Briefing for Representative Jim Jordan

Critical Constitutional Matters for the House Committee on the Judiciary

Prepared September 28, 2012

Federal courts are coddling a proven infringer

An Ohio-based software developer, Leader Technologies Incorporated, with numerous investors in Ohio's 4th Congressional District, owns U.S. Patent No. 7,139,761 that Facebook was found guilty of infringing on 11 of 11 counts.[1] Despite this, the district court and the U.S. Court of Appeals for the Federal Circuit[2] have upheld an obscure "on sale bar" element of the verdict which essentially strips Leader of an outright win. The public record reveals that the Federal Circuit judges hold well-publicized stock in Facebook which they did not disclose, along with numerous other conflicts of interest. Through their stock, these judges stood to benefit directly from a decision favorable to Facebook.

The Court dramatically abused Leader's due process rights by ignoring Leader's "clear and convincing" evidence appeal argument, and replaced it with a Court-fabricated "substantial evidence" argument which Leader had not argued, and for which the Court was not briefed. The Court even reached into the cold record for new evidence not heard by the jury. Such "judicial hyperactivity" is unfair and unconstitutional.

The Court essentially *gifted* a win to Facebook without requiring them to produce *any* proof at all, much less "clear and convincing" proof.

This conduct threatens fundamental democratic principles of due process, disclosure of judicial conflicts of interest, and basic property rights guaranteed by the U.S. Constitution. In short, if the *Leader v. Facebook* decision is permitted to become law, then the rights of inventors will be obliterated; further encouraging deep-pocketed infringers to abuse property rights with impunity; knowing that the courts will coddle them.

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[1] *Leader Technologies, Inc., v. Facebook, Inc.*, 08-cv-862-JJF-LPS (D.Del. 2008); *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.)(Fig. 1).
See Hearing, Mar. 5, 2012.

[2] This court of appeals headquartered in Washington D.C. was created by Congress in 1982. It is unique among courts of appeals as it only handles patent and certain kinds of contract cases. *See* The Federal Circuit Historical Society. Accessed Sep. 28, 2012.

—U.S. Patent No. 7,139,761—

The engine that runs Facebook is stolen from Ohio company Leader Technologies

On July 27, 2010 Facebook was found guilty on 11 of 11 counts of "literal infringement" of Leader's U.S. Patent No. 7,139,761, an invention that was five years, 145,000 man-hours and over $10 million in the making. (Numerous investors from Ohio's 4th Congressional District have invested in Leader.) This means that the software engine running Facebook is Leader's invention—an Ohio small business. However, both the district court, and now the Federal Circuit, have refused to affirm Leader's property rights for which Leader had worked "according to Hoyle" to properly protect; even engaging the author of the Federal Trade Secrets Act and Congressional adviser, law Professor James P. Chandler, to advise them on how to protect it. Instead, the courts have upheld an obscure "statutory bar" called "on sale bar"[3] and given the verdict to Facebook—the adjudged infringer.

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[3] Facebook did a complete about face just three months before trial, switching its claim from a claim that Leader had no invention, to a claim that Leader had an invention and tried to sell it too soon. The new Judge Leonard P. Stark allowed this new claim but *blocked* any new discovery by Leader so that Leader could prepare its defenses. This abuse of discretion is remarkable. However, the Federal Circuit has *never* overruled a district court judge on abuse of discretion, so such a claim by Leader would have been fruitless (although this Committee is free to explore this subject). The Committee should also quiz Judge Leonard Stark about the jury's statement after the trial that they made the on sale bar decision without having any evidence. Remarkably, the judge barred the attorneys from using this information. But, since the judge heard this truth, why did he support the lie?

Facebook's newly-minted on sale bar allegation was that Leader tried to sell their invention more than one year before filing for the patent (on sale bar was the same subject Microsoft attacked in *Microsoft v. i4i* curiously).

