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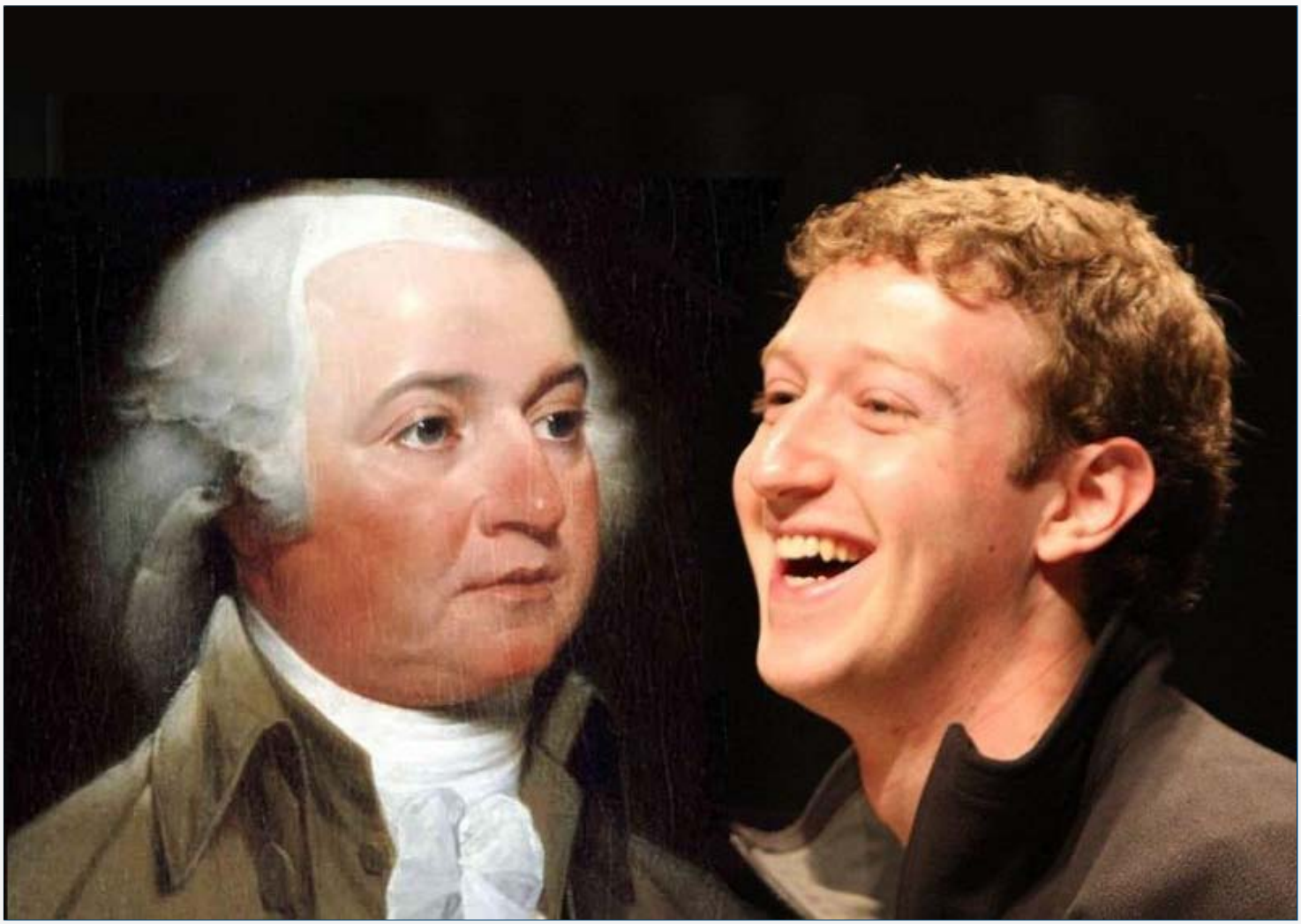
# Facebook — a force for freedom perhaps, but at odds with the rule of law in the U.S.



