

/// Donna Kline Now!

By Donna Kline — www.DLKindustries.com

Donna Kline Now!



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LEADER V.

FACEBOOK PRESS BACKGROUND

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{ 2012 05 15 }

/// Federal Circuit violates most basic tenets of **GROUP ONE vs. HALLMARK CARDS** re. validity of “on sale bar” evidence

Patent experts ask: “Why was former law professor Judge Kimberly A. Moore surprisingly silent in this opinion after being so legally spot on during the hearing?”

Patent experts whisper off-the-record that a “war on inventors” has emerged in the courts. They say that although the [American Invents Act](#) was touted as a boost to small inventors and entrepreneurs like Michael McKibben and Leader Technologies, just the opposite is the sad reality. They say it has become yet another club used by big

infringers to attack patents, just like the Federal Circuit has done here. Does this mean that the courts are now permitted to throw out well-settled precedent case law like [Group One v. Hallmark Cards](#) that Leader has followed? Is this court falling into the anti-patent lockstep?

Group One says that on sale bar evidence must be evaluated by the Uniform Commercial Code (“UCC”). The Restatement (Second) Contracts (1981) is a part of the UCC and [Section 21](#) says parties can agree NOT to be legally bound by preliminary business discussions. This means that the “no-reliance” clause in Leader’s nondisclosure agreements (NDA’s) renders all Facebook on sale bar accusations invalid. But **the court ignored its own *Group One* precedent.**

Nothing less than American innovation is on the line. Did big infringers get to this court? You decide.

After interviewing numerous attorneys with extensive backgrounds in patent litigation, it has become apparent that the Court opinion discussed below is rife with substantial legal error. Some have even said that this decision might destroy all patents if allowed to stand. So, dramatically and almost overnight, this case takes on immense importance to the future of American innovation.

The Federal Circuit did not apply any well-settled precedents to test whether the Facebook “substantial evidence” was anything but junk.

Junk is not “clear and convincing” evidence.

NO *Group One v. Hallmark Cards* Where was Judge Kimberly Moore? A former patent law professor knows better than to ignore this law.
NO *Uniform Commercial Code*
NO *Restatement (2nd) Contracts*
NO *Pfaff v. Wells Electronics, Inc.*
NO *Helifix Ltd. v. Blok-Lok, Ltd.*
NO *McNeill v. US.*
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Orwellian (black-is-white) definition of “clear and convincing” evidence

/// Facebook countersues Yahoo with

Appeals court shell game?

[Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.](#), 463 US 29 – Supreme Court 1983 at 43 states:

“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency [in this case, the district court].”

However, this *Leader v. Facebook* appeals court did just that. It *substituted* its “substantial evidence” doctrine for the trial court’s opinion and Leader’s “clear and convincing evidence” argument. Remarkably, this court ignored both the trial judge’s opinion and Leader appeal argument which was based on it. Logic, common sense and the law all say this is wrongheaded. why would learned judges do something so blatantly wrong? This is why so many observers are suspecting foul play.

According to the trial court’s written opinion, Facebook’s on sale bar verdict was based on two things: (1) Interrogatory No. 9 and (2) Michael McKibben’s video-taped testimony. The appeals court said both of these pieces of evidence were *ambiguous* at best. Therefore, the verdict should be discarded. Instead, the court put forward NEW evidence not even argued at trial. For example, unlike the Leader NDAs that received much attention at trial, Facebook never alleged an offer for sale to American Express. This is a NEW appeals court argument. The court said it could only rule on the record before it, yet ignored that and created new evidence anyway. Why?

Motor Vehicle Mfrs. Assn. also states:

“The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency’s action that the agency itself has not given.”

This means that the appeals court had no authority to create arguments and evidence not identified in the trial court.

[Anders v. California](#), 386 US 738 – Supreme Court 1967 states:

“The court has only the cold record which it must review without the help of an advocate.”

In *Anders* the court *required* counsel to brief the case specifically so that they could consider relevant law relied upon by the appellant.