Leader testified that they were selling things, but not the invention in question. They said an offer of the invention would have been impossible since the invention was not ready prior to its filing on Dec. 11, 2002. Facebook appears to have confused the jury and judge alike on both the evidence and the law. Although it is customary, Facebook did not put forward an expert witness on the subject in order to prove that the alleged offer contained all the elements of the software invention. No layperson could make such a judgment without the assistance of expert testimony. Instead, Facebook succeeded in getting the jury to disbelieve the inventor's testimony based solely on several convoluted video snippets and a doctored interrogatory. Then, they convinced the judge to support the idea that disbelieved testimony could be transformed into "affirmative evidence" of an opposite—despite the judge's jury instruction to *discard* disbelieved testimony. To

If Leader had lost "fair and square" this would have been the end of this case. However, the "bench-bar" shenanigans surrounding this verdict have exposed an unseemly underbelly of corruption and abuse of constitution rights. The Court *ignored* substantial new evidence emerging from other cases that prove unequivocally from the testimony of Facebook experts, that Mark Zuckerberg withheld 28 computer hard drives from Leader Technologies. This evidence has both civil and criminal implications.[4]

Leader respectfully requests that the Judiciary Committee begin an inquiry into the judicial misconduct and constitutional abuse of due process surrounding *Leader v. Facebook.*

On June 9, 2011 the U.S. Supreme Court re-affirmed the 30-year *American Hoist* "clear and convincing" evidence burden of proof in *Microsoft v. i4i*.[5] Microsoft and other large infringers had attempted to lower the standard of proof required to overcome claims of patent infringement to a lower "preponderance of evidence."

Is Microsoft looking for a "second bite at the apple" by peddling their influence at the Federal Circuit? The evident answer is yes.

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coddle Facebook on this novel opposite theory (not argued at trial; so were *ex parte* conversations with Facebook occurring?), Judge Stark produced an 1800's criminal case—a case that had never been used in a patent case in history. Shockingly, even though the Federal Circuit rejected the idea of disbelieved testimony being evidence of an ostensible opposite, they did not reverse the judgment. *See* 35 U.S.C. § 102(b).

[4] *See* Jul. 18-19, 2012 Facebook expert testimony in *Paul D. Ceglia v. Mark E. Zuckerberg*, 1:10-cv-00569-RJA (W.D.N.Y. 2010) cited in "Facebook Discloses 28 Hard Drives in 2012," Donna Kline. "Federal Circuit Violates Leader Technologies' Constitutional Rights." *Donna Kline Now!* Sep. 1, 2012. Accessed Sep. 28, 2012.

[5] It should be noted that Microsoft's lead attorney in *Microsoft v. i4i* was Thomas G. Hungar of Gibson Dunn LLP. Mr. Hungar is also Facebook's appellate attorney in *Leader v. Facebook* where both the district court and Federal Circuit chose to *ignore* the "clear and convincing" evidence standard (the same principle that Mr. Hungar had just lost a few months earlier in *Microsoft v. i4i*). It is evident that Mr. Hungar is attempting an end-run around the U.S. Supreme Court decision. The current *Leader v. Facebook* decision, as it stands, effectively trashes the "clear and convincing" evidence standard and permits decisions based on nothing but *attorney-fabricated* evidence; thus dispensing with a whole host of well-settled patent precedent like *Group One, Linear, Pfaff, UCC*, etc.

The Supreme Court stated that 30-years of well-settled law has confirmed that a validly issued United States Patent is *presumed* valid and can only be invalidated by proving "clear and convincing" evidence to the contrary. The law also provides additional means for attacking a patent's validity called "reexamination" at the Patent Office. Tellingly, the scenario that Microsoft attacked and lost in *Microsoft v. i4i* (on sale bar) is the very scenario that is being attacked again in *Leader v. Facebook*.[6]

Unless an infringer can *prove* by the "heavy burden" of "clear and convincing" evidence that a patent should not have been issued, the patent owners, small and large alike, should enjoy the property rights granted under the United States Constitution, Article I, Section 8 (this is the only property law actually written into the Constitution by the Founders):

> "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."

Judicial conflicts failed to "avoid the appearance of impropriety;" clear and convincing evidence legal standard ignored

Shockingly, the Federal Circuit answered a question that was not asked. They *abandoned* Leader's appeal based upon the "clear and convincing" evidence standard and *replaced* it with a "substantial evidence" standard that was not briefed by the parties. This breach of the Rules of Civil Procedure should have been reason enough to overturn the verdict. In short, the Court said that Facebook had lots of "stuff," but Leader argued that none of that stuff met the "clear and convincing" burden of proof as evidence. Leader argued that a bucket full of junk is still junk. Even so, the Court pronounced Facebook's evidence "substantial" without applying a single well-settled precedent to test that evidence.