# Leader v. Facebook

By Contributing Writers, Americans For Innovation (AFI), July 26, 2013. Click here for a PDF version of this article.

America's founding father, John Adams, warned of a societal condition when anarchy and tyranny would commence. In 1778, he wrote,

> "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If 'Thou shalt not covet,' and 'Thou shalt not steal,' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."

Thus, Adams identified three criteria signalling anarchy and tyranny:

1. When property is not treated as sacred as the laws of God;
2. When there is an absence of force of law and public justice to protect property; and
3. When thou shalt not covet and steal are not inviolable precepts.

## Line in the sand: Leader v. Facebook

Based on Adam's criteria, the seminal patent infringement case which came before the federal courts in 2008, suggests America is now in a state of anarchy and tyranny—namely Leader v. Facebook.

Under the U.S. Constitution, Article 1, Section 8, patents and copyrights are protected property: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The bottom line is that an inventor's patent should be just as much his or her private property as possessions, house and land. However, the Leader v. Facebook case suggests Americans are being insidiously stripped of these most fundamental of rights by certain vested interests.

## Social networking - Leader's invention

In the late 1990s Innovator Leader Technologies invented a technology we now call "social networking". By the time they filed for their first patents in 2002, they had invested 145,000 man-hours and over $10 million. Literally within three months of Leader perfecting the lynch-pin of their invention, Mark Zuckerberg and his PayPal associates were in the market, on February 4, 2004. Zuckerberg claims to have done all the work himself in "one to two weeks" while chasing girls and studying for finals.

New evidence indicates he received Leader's source code from a mole who was cooperating with Zuckerberg's apparent mentor, James W. Breyer, of Accel Partners LLP and with Fenwick & West LLP, who was also Leader's attorney at the same time. It appears that they were waiting for Leader to finish debugging its invention so that they could roll out the Harvard-boy-genius-Facebook-origins myth, with Zuckerberg in the leading role.

Not so coincidentally, Lawrence Summers was President of Harvard at the time. Summers arranged for the 19-year old Zuckerberg to get more Harvard Crimson news coverage than any world leader or event. Breyer was a big alumni contributor. PayPal COO, Reid Hoffman (later LinkedIn CEO) was coaching Zuckerberg and feeding him spending money, as was Peter Thiel, co-founder of PayPal. Tellingly, these three sold over $6 billion of their Facebook stock on Day 3 of the Facebook IPO, at the highest price anyone received for their stock before it crashed. Summers popped up in Silicon Valley before the IPO too—as "special advisor" to Instagram that sold their 13-man company to Facebook for $1 billion. Could it be that their CEO, Matt Cohler was able to exert some influence over Zuckerberg, as he knew about the theft of the Leader invention?

Forty-four months after filing for their patents, Leader received their first patent on November 21, 2006—U.S. Patent No. 7,139,761. On November 19, 2008, Leader filed a patent infringement lawsuit against Facebook. Leader Technologies, Inc., v. Facebook, Inc., 08-cv-862-JJF-LPS (D.Del. 2008).

## Facebook culpable on all 11 counts

On July 27, 2010 Facebook was found culpable on 11 of 11 counts of infringing Leader's invention. In short, this means the engine running Facebook is Leader's property. Facebook also failed to prove its pre-trial assertion that Leader had copied pre-existing inventions. In other words, Leader proved that no "prior art" existed before their innovations and, therefore, their social networking innovation was indeed worthy of patenting.

## On-sale bar outlier

With no real evidence other than Facebook attorney-theater, the district court Judge Leonard P. Stark gave the

decision to Facebook anyway, on a bizarre claim of "on-sale bar." The on-sale bar of 35 U.S.C. 102 is a United States patent law term that means if an invention has been for sale for over one year, it is no longer patentable. This law was made to stop companies, like pharmaceuticals, from extending the life of a 20-year patent monopoly by selling the new drug more than one year before applying for a patent (the 20-year clock starts at filing).

