

Donna Kline Now!



/// Donna Kline is a reporter for Pittsburgh Business Report and a former reporter for Bloomberg New York.

LEADER V. FACEBOOK PRESS BACKGROUND

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/// Big trouble ahead for Facebook IPO? Backgrounder

The undisclosed patent infringement case

Updated 2/17/2012 11:53 PM As you may know, Facebook filed for an initial public offering on February 1, 2012. What you may not know, is that there was a very ominous omission in the S-1:

Facebook has been found guilty of patent infringement against Leader Technologies.

An additional trial is set to begin March 5, 2012.

Fig. 1 - Big trouble ahead for the Facebook IPO? Donna Kline reports for Pittsburgh Business Report and is a former reporter for Bloomberg.

Yes, there are many cases pending against FB that are alluded to in the S-1 filing e.g.: "We are currently, and expect to be in the future, party to patent lawsuits and other intellectual property rights claims that are expensive and time consuming, and, if resolved adversely, could have a significant impact on our business, financial condition or results of operations " p. 19 But NOTHING that states there is a jury verdict against them for literal infringement on 11 of 11 claims of U.S. Patent # 7,139,761. (See Leader Technologies, Inc v Facebook Technologies, Inc , 08-CV-862-LPS (D Del 2008)

What is U.S. Patent No. 7,139,761?

Oh, just the source code for the entire Facebook platform. (WHAT? YOU CANNOT BE SERIOUS!!!) Leader Technologies claims it was stolen from them during the infamous Zuckerberg hacking event at Harvard University on October 28, 2003. (See

## 1 omissions & other conflicts of interest

### /// Big trouble ahead for Facebook IPO?

#### Backgrounder

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February 2012

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[http://en.wikipedia.org/wiki/H\\_story\\_of\\_Facebook](http://en.wikipedia.org/wiki/H_story_of_Facebook) under FaceMash) (A so see <http://www.youtube.com/watch?v=odOzMz-fOOw> for the dramatization of the event. The first dormitory to pop up in the video scene is Kirk and House, which happens to be the dorm next to Winthrop House where Leader Technologies CEO, Michael McKibben's, son lived.)

McKibben explains that he had sent the technical white paper describing key components of the invention to his son via email on October 22, 2003. This email was his son's Winthrop inbox during the hacking event mentioned above. **A patent for this technology had been filed on December 11, 2002.** The white papers had **'Copyright 2003, Leader Technologies Incorporated, PATENTS PENDING, All Rights Reserved.'** clearly printed in the footer of each page. (See [Leader White Paper, Oct. 22, 2003, Doc. No. 477](#); See also [Archive.org](#).)

In October of 2003, Leader Technologies was conducting confidential connection beta tests with Boston Scientific, including Cerve and Connect and clients of *Accel Partners*. Accel's heavily peopled with Harvard graduates. Accel's official story is that managing partner James Breyer first met Zuckerberg in early 2005 almost a year after Zuckerberg moved to California. However, given Breyer's close Harvard connections this official story is dubious in view of the stupendous *The Harvard Crimson* coverage given to Zuckerberg as a 19 year old student (See below), and his business partner Peter The 's \$500,000 investment in Zuckerberg a year earlier in June 2004.

(<http://ecorner.stanford.edu/author/Material/Info.htm?mid=1567>).

([www.accel.com](http://www.accel.com))

Accel Partners' website currently states they "partner with entrepreneurs around the world who have unique, breakthrough ideas and the courage to be *first*."

Translation, they provide capital, *publicity* and direction for the recruits. Interestingly enough, from October 1, 2003 to June 1, 2004, "Zuckerberg" and "thefacebook" have more citations in *The Harvard Crimson* than President George Bush or Google. And many more than "Winkovoss" or "Harvard Connection" who were in the beginning of an investment on against Zuckerberg at that time. (See <http://www.thecrimson.com/search/>.) Facebook launched in February and incorporated in June 2004.

**Accel's total holding in Facebook, including individual partners through various investing entities, is difficult to determine from the S-1 filing, but appears to exceed 15% ownership in Facebook.** This does not reflect the *billions* received by Facebook insiders who have a ready cashed-out in private transactions brokered by Goldman Sachs (**WHAT HAPPENED TO THE 500 SHAREHOLDER RULE???**). (See [Goldman Flooded With Facebook Orders, Wall Street Journal, Jan. 6, 2011](#) and [Crunchbase](#))

#### Just the beginning

On June 24, 2004, Leader Technologies' patent application published. Zuckerberg has testified that Facebook's "groups" functionality was programmed in the summer of 2004 by an *intern* named Steven Dawson-Haggerty. (See [Generated using D -ace.com](http://www.scribd.com/doc/61612724/The-Facebook-vs-</a></p></div><div data-bbox=)