More shocking is the fact that the Federal Circuit issued this ruling before the ink was even dry in *Microsoft v. i4i*. Suspiciously, Microsoft's previously unseen hand suddenly appears to be directing these proceedings and guiding the actions of Clerk of Court Jan Horbaly, who appears to be a

[6] *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238 (Supreme Court 2011) at 2252 ("They claim that inter partes reexamination proceedings before the PTO cannot fix the problem, as some grounds for invalidation (like the on-sale bar at issue here) cannot be raised in such proceedings.").

self-appointed Federal Circuit monarch. He exercises judicial powers well beyond the bounds of a clerk's duties. In addition, Microsoft's appellate attorney, Thomas G. Hungar, Gibson Dunn LLP is also Facebook's attorney.

The denial of an *amicus curiae* brief by internet pioneer Dr. Lakshmi Arunachalam (which exposed egregious mistakes of law along with substantial judicial conflicts of interest) triggered a Federal Circuit Bar Association[7] request which would essentially *absolve* the judges of any accountability for failing to disclose their conflicts of interest (including inside the Bar Association itself). This action becomes even more suspect when one learns that (a) Microsoft is a *Director* of The Federal Circuit Bar Association;[8] (b) Mr. Hungar's law firm Gibson Dunn LLP (along with three other Facebook law firms) is a member of the Bar's "Leaders Circle;"[9] (c) Mr. Hungar, Gibson Dunn LLP, Orrick Herrington LLP and Fenwick & West LLP represent both Facebook and Microsoft and all are active FCBA principles;[10] and (d) Microsoft is a ten percent (10%) owner of Facebook stock (along with at least two of the three judges[11] in *Leader v. Facebook*)

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[7] The Federal Circuit Bar Association ("FCBA") "offers a forum for common concerns and dialogue between bar and court, government counsel and private practitioners, litigators and corporate counsel." And, as is currently occurring in *Leader v. Facebook*, the FCBA advocates on behalf of Federal Circuit judges against certain litigants with whom they disagree. "Who We Are." *FCBA*. Accessed Sep. 28, 2012.

[8] "Board of Directors." Microsoft Corporation. *FCBA*. Accessed Sep. 28, 2012

[9] Gibson Dunn & Crutcher LLP, Fenwick & West LLP, Orrick, Herrington & Sutcliffe LLP, Gibson, Dunn. "2012 Leaders Circle." *FCBA*. Accessed Sep. 28, 2012.

See also Thomas Hungar. "The Federal Circuit, Looking Ahead." C-SPAN-2 video, @33m53s. May 19, 2006. <http://www.c-spanvideo.org/program/192618-1>.

In addition, Facebook's attorney Orrick Herrington LLP chairs the Legislation Committee; Facebook's and Microsoft's attorney Gibson Dunn LLP co-chairs the Patent Litigation Committee. An ordinary person on the street is hard-pressed not to see this cozy bench-bar relationship between Microsoft, Facebook and the Federal Circuit. "Committees." *FCBA*. Accessed Sep. 28, 2012.

[10] The current FCBA Request claims these relationships are all "innocent."

[11] Presiding Judge Alan D. Lourie and Judge Kimberly A. Moore. *See* Motion to Compel Each Member of the Federal Circuit to Disclose Conflicts of Interest in *Leader v. Facebook* by Amicus Curiae Lakshmi Arunachalam, Ph.D. filed Sep. 15, 2012, subsequently denied, but *never docketed* by the Clerk of Court Jan Horbaly and therefore never made accessible to the public. *See* published copy at Americans For Innovation along with all of Dr. Arunachalam's other un-docketed *amicus curiae* motions in this case. Details on the Facebook stock holdings of Judge Kimberly A. Moore are detailed in Renewed Motion of Lakshmi Arunachalam, Ph.D. for Leave to File Amicus Curiae in

and netted $246 million in the sale of its Facebook shares in the Facebook initial public offering on May 22, 2012.[12]

Could the appearance of impropriety be any more palpable?
What is the Federal Circuit's response?
Nothing, just "denied"—iconic of conduct being concealed.