Facebook was so confident about a win that they neither presented an expert witness (which is unheard of for on-sale bar claims), nor did they perform the well-settled legal tests of the evidence (also unheard of). AFI has studied the on-sale bar cases that have gone to appeal and discovered that Leader v. Facebook is an outlier. Of the 19 cases in the last decade, this is the only case that neither put forward an expert witness nor tested the evidence using Pfaff (discussed below).

## Facebook's disastrous Markman Hearing; a judgeship shell game?

Twenty-five year veteran Judge Joseph J. Farnan was the judge in the Leader v. Facebook case up to one month before trial. His magistrate for discovery issues was Leonard P. Stark. Earlier, on January 20, 2010, Judge Farnan had taken Facebook's lawyers to the woodshed in a disastrous Markman Hearing for Facebook. Subsequently, during the proceedings, President Obama nominated Stark to assume Judge Farnan's seat when he retired, which Judge Farnan planned to do after the Leader v. Facebook trial. Vice-President Joe Biden had been blocking earlier Republican nominees to this seat. On June 24, 2010 Stark took over the trial.

## Serious conflicts of interests

Unbeknownst to Leader, Donald K. Stern of Facebook's law firm, Cooley Godward LLP, was advising President Obama on the Stark appointment. This Justice Department conflict of interest was never disclosed, and has only recently been uncovered by AFI investigators. It may have been that 47 million Obama "likes" on Facebook and ambitions regarding a 2012 re-election trumped the Constitution and private property in this instance.

Also unbeknownst to Leader at the time were Judge Stark's holdings in eight Fidelity Funds that were notoriously invested in Facebook. Facebook's director, largest shareholder and Zuckerberg-mentor, James W. Breyer, is a partner of Fidelity's Robert Ketterson who manages those funds and is guided in his Facebook investments by Breyer. Breyer was his boss at the National Venture Capital Association from 2003-2004.

## Odd seismic shift from no invention to invention prematurely sold

It was on taking over the trial that Judge Leonard P. Stark allowed Facebook to change its claim to on-sale bar. This was a seismic shift.

Up to that point Facebook had claimed "false marking," which is the polar opposite of on-sale bar. By false marking it is alleged that Leader did not and never did have an invention. It claimed that Leader was falsely marking its products with "patent pending" and "patented," and thus deceiving the public.

Facebook's false marking claim was consistent with their pre-trial insinuations that Leader was nothing but a "patent troll" looking to get rich off Facebook. On-sale bar, quite contrarily, implies that an invention actually exists, but was sold too soon. The trial proofs for the two claims are markedly different. Leader had prepared for false marking, not on-sale bar.

It is also important to note that during earlier discovery, Judge Stark had allowed Facebook to get away with the excuse that all of Mark Zuckerberg's files and documents from 2003-2004 were "lost." Such evidence was important to Leader's claim of wilful infringement—that Zuckerberg knew he was using Leader's invention. It would also have certainly triggered breach of attorney-client privilege (Fenwick & West), trade secrets violation, economic espionage and maybe even racketeering claims. In 2012, the testimony of Facebook's own experts in Ceglia v. Zuckerberg proved this to be a flagrant lie. That testimony identified 28 of Zuckerberg's hard drives and Harvard emails that were in the possession of Facebook attorneys the entire time.

Leader's attorneys objected to the serious disadvantage created by this seismic change to on-sale bar so close to the trial date and after the close of discovery. But Judge Stark allowed it anyway. It is highly irregular for a judge to allow such a material change of claims so close to trial.

When Leader asked Judge Stark for time to conduct additional discovery (witnesses, experts, evidence, source code) to build its defences for the new on-sale bar claim, Judge Stark blocked all new discovery. Judge Stark even blocked Leader from introducing its own source code into evidence. Source code, after all, is to a software

invention what the rotating cylinder was to Edison's phonograph. Just imagine, Thomas A. Edison being blocked from showing his rotating cylinder to a jury to defend his patent.