Leader was not treated equitably here. Despite the Supreme Court’s clear prohibition against reaching back into the “cold record” for evidence of things not argued in the lower court (like references to American Express), this court reached back into that “cold record” and developed its own arguments. In any event, if the court is going to reach into the “cold record,” then it needs to look at the whole record and not just one little bit that supports a fabricated argument. Even so, the reference to American Express was used for visual effect anyway, not substance. (So what, Leader had a conversation with American Express— they’re a business trying create value for their shareholders.) More innuendo, now coming from the court. Yikes.

[Universal Camera Corp. v. NLRB](#), 340 US 474 – Supreme Court 1951 states:

“The trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything ‘logically probative of some matter requiring to be proved.’ Thayer, A Preliminary Treatise on Evidence, 530; Funk v. United States, 290 U. S. 371.”

On the question of substantial evidence (the court’s preferred analysis of this case), the court must probe the WHOLE RECORD and not just pieces and parts.

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Thank you appeals court, but you've answered questions Leader did not ask

The court used the "substantial evidence" doctrine to make its decision. However, Leader's appeal was based on the "clear and convincing" evidence legal standard. In other words, Leader argued that no matter how much evidence Facebook presented, the legal question is "Was any of Facebook's evidence any good?" Leader argued that NONE of Facebook's evidence met the clear and convincing standard, yet remarkably the court chose not to address that legal question at all!

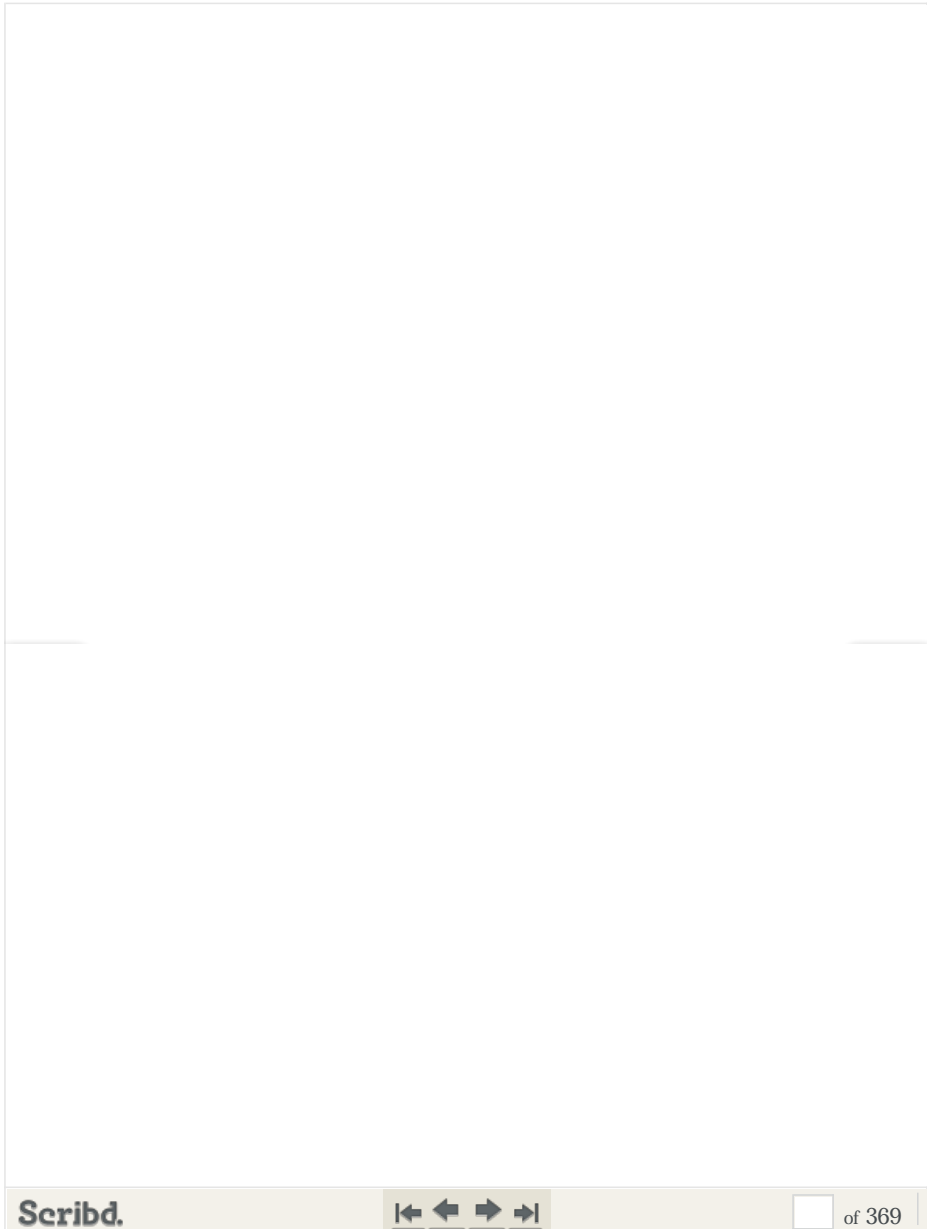
Facebook's contradictory arguments on source code