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[ConnectU-Mark-Zuckerberg-Deposition-Apr-25-2006](#) p. 91) There are 'complexities' revealed in the deposition cited above. Namely, on pages 40 and 41, Zuckerberg states that he began writing the code for Facebook sometime in January of 2004, while taking a full class load at Harvard. Facebook launched on February 4, 2004. Zuckerberg says that he wrote the code for Facebook in "somewhere between a week and two weeks..." (**WHAT???**) And, that an *intern* was somehow able to write the code for the "groups" component over summer vacation. (**ARE YOU KIDDING ME?**) (See <http://facebook-technology-origins.blogspot.com/2011/08/mark-zuckerberg-used-leader-white-paper.html>.) Zuckerberg also testified in the ConnectU trial that there were other sources of information that he lifted, but cannot remember what they are. (p. 36)

Anyone with a programming background knows that it takes *much* longer to program and test code of this nature. Leader Technologies invested 145,000 man-hours and 10 million dollars into creating the invention by late 2002. They have argued that the similarities between the product and the engineering Facebook are eerily too similar. (**And they won.**)

### Legal Battle Timeline

\* Leader Technologies awarded patent # 7,139,761 Nov. 21, 2006.

\* Leader files patent infringement suit against Facebook on Nov. 19, 2008 (*Leader Technologies Inc , v Facebook Technologies Inc , 08-CV-862-LPS* (D.Del. 2008))

\* Trial begins on July 19, 2010

\* Jury returns a *split verdict* on July 28, 2010. Leader prevails on "infringement" of a 11 of 11 claims of patent infringement and no published prior art. Facebook prevails on "obviousness." (See [Leader Press Release: Leader v Facebook Split Verdict, July 29, 2010](#).)

### How it all went down

In a patent litigation, the plaintiff (Leader) has one primary goal: to prove that they were, in fact, the original inventor, and that the defendant (Facebook), infringed their patent. The defendant, on the other hand, can attempt to prove that either: 1) the patent was not infringed 2) the patent is unenforceable or 3) the patent was never valid. Many lawyers will tell you that it's the party with "the most money and resources that usually wins the verdict." (See <http://www.patent-litigation.com/patent-infringement-litigation-awsut>.)

### Quick Tutorial

During the 'discovery period' of a lawsuit, the plaintiff and defendant learn as much as they can about the other party's claims and defenses. Discovery can occur through; 1) Interrogatories written questions to the opposing party; 2) Requests for documents and/or 3) Depositions. The discovery period is designed to eliminate "surprises" and clarify what the lawsuit is about.

### Plan A – False Marking

During the discovery period of *Leader v Facebook*, Facebook attorneys were pursuing a claim that accused

Leader of “false marking,” which essentially claims that Leader didn’t invent *anything* they merely affixed a patent symbol to material and code that was a ready existence. (See [US Patent Office Examiner’s Manual – False Marking](#) and <http://facebook-technology.org/ns.blogspot.com/2011/08/no-evidence-no-prob-emb-fabricate-t.htm>.) Facebook attorneys requested access to Leader2Leader source code. (See item 8 at <http://facebook-technology.org/ns.blogspot.com/2011/11/readers-awyers-d-smart-e-facebooks.htm>.) They stated that it was impossible for them to do an element-by-element analysis without access to the code. Leader objected and made the code available pursuant to the court’s order. **(After all that, this code was never brought up again as evidence against Leader.)**

### Plan B – On Sale Bar or “The Old Switcheroo”

On July 17, 2010, after the discovery period had closed and three months before trial began, Facebook attorneys asserted the “on sale bar” claim against Leader. This accusation is exactly the opposite of the original claim. “On sale bar” means that the inventor cannot offer his patent for sale more than 12 months before the patent application is filed. In other words, the invention *did* exist and was sold too early. (See [US Patent Office Examiner’s Manual – On Sale](#).) Here is an excerpt from Leader’s appellate brief currently on file and set to begin arguments March 5, 2012:

“From March through November 2009 Facebook served multiple interrogatory responses regarding its invalidity contentions not once did it mention the on sale or public use bars instead Facebook filed a false marking counterclaim in December 2009 alleging that Leader had falsely marked Leader2Leader as embodying the patented invention because in Facebook’s view “Leader2Leader *does not practice* the invention disclosed by the claims of the ‘76 patent” JA4355 (emphasis added) Consistent with that position Facebook’s expert report on invalidity submitted in April 2010 after the close of fact discovery did not assert invalidity under the public use and on sale bars Just three months before trial and after the close of discovery however Facebook made an about face in its third supplement to an interrogatory response Facebook asserted that Leader2Leader did embody the patented invention after all that it had done so since some unspecified time before December 2002 and that public demonstrations and offers for sale of Leader2Leader before that date rendered the patent invalid the district court denied Leader’s motion *in limine* to exclude that eleventh hour defense See JA225 (D 683) *see also* JA 342” (See <http://www.scribd.com/doc/625483/Leader-v-Facebook-APPEAL-Leader-Opening-Brief-July-25-2010> p 9)

The above is “evidence” for Facebook alleging one defense, seeking evidence for that defense, then ultimately choosing the *opposite* tactic during trial. Courts are not supposed to permit new claims so close to trial when a party is prejudiced, but this court did after discovery had closed.

