logs in and sees data that can't be shared;"
- (3) a way of identifying "the specific user(s) or categories of user(s) that have permission to view particular content;" and
- (4) a system that is not just "all content," or a system merely with a private log-in.

Expert testimony based on these definitions is an attempt to redefine the term "privacy level information" in a manner inconsistent with the Court's June 6, 2013 Order. A statement that privacy level information must indicate the "metes and bounds" of who has permission, or a statement that privacy level information must indicate the "specific" user or users who may access certain content, impermissibly alters and narrows the construction of the term "privacy level information." The Court's construction did not indicate or require that privacy level

information must identify the universe of those who may and may not access certain content.

According to the Court's construction, configuration information that describes a user who is permitted to view particular content is privacy level information. Any testimony of Dr. Golbeck altering or varying the Court ordered definition of "privacy level information" must therefore be excluded. Such testimony is not relevant and likely to cause jury confusion.¹

B.

Second, defendant seeks to exclude Dr. Golbeck's testimony in her rebuttal report regarding whether prior art identified by defendant is properly combinable. In her rebuttal report, Dr. Golbeck identifies the opinion of defendant's own expert, Dr. Klausner, who states that the prior art is properly combinable. In an attempt to refute that that opinion, Dr. Golbeck states that the combination of the two prior inventions is not obvious, that there is no apparent reason to combine the two prior inventions, and that Mr. Klausner failed to provide any reason why a person would have been motivated to do so.

Dr. Golbeck's opinion may have been intended to point out that defendant did not carry its burden of establishing "why a person having ordinary skill in the art would combine the references to arrive at the claimed invention." *Innogenetics, N.V. v. Abbott Labs*, 512 F.3d 1363, 1374 (Fed. Cir. 2008). Yet, in so doing, Dr. Golbeck merely states that it is not obvious to combine the prior teachings, and that a person would have no reason to do so. She gives no sources for this opinion, and provides no reason to believe her opinion is based on a reasoned explanation. Accordingly, because Dr. Golbeck's testimony on combining prior art is

¹ "When experts opine as to claim construction issues, the risk of jury confusion is high, and allowance of such testimony is improper." *Callpod, Inc. v. GN Netcom, Inc.*, 703 F.Supp.2d 815, 819 (N.D. Ill. 2010).

unsupported by facts or data, and she provides no reasons or bases for her opinion, it must be excluded under *Daubert* as unreliable and unhelpful.

Furthermore, plaintiff submitted a supplemental brief, the Golbeck Declaration, on this issue, but it was untimely filed. Plaintiff provides no reason for the declaration's untimeliness, nor does it provide a reason that declaration should be admitted as either "substantially justified or harmless." *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 2013 WL 4007537 (Fed. Cir. 2013). In fact, plaintiff does not discuss the tardiness of the declaration at all. Accordingly, the Golbeck Declaration must be excluded as untimely under FED. R. CIV. P. 37(c).

C.

Finally, defendant seeks to exclude the testimony of Dr. Golbeck on the issue of Facebook's commercial success because her testimony is based solely upon the conclusions of plaintiff's damages expert, James E. Malackowski, in his damages report. As plaintiff itself has admitted, if Mr. Malackowski's expert report is admissible, so is Dr. Golbeck's testimony on the issue—and vice versa. Plaintiff offered no other reason as to why Dr. Golbeck's testimony on this issue would be admissible if this Court were to find Mr. Malackowski's damages report inadmissible. Thus, because Dr. Golbeck's testimony regarding commercial success relies solely upon Mr. Malackowski's excluded report, Dr. Golbeck's testimony must be excluded.

II.

Accordingly, for the reasons stated above, and for good cause,

It is hereby **ORDERED** that defendant's motion is **GRANTED** with respect to testimony of Dr. Golbeck regarding "privacy level information" that is inconsistent with the Court's construction.


It is further **ORDERED** that defendant's motion is **GRANTED** with respect to testimony of Dr. Golbeck regarding whether prior art references are properly combinable.

It is further **ORDERED** that defendant's motion is **GRANTED** with respect to the Golbeck Declaration, which is excluded as untimely.

It is further **ORDERED** that defendant's motion is **GRANTED** with respect to testimony of Dr. Golbeck regarding Facebook's commercial success.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
December 3, 2013



T. S. Ellis, III
United States District Judge