The only Leader source code evidence Facebook produced was the Leader source code contained in Leader's [provisional patent](#) filed on **Dec. 11, 2002**. A provisional patent application is a streamlined way for an inventor to protect the idea before submitting the full-blown, more thorough patent application. The inventor *must* file the full patent application within 12 months. Leader filed the full patent application on Dec. 10, 2003. Now stay with me here, because this little switcheroo is deadly to Facebook. Facebook's expert witness Dr. Saul Greenberg argued that the source code in Leader's provisional patent application in 2002 DID NOT practice the invention. Facebook prevailed on that argument. So, **this means that Facebook themselves argued that the only Leader source code in the record DID NOT practice the invention.**

See the actual transcript here:

Testimony of Facebook expert witness Dr. Saul Greenberg

[Leader v. Facebook – Trial Transcript, Fri. Jul. 23, 2010](#)



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Fig. 1 – Leader v. Facebook, Trial Testimony, Facebook expert witness Dr. Saul Greenberg, Fri. Jul. 23, 2010, Page ID#: 10908: 2-12. Summary: Does the provisional patent source code disclose the invention? No. This was the ONLY hard evidence of Leader's invention introduced by Facebook. Therefore, Facebook's own expert testimony *disproves* its on sale bar claim. Didn't our mothers tell us that we could not have our cake and eat it too? Meep, meep.

Facebook expert witness Dr. Saul Greenberg's testimony

Q. = Facebook attorney **Heidi Keefe** ("I love my company [Facebook].")

A. = Facebook expert witness **Dr. Saul Greenberg**

Q. So the — in your — in your opinion, did the disclosure from the provisional application, including the [source] code at the back, enable one of skill in the art to build or understand what was in the claims of the 761?

A. No.

Q. In your opinion, does the provisional patent application disclose each and every element fully of the asserted claims of the 761 patent?

A. No, they do not.

Now here's where Facebook marches off into the weeds. On the same day that they argue the Leader source code does not practice the invention, they simultaneously argued that the Leader2Leader product DID practice the invention for the purposes of "on sale bar" . . . **without introducing any source code to prove that claim. It is Facebook's burden (again) to prove.**

Let me help you here, because these arguments defy common sense. Facebook ambiguously argued that Leader DID *and* DID NOT practice the invention. Take your pick. Ambiguous arguments in law are to be considered false statements since they cannot both be right. And yet, this court just confirmed the ability of a lower court to make two decisions against an inventor that are logically and diametrically opposed to one another ("on sale bar" and no invention in the patent source code). **THIS CONTRADICTION SHOUTS FOR ATTENTION, SO I AM SHOUTING IN ALL CAPS AND BOLD AND IN RED!!!!**

The court had a duty to decide based upon the law (that's what they are paid tax dollars to do), but they punted instead.

If the source code introduced **did** practice the invention, then **Leader wins** because on sale bar ceases to be an issue.

If the source code introduced **did not** practice the invention, then **Leader wins** because on sale bar could not have occurred.

Therefore, **Leader wins either way**. You don't need to be a patent attorney or rocket scientist to see this.

What was Facebook so-called "substantial evidence?"

On the issue of the source code and the existence or lack of existence of the '761 invention during critical dates. The court stated:

"But, in this case, Leader fails to point to any contemporaneous evidence in the record that indicates that the Leader2LeaderR powered by the Digital LeaderboardR engine that existed prior to the critical date was substantively different from the post-critical date software; indeed, the evidence points in the opposite direction."