Despite this irregularity, Leader reasoned that Facebook would not, in any case, be able to meet the legal standards required to prove on-sale bar. Those standards required Facebook to introduce hard evidence like source code, commercially complete contracts, testimony from the recipients of the alleged offers for sale, etc. The gold-standard test for on-sale bar evidence is Pfaff v. Wells Electronics, Inc., 525 U.S. 55 (1998). Another test is Group One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041,1047, 59 USPQ2d 1121, 1126 (Fed. Cir. 2001).

Leader says that engineering notes in the source code show the day in early 2003 when the invention (an innovation that social media users now take for granted) was actually placed in the source code library for the first time; then, in late 2003, when it was actually debugged. Quite clearly, it could not have been offered for sale before it existed. However, Judge Stark blocked such critical evidence. And, although Facebook was granted access to Leader's source code, the only code they presented for another purpose proved Leader's point, not theirs. That evidence too, was ignored by Judge Stark.

## Rules of evidence violated

None of the well-established on-sale bar tests were performed on Facebook's evidence. Facebook presented one document, two-thirds of which had been blanked out (Interrogatory No. 9), and two little snippets of video testimony, spliced together. Both items were presented out of context and violated the Rules of Evidence (Wigmore, Evidence, 3rd ed. - "Possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was."). Although neither item passed the Pfaff, Group One, Jury Instructions, etc., evidence tests, they were allowed.

After the jury verdict, Judge Stark permitted the attorneys to question the jury. Leader's attorney asked the jury what evidence they used to make the on-sale bar determination. According to eyewitnesses, the foreman said they had no evidence, just a hunch based on the video snippets and the blanked out document. The judge confirmed this in his order later. Leader's attorney also asked if the jury had performed an element-by-element test of Leader's patent against the alleged offers for sale (the Pfaff test). The jury admitted they had not. Judge Stark then put a gagging order on these jury admissions.

## One court appeal process

All patent cases go to one appeals court called the Federal Circuit in Washington D.C. That court was set up by Congress in 1982, to specialize in patents. In summary, the Federal Circuit went through the motions of impartiality. Leader's attorneys argued strongly for the rule of law and precedent to prevail. However, the court refused to overturn the on-sale bar ruling. Two of the court's decisions were extremely timely given the upcoming Facebook IPO, suggesting possible collusion.

Leader then appealed to the U.S. Supreme Court, which refused to hear the case.

## Conflicts of interest rife

In addition to the courts' systematic failures in applying well-established law, these new facts were recently uncovered by investigators:

1. All the judges assigned to Leader v. Facebook, including Chief Justice John G. Roberts, Jr., held Facebook stock. Judges are instructed to withdraw from cases where they have even "one share" in order to avoid impropriety, the appearance of impropriety and judge bias.

2. Facebook went public during the Leader v. Facebook proceedings. This generated over $6 billion for Facebook's private stockholders, who cashed out before the stock crashed.

3. The Federal Circuit failed to disclose that Facebook attorney, Thomas G. Hungar, of Gibson Dunn LLP, was the Court's own attorney in a previous matter.

4. Chief Justice Roberts failed to disclose that Facebook's attorney, Thomas G. Hungar, Gibson Dunn LLP, is his long-time protégé.

5. The Federal Circuit Clerk of Court, Jan Horbaly, failed to disclose that he collaborates closely with Facebook's lawyers and law firms, and has done for many years.

6. Federal Circuit Chief Judge Randall R. Rader failed to disclose that Leader's director and potential expert witness, Professor James P. Chandler, was his former law professor at George Washington University, with whom he had been in conflict many times over the Federal Trade Secrets Act and the Economic Espionage Act of 1996, when Rader was chief counsel to committee chairman Senator Orrin Hatch. Chandler advised Leader throughout the pre-patent invention phase and filed the Leader patents.

7. Federal Circuit Judge Kimberly A. Moore failed to disclose that Weil Gotshal LLP, who made an appearance in the case defending Facebook and the Federal Circuit judges, was her former client and is Microsoft's attorney, one of Facebook's largest stockholders.

