

Appendix B

SEALED TRANSCRIPT

Page 35

1 DR. JONES: Okay.

2 THE COURT: We're already past that. I mean,
3 I understand that if they go ahead and set them up --

4 DR. JONES: Okay.

5 THE COURT: But, you know, if they just
6 provide -- say here it is, go ahead and, I mean, pick
7 what you want, how do we say that that is preset?

8 DR. JONES: The permissions -- when one
9 writes the source code, one has to put in checks
10 essentially for permissions at specific locations; and
11 those aren't arbitrary permissions. They're positions
12 selected ultimately to differentiate between at places
13 you think, as the designer, you're going to need to
14 differentiate between roles, for example, looking at
15 grades. Permissions are set there with the idea of
16 differentiating between student capabilities and
17 instructor capabilities.

18 The checks aren't at arbitrary places in the
19 code. They're at places where, as the designer, you're
20 saying I've got a student view or I've got an instructor
21 view, that I'm putting these checks in at those places.
22 So, the system has been designed with these roles in
23 particular in mind.

24 THE COURT: Well, except that the -- I mean,
25 if you're going to say that, I mean, the patent covers

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 36

1 every system where no matter what is done with the
2 system, it infringes, you start running into, I think, a
3 little bit of a problem there. I mean, given the prior
4 art -- I mean, there was a lot of talk about, you know,
5 the prior art and how it was done in the past. So, even
6 in the past evidently there were -- a professor could be
7 given various permissions and a student could be given
8 other permissions and that's -- I mean, that's not new.

9 DR. JONES: And that's not my contention.
10 With the infringement analysis what I'm talking about is
11 my examination of the specific Desire2Learn system,
12 looking at their design documents, for example, as well
13 as their source code and the choices that were made
14 there.

15 THE COURT: Right. You're talking about now.
16 But what I'm talking about is how difficult it would be
17 to design around that. In other words, what would it
18 take to -- and I had gotten the impression from the
19 testimony that a system that basically gave a large
20 number of possible roles and a large -- an even larger
21 number of possible permissions that could be mixed and
22 matched, in other words, not preset, is -- and as long
23 as they're not saying, well, here's your samples or your
24 defaults or whatever and you can play with it after
25 that -- I mean, your testimony was, no, they hadn't done

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 37

1 that; they still had -- except they're now calling them
2 "sample" instead of "default" or "suggested" instead of
3 "default," which -- I mean, that seemed to be kind of a
4 transparent work-around.

5 But let's assume they honestly get rid of all
6 that stuff and all you now have is, you know, basically
7 a mix-and-match system that the user can use any way
8 they want. It's obviously going to take them some time.
9 I mean, they even refer to it as their carpal tunnel
10 screens that they had because it takes so much time to
11 do. And, yeah, you can say it's not practical; but
12 that's their marketing problem whether it's not
13 practical. The question is whether it is infringing.

14 DR. JONES: I would say it is, also, because
15 if you look at what the roles would ultimately be, they
16 are -- let's say the customer did that. Those roles are
17 equivalent, in my analysis, to the roles that are set
18 in -- that -- for example, to the default roles. So,
19 there is -- one can find no difference between those
20 roles. If one examines the system a year later, the
21 operation of the roles that they set up are equivalent
22 to the operation of the default roles that we're talking
23 about here. And part of the reason that I reached that
24 conclusion is the design of the system as well as
25 further examination of the use of the system, in other

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 38

1 words, the roles that the customers are actually using.

2 THE COURT: But how is that different from
3 the old art?

4 DR. JONES: In this case it's the capability
5 of establishing that a user can have multiple roles.

6 THE COURT: Well, no. Right now I'm not
7 talking about the multiple roles. I'm talking about the
8 user has -- you know, is going to pick one of those many
9 roles; and then you're going to assign a bunch of
10 permissions to it. And that, I understood, was going on
11 in the old art. The problem that was to be solved,
12 according to all the evidence I heard, was that you had
13 this problem of you had to have different account
14 numbers and different passwords and so forth to get on.

15 But as long as we're talking about -- and
16 we've already discussed that possibility of getting
17 around or design-around. But let's assume that we're
18 just going to -- you know, professors are going to be
19 professors and teaching assistants are going to be
20 teaching assistants and students are going to be
21 students and all they get is a mix-and-match -- I mean,
22 the administrator may have to eventually tell them what
23 they can do or not do; but it is not preassigned.

24 DR. JONES: Let me just clarify. So, if
25 you're asking me is this -- the hypothetical situation

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 41

1 line 3. And he basically says the reason why there's
2 predefined roles in here is because of the sample roles
3 and because of the role categories.