This is not true. Facebook introduced Leader source code from the provisional patent into evidence and argued that it DID NOT practice the invention. So Facebook's own successful trial argument proves the court's statement is erroneous. On the basis of Facebook's trial argument (that the provisional patent did not practice the invention) Leader was denied its earlier Dec. 11, 2002 priority date.

Congratulations,

Facebook. See you at the Supreme Court?

Donna Kline on ///

Congratulations,

Facebook. See you at the Supreme Court?

gg on ///

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on /// Congratulations,

Facebook. See you at

The patented software was 'publicly used?' 'on sale?' When?

Picking up at page 5 of the opinion, the court states:

"The relevant case history begins in 1999. In August of that year, McKibben and Jeffrey Lamb conceived the invention claimed in the patent. Immediately after conceiving the idea, the inventors began developing software based on that idea with the goal of building a commercial product. In total, about fifteen to twenty people worked on the project. According to Lamb, Leader completed the project within 'a couple of years . . . [m]aybe three,' i.e., probably the '2002ish time frame.' J.A. 24829.

Yeh. So what. What does this prove? Nothing except that they were in software development. Many/most ideas require much experimentation before all the aspects of an invention can be fleshed out. I might conceive of the idea for a floating car, but until I master anti-gravity, I probably won't have an innovation that is ready for patenting. Likewise, software engineering inventions generally have thousands to millions of lines of programming to perfect.

Where was Judge Moore, a patent professor, on the legal standards here? To patent people, her opinion is suspiciously silent. She knows that one often conceives of something well before it is "ready for patenting" and that "evidence of conception" is only one in a series of steps called "evidence of continuous reduction to practice." Both Leader witnesses McKibben and Lamb testified that this magic moment where the invention was ready for patenting did not occur until about Dec. 11, 2002. The source code from this period was in the provisional patent and Facebook's own expert argued that that source code did not have the invention.

Why does anyone still believe that Zuckerberg wrote the platform for Facebook in "one to two weeks?"

The court roots around the "cold record" and digs out new evidence!

The court stated:

"By December 8, 2002, Leader had demonstrated and offered Leader2Leader® to a number of other companies, including American Express and The Limited. In its interaction with The Limited, Leader described Leader2Leader® as the company's "full suite of technology services," J.A. 34692, and explained that the software had "potentially strong fits" in managing project resources and allowing collaboration, among other areas, J.A. 27221. Regarding American Express, according to McKibben, the head of technology architecture at American Express described the Leader2Leader® product as "disruptive technology" that will "create its own market." J.A. 34692. After seeing the software, American Express put on hold its collaborative computing initiative and was considering investing in Leader. J.A. 27216, 34692.

What does any of this court opinion prove? Absolutely nothing!

1) **"Demonstrated" is much different than "offered" for sale.** Anyway, what was offered? A brand name. See *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339 (Fed. Cir. 2000) (brand names are not sufficient to prove on sale bar). *Helifix* is the law that Leader was obliged to follow. What law is the Federal Circuit now following since it has ignored *Helifix*? Anyway, an offer that "rises to the level of a commercial offer for sale" must be tested against *Group One v. Hallmark Cards* cited above. Without the *Group One* test, this court's opinion is pure speculation. It's like saying, "Yeh, Facebook showed a box full of stuff. Since there was stuff, the stuff proves Leader sold the technology." If the box of stuff was all junk, then Facebook submitted junk and the court blessed the junk. Any layman can see this logic is bogus.

the Supreme Court?

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Facebook. See you at

the Supreme Court?

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2) **Why the reference to American Express?** American Express was not mentioned in any of the briefs supplied to the court and "American Express" was never evidence and testimony put in front of the jury? Maybe because it is a more generally recognized name than say, Wright Patterson Air Force base? Are we trying to appeal to the layperson so there will be fewer questions about the Court's decision? See [Anders v. California](#) above.

3) **Who doesn't refer to their technology as having a "strong fit" to an industry's needs, or a "full suite of technology services?"** What are you supposed to say? "Uh, here is a product that we worked on for several years for no reason whatsoever. Uh, it isn't really thorough or complete, either....duh???"