8. Another political appointee, David Kappos, then Director of the U.S. Patent Office, ordered an unprecedented 3rd re-examination of Leader's patent, despite Facebook having failed the arguments three times previously. Kappos previously worked for IBM, which sold 750 patents to Facebook during the proceedings. Kappos retired just a few months ago, after the exposure of his conduct. Currently, the Patent Office is attempting to invalidate all 35 patent claims of a 10-year old patent, not just the 11 that Leader sued Facebook in respect of.

9. Federal Circuit Clerk of Court Jan Horbaly was caught by AFI investigators denying Leader v. Facebook motions within hours of their arrival, so said one of his staffers, Valerie White, before she was muzzled the next day, never to be seen or heard from again, even though she promised to investigate and respond back. She said there would be no way the judges could have all seen, considered and denied a motion in a few hours.

10. Quite irregularly, Fenwick & West LLP failed to disclose its knowledge of Leader's earlier patents to the Patent Office in Zuckerberg's patent filings. Despite such information being in the public domain, the Patent Office issues new patents to Facebook at a feverish pace.

11. Patent Office Judge Stephen C. Siu, who is overseeing Kappos's third re-examination order, worked at IBM and Microsoft. Microsoft is one of Facebook's largest shareholders. Siu has not disclosed this conflict of interests.

12. The Patent Office claimed "executive communication privilege" when asked to provide Freedom of Information Act (FOIA) information to a third party requester regarding internal communications about this re-examination. The contents were blacked out. This suggests the U.S. Executive is meddling in Leader's effort to assert their patent property rights. The Patent Office's deputy counsel, Kathryn Siehndel, who made the executive privilege claim, failed to disclose that she used to work for Facebook's attorney, White & Case LLP.

13. Current Federal Reserve Chairman candidate, Lawrence "Larry" Summers has mentored Facebook's COO, Sheryl Sandberg since the early 1990's. He also mentored Russian Yuri Milner, who has close ties to Russian oligarch Alisher Asmanov and the Kremlin. Summers was one of the Harvard-wunderkind architects of the disastrous Russian voucher system in the early 1990's while Chief Economist for the World Bank. Milner is Facebook's second largest shareholder and is partnered with Goldman Sachs and Morgan Stanley. With Goldman's and Morgan's help, Milner moved billions of dollars into Facebook pre-IPO.

    This occurred after the US taxpayers bailed out Goldman and Morgan Stanley in 2008. To this day no one knows the origins of those funds, which pumped Facebook's valuation up to $100 billion. Milner is also connected with Bank Menatep, which was caught laundering $10 billion in Russian mob funds and diverting $4 billion in IMF funds. Summers' conduct here has never been scrutinized, even though he was appointed to oversee the bailout soon after Barack Obama was elected President. See Congressional Briefings.

## Absence of force of law and public justice to protect property

Ominously, in an earlier Federal Circuit decision Zoltek Corp. v. US, 442 F. 3d 1345 (Fed. Cir. 2006) the Federal Circuit judges (these same judges) ruled that patents were not private property. See Boston University Professor Adam Mossoff's critique of this ruling. This decision topples 200 years of American property law and precedent.

The suspect conduct of the judicial and executive branches in the case of Leader v. Facebook favours a well-connected, privileged elite, but threatens the property rights of the ordinary American.

John Adams wrote in the Massachusetts Constitution, the model for the U.S. Constitution:

> "No man . . . [shall] have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community." (Article VI)
>
> "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." (Article V)

We must draw a line in the sand. The longer we allow conflicts of interest in our judicial processes and ill-conceived legal precedents, the more difficult it will be to stop them.

The question is: Will we draw a line in the sand, or stick our heads in it?

* * *

## About *Americans For Innovation* (AFI)

Americans For Innovation (AFI) emerged as a grassroots effort after the Leader v. Facebook district court trial when judicial misconduct was suspected. AFI investigators uncovered and exposed the extensive Facebook holdings by the judges, as well as their deep relationships with Facebook staff and attorneys, the Patent Office and the White House. All AFI writings are opinion. Readers are encouraged to think for themselves, and not rely on the information without independent verification.



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