The Federal Circuit Bar Association's current attempt at a blanket judicial absolution[13] would sweep under the carpet *substantial* conflicts of interest, including: (a) the nondisclosure of Facebook stock holdings by Federal Circuit judges and their families; (b) knowingly false statements in the court's order denying the amicus brief; (c) Facebook stock held by members of the Federal Circuit Bar Association's Board of Directors where the Clerk of Court is an Ex Officio officer;[14] (d) undisclosed biases among members of the court against litigant parties, most notably Leader's former director law Professor James P. Chandler;[15] (e) court decisions timed to Facebook-favorable media events where the media and Facebook knew

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Support of Leader Technologies' Petition for Rehearing and Rehearing En Banc. Details of Presiding Judge Alan D. Lourie's Facebook stock holdings can be found at Donna Kline. "Hijinks At The High Court." *Donna Kline Now!* Jul. 27, 2012.

[12] Microsoft Insider-Trading. $246 million in Facebook stock sold in IPO. SEC Form 4. <http://www.secform4.com/insider-trading/789019-1.htm>.

[13] *See* Response to the Federal Circuit Bar Association's Request for Reissue of Order as Precedential Pursuant to Federal Circuit Rule 32.1(e) by Amicus Curiae Lakshmi Arunachalam, Ph.D. To date the Court has not docketed this response. *See* a published copy at Americans for Innovation <http://www.scribd.com/amer4innov>

[14] Officers of the Federal Circuit Bar Association, Ex Officio, The Honorable Jan Horbaly. *The Federal Circuit Bar Journal*, Vol. 19, No. 4, p. ii.

[15] Law Professor James P. Chandler is a former director and patent advisor to Leader Technologies; prior to that he was a sometimes harsh critic of the Federal Circuit. He also lobbied Congress to pass the Federal Trade Secrets Act (18 U.S.C. §1832) and Economic Espionage Act of 1996 (18 U.S.C. §1831); an activity that was not uniformly supported by Federal Circuit judges, even though it was passed unanimously by Congress. Professor Chandler was also Chief Judge Rader's George Washington University law professor on intellectual property and then advised Senator Orrin Hatch's Judiciary Committee for almost a decade; a committee which Professor Chandler advised closely. None of these material conflicts of interest were disclosed in this case. No judge uttered a single word about any "appearance of impropriety." No judge disqualified himself or herself pursuant to 28 U.S.C. §455 - Disqualification of justice, judge, or magistrate judge.

court decisions before Leader (IPO, *Fox Business*); (f) court's refusal to docket *amicus curiae* briefs for public review yet issuing public denials of them; (g) court's refusal to disclose conflicts of interest when asked; (h) negligence in not investigating substantial new evidence that Mark Zuckerberg withheld 28 computer hard drives of evidence from Leader Technologies, and (i) Court's denial of Leader's 5th and 14th Amendment rights to due process.

The agenda of the Federal Circuit, in conjunction with Microsoft, Facebook, the Federal Circuit Bar Association, and their close collaborators appears to be to destroy patent law as we know it

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In addition to Facebook being judged to literally infringe 11 of 11 Leader patent claims asserted at trial, Leader has won <u>two</u> patent reexamination challenges at the Patent Office filed by Facebook. *All* Leader's claims have been reaffirmed as valid over the prior art.

The *only* question of law standing in the way of Leader taking charge of its property, which is currently being used to drive Facebook is the unfavorable on sale bar verdict for which both the district court and Federal Circuit have refused to assess based on well-settled law. They are making new law on the fly without justification. The problem now is that if this law is not overturned, it could destroy patent law as we know it.

To sustain the jury verdict for on sale bar, the <u>district court</u> (a) ignored its own jury instructions; (b) permitted Facebook to admit tainted evidence that confused the jury; (c) ignored well-settled precedent;[16] and (d) applied criminal law from the 1800's that had *never* been applied to testimony in a patent case.

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[16] The Court *excused itself* from performing even a single one of its *well-settled* tests for determining whether or not an alleged offer for sale "rises to the level of a commercial offer for sale" according to the Uniform Commercial Code. *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F. 3d 1041 (Federal Circuit 2001) at 1047 ("As a general proposition, we will look to the Uniform Commercial Code ("UCC") to define whether, as in this case, a communication or series of communications rises to the level of a commercial offer for sale"). Failure to affirm this "clear and convincing" standard for evaluating evidence will leave patentees with **no objective standard** and create 100% uncertainty for *all* inventors. It will likely destroy the confidence of the small inventor in the patent process altogether, thus depriving the public of new inventions.