Appalling lack of business understanding in this court? Or, were they just looking for sound bytes to appease the muppets? Worse, did Facebook write this?

This court writing is appalling in its lack of business sense in addition to its misapplication of patent law. Are these just a bunch of ivory tower judges with no sense of the real world? Inventors often must discuss their budding invention with prospects. Leader was very careful to protect its discussions. **All the evidence (including NDAs) proves this.** As further evidence of that Leader was careful, their first director and security adviser was [Maj. Gen. James Freeze, US Army \(ret.\)](#), former head of the US Army Security Agency and the author of "The Freeze Report" assessing Department of Energy security. Their second director and first patent attorney was [Professor James P. Chandler](#), President of the National Intellectual Property Law Institute and author of the Economic Espionage Act of 1996 and the Federal Trade Secrets Act. Clearly, Leader took *extraordinary measures* to protect its inventions from inadvertent disclosures. It is hard to imagine more reasonable measures than these for any inventor, anywhere on the planet. If these measures were not good enough, none will ever be.

Why didn't the court identify any of this evidence in reaching back to the "cold record." **This evidence proves that Leader took great care to protect its inventions.** Is the actual evidence an inconvenient truth for a court intent on bending justice to fit a big infringer's agenda? Hmmmm. And oh by the way, even experimental use of a new invention is permissible in patent law, but we don't need to go there since there is enough other law the court skipped over. Judge Moore, why were you silent? See [Allen Engineering Corp. v. Bartell Industries](#), 299 F. 3d 1336 – Court of Appeals, Federal Circuit 2002 (experimental use of a new invention is permitted to perfect the invention without triggering on sale bar). No *Allen Engineering* test was performed on Facebook's so-called evidence.

Is it just me, or am I doing all the court's work for them? Geeesh!!!

Facebook received court assistance in maintaining the big lie?

However, instead of reviewing ALL the record, the Court went snipe hunting for sound bytes to help Facebook maintain the big lie. This conduct offends the senses and common sense. Patents are to protect inventors, not punish them. However, numerous patent attorneys have told me that the courts have turned decidedly anti-little guy in favor of big infringers. Very disappointing for this American to hear that another element of the Constitution (patent rights) is under attack. By whom? Well, in this case, the Federal Circuit!

The court then states:

"At the same time, Leader was struggling financially and was eager to obtain Leader2Leader® customers. By December 3, 2002, Leader had deferred employee salaries and was facing an economic climate in which raising short term financing "ha[d] never been harder." J.A. 27215. McKibben explained to Leader's employees that a contract from Boston Scientific, The Limited, or American Express, among others, would change

Leader's valuation position with institutional investors. Indeed, according to McKibben, the "most significant factor" that would improve Leader's negotiating position in valuation discussions was "the acquisition of 'marquee' paying customers."

OK. What does this prove? These are merely statements of fact at the time. OF COURSE having big name clientele would help with negotiations. It would help anyone. We understand what these comments are meant to IMPLY to the largely blue-collar lay juror and muppet IPO investor, right? That Leader was so desperate for cash that they would now start breaking rules? Honestly, it sounds like Facebook attorneys wrote this paragraph themselves. And breaking rules for cash is something we KNOW **they** would do.....LOL. For the record, the only contract that resulted from any of these discussions was one with Boston Scientific in June of 2003. The '761 provisional patent application was filed December 11, 2002. Wow. That is a much different reality than the muppet food stated in the court's opinion.

Interrogatory No. 9 is not what Facebook wants it to be (if you repeat a lie enough, it becomes truth?)

The court states:

"During discovery, Facebook served an interrogatory that asked Leader to identify all products and services that it contended practiced the claims of the '761 patent. Leader provided two responses that were at issue during the litigation. In its First Supplemental Response, Leader asserted that "Leader2Leader® powered by the Digital Leaderboard® engine is covered by the '761 patent." Leader, F. Supp. 2d at 717. Thereafter, Leader amended its response to more specifically state that "Leader2Leader® powered by the Digital Leaderboard® engine is the only product or service provided by Leader which embodies, either literally or under the doctrine of equivalents, any of the asserted claims" of the '761 patent. Id. McKibben verified those interrogatory responses.