### Trial Begins

Now that Facebook’s “clear and convincing” burden is to “prove” that Leader offered its product for sale more than a year before filing the patent, you would expect them to show Leader’s source code and expert testimony to back the former case. They did not. (See <http://www.scribd.com/doc/61256189/Leader-v-Facebook->

Leader had conducted *beta tests* in October of 2003. These tests are designed to see if the software meets the requirements that guided its design and development; works as expected; and/or can be implemented with the same characteristics. Participants included The Limited, Wright Patterson Air Force Base and Boston Scientific (including Accents.) Leader's non-disclosure agreements signed by the participants contained a specific provision called a "no-reliance" or "no legal effect" clause that specifically prevents preliminary discussions from being construed as offers. (i.e. product for sale.) Since Facebook's "on sale bar" claim was added after the close of discovery, Leader had no opportunity to prepare customary defenses for these claims. This normally includes gathering hard evidence like expert testimony, engineering records, depositions of the alleged customers, and most importantly, source code. At Facebook had were some emails making reference to various Leader brand names, no source code, no nothing except a tattered evidence and snippets of video. **CLEAR AND CONVINCING EVIDENCE? ARE YOU KIDDING ME???**

### Interrogatory No. 9

This section related to questioning whether or not Leader's software products in 2009 practiced the invention (source code) for false marking. Facebook chose to re-purpose this question and allege that it applied to Leader's product in 2002. They chose this path AFTER they failed to prove "false marking" of the patent The U.S. Constitution, in Article I, Section 8 explicitly protects authors and inventors:

"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"

<http://facebook-technology.blogspot.com/2012/01/facebooks-tricks-with-key-evidence.htm>

### The Verdict

Jury returns a *split verdict* on July 28, 2010. **Leader prevails on "literal infringement" of all 11 of 11 claims of patent infringement and no published prior art.** Facebook prevails on "on sale bar." (See <http://www.leader.com/docs/Leaderpressrelease-07-29-10-LeaderFacebookSplitVerdict.pdf>.) Leader files an appeal on July 25, 2011 at the Federal Circuit Court of Appeals in Washington D.C.

### Back to the S-1 Filing

Where in the Facebook S-1 filing is this ongoing lawsuit with Leader Technologies mentioned? Nowhere. Facebook did dedicate a paragraph to the "Paul D. Cegala" lawsuit (in discovery) on page 93 of the S-1 filing. If you search the name Paul Cegala, you will find that he has convicted of possessing 400 grams of 'magic mushrooms', and has been charged with grand larceny and fraud in the state of New York. (Sounds like an upstanding guy.) But again, no mention of Leader Technologies, although **this is the first and only case against Facebook to 1) have a jury trial and 2) make it to the Federal District of Appeals.**

## What's at stake?

### If Leader prevails in appeal, damages against Facebook could be 5-25% of Facebook's gross revenues from 2006 through 2021. (YOU DO THE MATH.)

And, if it's proven that Facebook has knowingly, deliberately, intentionally, willfully or wantonly infringed the patent, punitive damages can be tripped.

([http://www.inventoriprotect.com/p/pub\\_citations/docs/Damage\\_Reief\\_for\\_Patent\\_Infringement.htm](http://www.inventoriprotect.com/p/pub_citations/docs/Damage_Reief_for_Patent_Infringement.htm).)

## Materiality?

In the S-1, Facebook alludes to ongoing lawsuits that may be "expensive and time consuming" but makes no mention of the *Leader v Facebook* trial set to begin on March 5, 2012. The Federal District Court of Appeals is the second highest court in the United States. The S-1 rules that the applicant is required to disclose a *material* litigation.

Materiality in this case must surely include the first and only litigation against Facebook to be pending in a Federal Appeals Court. In other words, the company cannot hide from investors the risks associated with a pending lawsuit that may have significant negative impact on shareholder value of Facebook poses. And certainly a pending injunction that could shut them down.

\* \* \*

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## Comments

1. **KC-CA** February 13, 2012 a 10:16   
am [Perma nk](#)  
H Donna,  
Some of my bus ness fr ends n Ca forn a have been fo ow ng Leader vs. Facebook and were utter y dumbfounded when they read

Facebook's gyrations to avoid disclosing infringement of 11 of 11 Leader patent claims. They said they would be filing complaints with the SEC.

Something doesn't smell right. McKibben's son at Harvard at the same time as he became a dorm! Zuckerberg claiming to have built something in one or two weeks that took Leader 145,000 man hours and 10,000,000 dollars. The "groups" feature appearing on Facebook months after the US Patent Office published the patent application. Acc Partners and the Harvard alumni saying down a false story of first encounters with Zuckerberg. Acc Partners and other insiders already cashing out much of their stock to DST, Goldman Sachs and Russian oligarchs. Do they think our investors are dumb as rocks? They must.

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