Then, the Federal Circuit followed suit where they: (a) ignored the "clear and convincing" evidence burden of proof that formed the basis of the appeal; (b) fabricated a new "substantial evidence" argument; (c) reached into the cold record for new evidence that was *not presented to the jury* to support its new argument *without holding a hearing*; (d) ruled on its new argument and evidence in the *secrecy* of chambers; and (e) denied an *amicus curiae* brief within hours of arriving, then lying about the timing in the denial of the Opinion that they now wish to be made precedential.

Influence Peddling at the Federal Circuit

How biased were the Courts in this case? The old adage is if you repeat a lie enough times, it has a way of becoming the truth. The conduct of the courts embraced this notion.

Interrogatory No. 9 was answered in the present tense after the district court *ordered* that it be answered in the present tense. Facebook presented this interrogatory to the jury (in a heavily-doctored form); arguing that it also applied to the past. The district court judge then affirmed a past-tense interpretation, thus contradicting his own order.

Then, the Federal Circuit *repeated* Facebook's incorrect past-tense version of the interrogatory in its decision. Such conduct is a clear sign of collusion and influence peddling.

Also, *Fox Business* and Facebook knew about the Federal Circuit's decision on Leader's petition days before Leader was notified by mail. More proof of collusion—this time captured on national television.[17]

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[17] Shibani Joshi. Interview with Michael McKibben, Chairman & Founder of Leader Technologies, Inc. *Fox Business*, Jul. 16, 2012.

Important Constitutional Principles Threatened

1. **Intellectual Property Rights Of Small Inventors Being Destroyed.** Legitimate small business inventors are currently being harassed by self-confessed hackers like Facebook, and deep-pocketed collaborators who willfully infringe, then dare the patent holder to sue to protect his or her property rights. During the pendency of the lawsuit, the infringer often makes revenue from the infringement (Facebook has generated more than $10 billion in revenue from Leader's invention)—allowing those funds to be used to fight off the very inventor of the infringer's revenue engine. This twisted circumstance is immoral and obscene, and should not be propped up by the legal system. In this scenario the legal system just chews up endless attorney hours in "motion practice."

The original purpose of a patent was to reward the inventor, not lawyers and their deep-pocketed collaborators.

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2. **Judicial "Hyperactivity" Abuses Constitutional Due Process.** Pundits for a decade have been complaining about the "hyperactivity" of the Federal Circuit.[18] In other words, matters where the court has overstepped its "corrective" role and abused due process by fabricating new arguments and evidence and disposing of the matters without even a hearing on their novel arguments. The right to confront one's accuser is a cornerstone of American democracy. A Federal Circuit that creates new arguments and evidence in the *secrecy* of chambers and *without a hearing* is a court that has lost sight of the purpose of *constitutional due process*.

3. **Court Attempting To Undo Judicial Conflicts of Interest Rules.** Judicial disqualification in the face of conflicts of interest is a process *enshrined* in the democratic principles of fairness and equity. Citizens should not have to fight to obtain fair treatment from their judges. However, in *Leader v. Facebook* the court is attempting to sweep

[18] "Judicial Hyperactivity: The Federal Circuit's Discomfort with Its Appellate Role; Rooklidge, William C.; Weil, Matthew F." Univ. of California, Berkley, 15 *Berk. Tech. L.J.* 725 (2000).

under the carpet a *legion* of conflicts of interest. They have even prompted The Federal Circuit Bar Association to file a motion to support them in creating precedent that would *excuse* them from most any conflict of interest circumstance one can imagine.[19] This precedent would effectively neuter the work done by the Congress in 28 U.S.C. §455.

Unless stopped, the Federal Circuit, along with their cronies at the Federal Circuit Bar Association, Microsoft and Facebook will codify changes to our fundamental constitutional rights, including:

(a) the destruction of important American intellectual property rights,

(b) the abuse of due process rights, and

(c) the excusing of judges from most any judicial conflict of interest according to their own opinion rather than the "average person on the street" propriety test.[20]

American civil and property rights will quickly become those of a banana republic.

We can do better. We must do better.