OK, here comes the fun stuff. The infamous Interrogatory No. 9.

Originally sent as the ninth question in the first set of interrogatories:

"For each claim of the '761 patent that LTI contends **is practiced** by any product(s) and/or services of LTI, identify all such product(s) and/or service(s) and provide a chart identifying specifically where each limitation of each claim is found within such product(s) and/or service(s)"

Leader first objected to the question because it was deemed "vague and ambiguous" and "subject of expert testimony." Leader also responded that the question was "unduly burdensome and oppressive."

Don't believe me? Just [click here](#) for the original document and scroll to page 31. BTW, the judge overruled Leader's request to show the jury this un-doctored version. Why do you think the jury was not permitted to see this full document? Perhaps because Michael McKibben would have pointed out the objections? That would have ruined the innuendo effect completely now wouldn't it?

While a judge has wide discretion in such matters, this withholding of this full evidence was a big prejudicial mistake. That decision makes the mind wander and ask what was the big deal? Why did the judge protect Facebook's innuendo strategy right at that point? See [Wigmore, Evidence 3rd ed.](#) ("Possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was.") See also "[Facebook's prized evidence was a trick.](#)" Such judicial discretion may be permissible, but is the resulting evidence "clear and convincing?" Hardly. Meep, meep. But, wait, we're just acknowledging the box of stuff, even if that stuff is just junk. How could I forget? I feel a hairball forming.

The objection was overruled by Judge Stark and Leader ultimately provided two supplementary responses: "Leader makes this supplemental response herein ("Supplemental Response") based solely on its current knowledge, understanding,

and belief as to the facts and information available to it as of the date of the Supplemental Response.” (Date being September 15, 2009.) Please have a [look here](#) to see the full response, and you will agree that it is much different in tone than the two “redacted” (doctored) versions that were the ONLY versions the trial court let the jury read. Here they are: [Doc. No. 627-23](#) and [Doc. No. 627-24](#). Also note that the question was answered in reference to the current (2009) version of Leader2Leader and in no way references any earlier version.

Judge Kimberly AWOL?

Judge Kimberly Moore’s perspectives articulated thoroughly in the hearing were suspiciously missing when the court made reference to the interrogatory. The idea that the opinion was “too narrow” to test the credibility of Facebook’s doctored Interrogatory No. 9 is not a credible argument since the Facebook interpretation of the evidence was accepted by the Court uncritically—without first testing it against the laws of evidence. The Supreme Court’s recent ruling on verb tense in *McNeill v. US*, 131 S. Ct. 2218 – Supreme Court 2011 131 S.Ct. 2218 (2011) (“Use of the present tense . . . does not suggest otherwise.”) supports Leader’s argument that the question was asked in the present tense in 2009. It “does not suggest otherwise.”

Vomit Time – testimony obviously taken out of context

The court stated:

“Facebook also deposed McKibben. In his deposition, McKibben could not identify any iteration of the Leader2Leader® product that did not fall within the scope of the claims of the '761 patent, testifying that “[t]hat was a long time ago. I – I can’t point back to a specific point.” Id. at 719.”

This is the part that makes me want to throw up. Seriously. Because this is where the Facebook attorneys’ trickery took hold and apparently convinced not only the jury but a panel of federal judges as well.

1) Here is the entire Q&A IN CONTEXT that is on record. Note the difference between how it is paraphrased above and how the conversation really went.

McKibben answered in his deposition:

8 Q. Did you have any technique for
9 identifying differences between various
10 iterations of Leader2Leader product?
11 A. As I’m speaking here today, I
12 believe that our developers kept track of that.
13 But the name they gave to it, I don’t remember.
14 Q. Can you identify any iteration of
15 the Leader2Leader product that, in your opinion,
16 did not implement what’s claimed in the '761
17 patent?
18 A. That was a long time ago. I — I
19 can’t point back to a specific point.

The court repeated this misrepresentation stating:

“In his deposition, McKibben could not identify any iteration of the Leader2Leader® product that did not fall within the scope of the claims of the '761 patent, testifying that “[t]hat was a long time ago. I – I can’t point back to a specific point.”