4 And to go back to the court's original
5 question, if you remove those so that you do have to go
6 in and set up new roles and so the user has to do that,
7 then you've taken the predefined roles out of the
8 system.

9 And, again, to remove the idea -- to say any
10 roles whatsoever, which is what Dr. Jones is doing, is
11 is predefined removes that limitation from the patent.
12 It removes a critical limitation that was added during
13 the course of the prosecution history from the patent,
14 and it essentially does that in a way that is
15 inappropriate and is not consistent with the jury
16 verdict.

17 But again, to go back to the court's original
18 question, we can remove those roles, we believe. We can
19 remove them from the literature, from the product, from
20 the source code. We can remove those inexpensively and
21 quickly. I believe the numbers at the trial were
22 exactly what the court was talking about, 26 and then an
23 additional 15, which would add up to about 40 to do all
24 the stuff. And that's our view is that that is not only
25 possible, your Honor, it's possible cheaply and

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 42

1 efficiently.

2 THE COURT: Well, then, doesn't that actually
3 argue in favor of an injunction? Because when I balance
4 out the equities, it doesn't really cost you very much
5 to go ahead and get right with the patent as it were,
6 assuming that I've analyzed it and the jury's analyzed
7 it correct. So, what big harm is there for me to go
8 ahead and issue an injunction? And you can solve those
9 problems, for that matter, even with your existing
10 clients, it would seem. I guess I'm a little -- and
11 I'll ask you that next, but doesn't that argue pretty
12 strongly for an injunction?

13 MR. DASSO: Well, your Honor, there is a
14 couple things here. One is we made the argument that
15 you don't know what to enjoin based upon the jury's
16 verdict. I understand that the court now is talking
17 about the eBay factors and assuming we get to --

18 THE COURT: Sure, I am.

19 MR. DASSO: Okay. When we get to the point
20 of the eBay factors, I would say that you could look at
21 that either way. My argument would be if we're talking
22 about a very small feature here, something that can be
23 adjusted for \$40,000, then it falls right within the
24 scope of Justice Kennedy's concurrence to eBay where he
25 says you shouldn't be in a situation where you have a

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 91

1 going to be to come up with a noninfringing alternative.

2 MR. DASSO: Yes, your Honor. The court asked
3 us to do two questions; and one was a number of
4 nonhosted clients generally or self-hosted clients,
5 however you want to do it. We have that list. It comes
6 off of Plaintiff's Exhibit 145, and I could email it to
7 Ms. Chen and Blackboard at the same time or however the
8 court wants to do it. I could read it into the record.
9 But we do have --

10 THE COURT: What's the total number?

11 MR. DASSO: There was 15 clients, your Honor.
12 One of those ran two -- 15 installations, I should say.
13 One installation runs two clients, as I understand it.
14 So, 16 of the 75 are -- that's not hosted by D2L in
15 Canada. The other 59 -- I actually was a math major,
16 your Honor; and I can't figure out --

17 THE COURT: Whatever percentage that is.

18 MR. DASSO: 59, there you go. And they are
19 all hosted on D2L's sites on the servers in Canada.

20 THE COURT: All right.

21 MR. DASSO: As to the other point, your
22 Honor, the question about whether it would be difficult,
23 again, we would make two points. One was our view of
24 what the patent is is this predetermined roles and the
25 sample roles. That, we have consistently maintained,

Christina L. Bickham, RMR, CRR
409/654-2891

SEALED TRANSCRIPT

Page 92

1 would be easily and cheaply done; and we continue to
2 believe that the amounts that we provided in the court
3 were correct --

4 THE COURT: How long would it take? I mean,
5 are you willing to -- can I take your saying this as
6 evidence, or do we need to get one of your experts sworn
7 in to --

8 MR. DASSO: We don't have experts here. We
9 have the client here, your Honor; and I'm happy to do
10 whatever the court wants. I can make representations to
11 the court as to what we would think it would be, and I'm
12 happy to have someone jump up and --

13 THE COURT: As long as you're willing and
14 able to give me -- I mean, obviously things can change.
15 I mean, you know, a meteorite might hit the facility in
16 Canada and delay you; or there may be a huge power
17 blackout because of a winter storm. I don't know.

18 But in general what I -- I mean, you're
19 telling me that this work-around, this first work-around
20 you're talking about, would be in the range of 15- to
21 \$40,000. And how long would it take?

22 MR. DASSO: We believe less than 30 days,
23 your Honor.

24 THE COURT: All right. And then tell me
25 about the other question I had, which is something that