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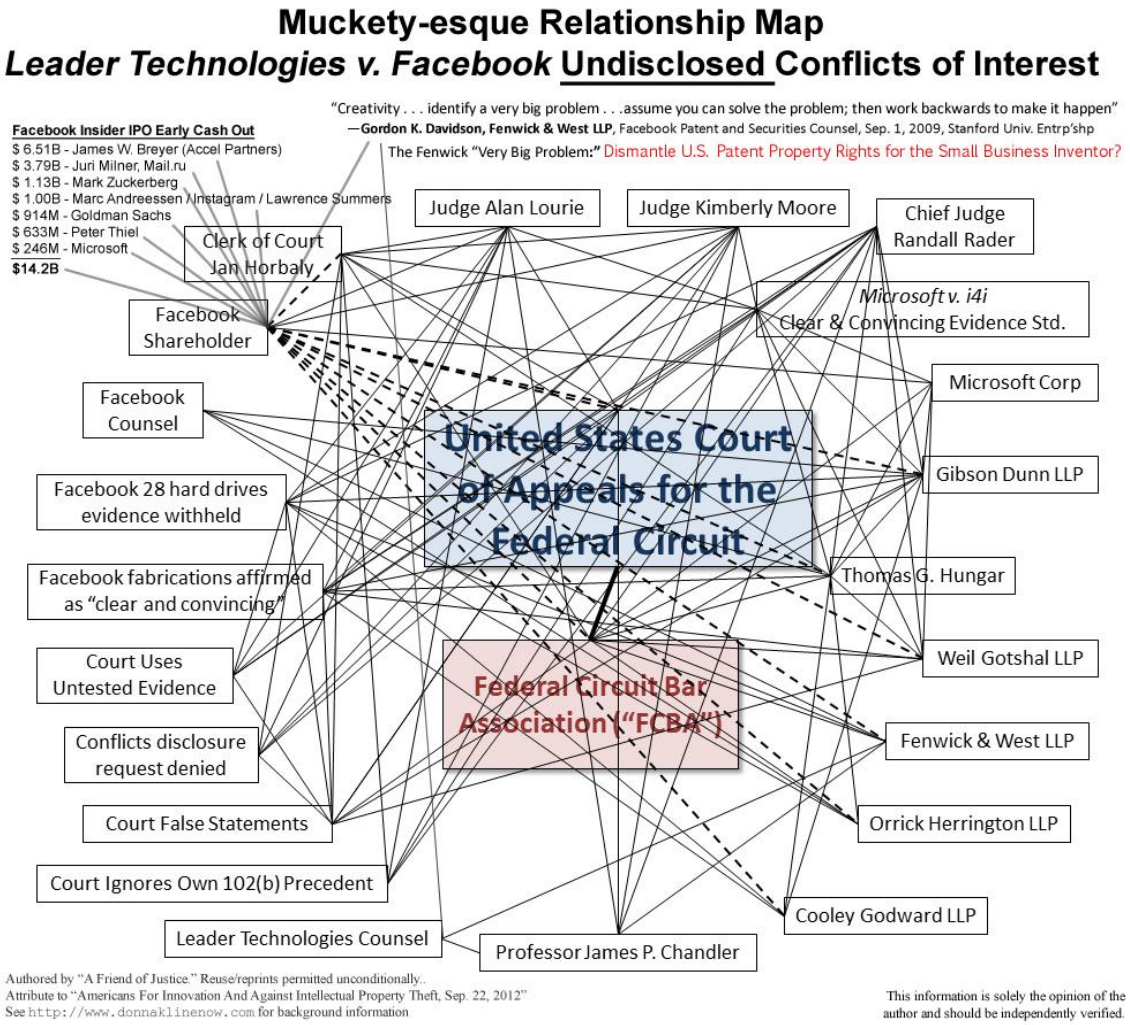
[19] *See* RESPONSE, fn. 12.

[20] *Potashnick v. Port City Const. Co.*, 609 F. 2d 1101 (5th Circuit 1980) at 1111 ("how his participation in a given case looks to the average person on the street").

Addendum

Former *Bloomberg TV* investigative reporter Donna Kline has been conducting an investigation into *Leader v. Facebook*. One of her readers prepared this conflicts of interest relationship map to illustrate the untoward nature of the conflicts in this case and why the Federal Circuit was duty-bound by statute to have avoided the "appearance of impropriety" pursuant to 28 U.S.C. §455.[21] Sadly, they are running for cover instead.



[21] *Source*: Donna Kline. "Cover-up In Process at the Federal Circuit." Fig. 2, *Donna Kline Now!* Sep. 17, 2012. Lasted accessed Sep. 28, 2012. <http://donnaklinenow.com/investigation/cover-up-in-process-at-the-federal-circuit>.