Ahhmmm. So much for the Federal Circuit’s commitment to the facts.

2) Keep in mind that there were 15 to 20 developers working on this project in 2002, each concentrating on a specific component. As components were completed, they were added to the official main library of code, or CVS, or source code tree. As project manager, McKibben was not responsible for

submitting the code to the tree himself, that was done independently by each developer. ALL software developers know this process and would not be surprised if McKibben never knew the “a specific point” unless he took the time to comb through hundreds of thousands of lines of computer code submitted by 20 people for “a specific point.” It is an unreasonable question when you actually think about it. Even so, McKibben answered that his developers would know. But that was conveniently sloughed over by these judges too. Gag. It’s their job to fix such obvious misinterpretations of key evidence. This question stumps speakers of English and even patent law professors? I don’t think so.

3) Also, and most importantly, at the time this question was posed, Facebook was not asserting the “on sale bar” claim. They had stated that they were trying to prove “false marking” of the patent; that the invention wasn’t unique and could otherwise be found in the technological universe. At no time during the discovery period did Leader have a reason to believe that dates were critical to their case. Only *after* discovery had closed did Facebook reveal their new assertions. Why do you suppose that is? Did Facebook review their “evidence” and find that the invention was indeed unique, but – AHA! – they could juxtapose these two responses in such a way to discredit McKibben? Lucky SOB.

4) Leader attorneys objected heavily to this change in assertions for false marking to on sale bar, but for some reason the judge allowed it (without allowing additional discovery, deposition of expert witnesses, etc.—all customary stuff in order to prevent either side from being sideswiped at trial [like Leader was]). Leader was not given a chance to submit any more data that would refute the claim. Vomit.

Leader’s nondisclosure agreement (NDA’s) were ignored by the Court

The court stated:

"The interrogatory responses and McKibben’s deposition testimony were a focus at trial. At trial, McKibben testified that the interrogatory and Leader’s responses, by employing the present tense, were directed at whether Leader2Leader® practiced the ’761 patent’s claims in 2009. McKibben also testified at trial that the Leader2Leader® product powered by the Digital Leaderboard® engine was covered by the asserted claims in 2007 and 2010, but not prior to December of 2002. Specifically, McKibben testified at trial that he ‘vividly remember[ed]’ that the patented technology was not incorporated into the Leader2Leader® product ‘until days before’ the December 11, 2002 filing of the provisional patent application. J.A. 25708–09; see also Leader, 770 F. Supp. 2d at 722 n.16. On cross-examination, Facebook played McKibben’s inconsistent deposition testimony before the jury.

I will tell you a little secret . . . If you go through the source code of Leader2Leader, you will find the *exact* date the tracking component of the invention was added. Not *invented*, mind you, but officially *incorporated* into the software code tree. McKibben knows approximately when the invention code was complete – the patent lawyers were teed up and waiting for the green light to file – it was ready just days before the application was filed. That invention code was *incorporated* in to the source code tree later once it was transferred off one of the Leader computers where it was first created. This again shows that product was only then practicing the invention and *was/could not* have been for sale prior (since it did not yet exist, as both inventors testified and Facebook never proved otherwise, except by innuendo). Innuendo is not evidence the last time I checked.

After the parties argued their positions to the jury, the jury returned a verdict in favor of Facebook on the on- sale and public use bars. First, the jury specifically found that the ’761 patent was not entitled to the priority date of the provisional patent application, a finding that Leader does not challenge on appeal. The jury also specifically found that the asserted

claims of the '761 patent were invalid on two independent grounds: (1) that the invention was subject to an invalidating sale; and (2) that the invention was subject to an invalidating public use."

Dear Justices, how is it that the provisional source code introduced by Facebook proved the invention **DID NOT** exist, yet Leader could make an allegedly invalidating offer of this code if it DID NOT have the invention? I am feeling a hair ball form. Gack!

Also, Where is mention of the Leader NDA's with the very clear "no reliance" clause in the opinion? They were in evidence by Leader and also entered by Facebook. The NDA's NEGATE the on-sale and public use! 🤔

Why was former patent law professor Judge Kimberly Moore silent on this fundamental issue regarding on sale bar? [*Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F. 3d 1041 \(Fed. Cir. 2001\)](#) (uses the Uniform Commercial Code ("UCC") to evaluate alleged offers). Why was there no analysis of the effectiveness of these NDAs as compared to the UCC standard for evaluating such offers? *Group One* is considered "on sale bar" patent law Class 101. **Without this *Group One* analysis of the alleged offers, Leader's fundamental patent rights have been violated, according to ALL the patent law experts with whom I have spoken.**

Indeed in another recent case [*DIGITAL-VENDING SERVICES INTERNATIONAL V. THE UNIVERSITY OF PHOENIX*](#), p. 3, **Judge Moore dissented when she believed that her fellow judges were not interpreting patent law properly** with respect to "enablement." In that case, her fellow judges used a patent definition in general terms that the patentee had specifically defined in more narrow terms—which is the prerogative of a patentee (to be his or her own "lexicographer"). Judge Moore dissented in that recent case to protect the rights of the inventor, but was utterly silent when it came to the court's refusal to assess the NDAs pursuant to *Group One*. Hmmmm. Specifically, Leader's NDAs contained a "no-reliance" clause where the parties agreed, prior to discussing the technology, that nothing they discussed would bind them to an offer or to a contract of any kind. The specific test in *Group One* is whether or not any alleged offer "rises to the level of a commercial offer for sale."

Judge Kimberly A. Moore failed to apply the *Pfaff v. Wells Electronics* test to Facebook's evidence

Another utter omission in the court's opinion was its failure to apply well-settled law for determining if Facebook's so-called evidence met the *Pfaff* test for patentability. *Pfaff* requires two conditions: the invention was ready before the critical date, and that a person skilled in the art could practice the disclosed invention. Well, the only source code introduced in the provisional patent DID NOT practice the invention, according to Facebook's expert Dr. Saul Greenberg. Therefore, Facebook's own evidence fails *Pfaff*. [*Pfaff v. Wells Electronics, Inc.*, 525 US 55 – Supreme Court 1998.](#)

No *Group One* test was performed by this court on ANY of the so-called Facebook evidence

I am going to stop for now and let readers absorb this. It is now apparent to me now that the "steaming pile of poo" referred to in one the Comments by a patent attorney, is indeed, a factual statement. The lack of judicial competency in this decision is sad and embarrassing to this American.



This post will be updated many

The Federal Circuit opinion in Leader v.

times over the next week or so, so *Facebook is a 'steaming pile of poo'*
you may want to return often to
get caught up and read the new
Comments. I will try and mark when I insert whole new sections.

I am hearing about numerous one's of you who are taking up the Commenter's
cause and writing to your elected representatives, media and federal agencies. I
assure you of my dediction here to presenting only the facts. I won't shy away
from expressing my opinion about those facts, but I won't hold back those facts
from you so you can make up your own mind and act accordingly.

Here are more stories breaking today as I type:

- [Goldman Sachs Naked Short Selling OOPS](#)
- [Accel Partners and Goldman Sachs Selling Facebook Shares Pre-IPO](#)
- [Microsoft also selling their shares.](#)

BUYER BEWARE!

Meep, meep.

—Donna

[Here's a link to the 56 Comments in the previous post. Carry on here.](#)

Posted by [Donna Kline](#) on Tuesday, May 15, 2012, at 11:01 pm.


Filed under [Investigation](#).

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{ 1 }

Comments

1. **bg761** | May 16, 2012 at 3:15 pm | [Permalink](#) 
Gack! 😞 I needed to get rid of that hairball after reading the 3, maybe 2, or 1? judge opinion. Or was is contracted to Facebook since most everything was Facebook attorney evidence anyway! If this doesn't raise some eyebrows, then we know the deep pockets are buying off the media! To ignore this blatant attempt to wash over an inventors life work, would be a travesty.
Thank you Donna for being thorough!
If anybody hasn't noticed, the use of 1 sentence testimony is not used here. You can read what they were thinking and get the whole picture instead of a "sound bite" 😞
Meep Meep

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*Your email is never published nor shared. Required fields are marked **

Name *

Email *

Website

Comment

**« /// CONGRATULATIONS.
FACEBOOK. SEE YOU AT THE
SUPREME COURT?**