Social Media Advertising Risks

DIRECTOR AND EXECUTIVE LIABILITY FOR IMPROPER USES AND CONVEYANCES

Are you using pirated software? Can you correct the situation and limit board liability?

By Erik Lohmeier, Tim Olish and Al Stern ▶ Published by AMAX Consulting, LLC, April 5, 2013

Leader Technologies holds the valid U.S. patents and copyrights that comprise the foundation for social media. This means the technology running Facebook is actually **Leader's invention**. Despite this fact, Facebook has <u>not</u> paid for a license, and instead engages in a concerted effort to pretend that Leader's patents and copyrights do not exist.

Facebook has attempted to undermine this reality through several failed legal tactics. Facebook triggered two failed patent re-examinations at the Patent Office. Facebook issued a worldwide invitation for developers to submit patent prior art to support their position, but *none* of the hundreds of submissions survived scrutiny. Facebook sponsored two years of failed blogging in the anti-patent blogosphere. Facebook used expert witnesses from the University of

Pennsylvania and the University of Calgary in federal court, but failed to disprove Leader's patent claims, which were defended by Leader's experts from the University of California, Berkley and Carnegie Mellon.

As a result, Facebook was found guilty of "literally infringing" Leader Technologies' U.S. Pat. No. 7,139,761 on 11 of 11 counts.[1] Leader's patent portfolio has a total of 75 patent claims to date in this space in addition to two federal copyrights. These innovations cover social media based platforms, applications (a.k.a. apps) and telecommunications.

FRAUD AGAINST THE PATENT OFFICE

Disclosure of known related technologies is an important statutory requirement to preserve the integrity of the patenting process. Lack of such disclosure is called "inequitable conduct," or in more common terminology it is fraud against the Patent Office (since one is intentionally withholding information from the patent Examiner that might invalidate the application).

Fenwick & West LLP was Leader Technologies' attorney in 2002-2003. They actually had ***a copy of Leader's source code in their client file.*** Therefore, Fenwick clearly had intimate knowledge of Leader's inventions. They had an ethical duty to disclose that knowledge to the Patent Office when they represented Facebook and Mark Zuckerberg in later patent filings. They did not. Add to this the fact that Fenwick also represented James W. Breyer and KKR-Accel Partners LLP in 2002-2003 and since at least 1998. Breyer (Founder of Accel) was Facebook's first chairman of the board and primary financier. Fenwick was also lead counsel on Facebook's IPO.

In 2005, Facebook's own attorney Christopher P. King of Fenwick & West had *acknowledged* Leader's technology in patents that Facebook later purchased from Netscape founder Marc Andreessen (now also a Facebook director). But then, in 2008 that same attorney *failed to acknowledge* Leader's patents in patents filed for Mark Zuckerberg by Fenwick & West. Therefore, "inequitable conduct" looms large over Facebook's entire patent portfolio.

Facebook's legal conduct has *increased* your liability

"Facebook and Fenwick & West may believe their legal tactics in *Leader v. Facebook* served their purposes, but their conduct ***dramatically increased*** the uncertainty and liability risks for their users and advertisers."

None of these risks were disclosed to prospective investors in Facebook's S-1 disclosure before the IPO.[2]

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[1] Petition for Writ of Certiorari *Leader Technologies Inc., v. Facebook, Inc.*, No. 12-617 (US Supreme Court, Nov. 16, 2012).

[2] In 2012, Mr. King even changed his name to "Christopher-Charles King," but just on his Facebook disclosures at the Patent Office. This change would help avoid his real name appearing on search results. Mr. King appears to be the first male attorney in history to hyphenate his first name especially for a client.

LEGAL IMPLICATIONS FOR ADVERTISERS ON FACEBOOK

Facebook and Fenwick & West may believe their legal tactics in *Leader v. Facebook* served their purposes, but their conduct dramatically *increased* the uncertainty and liability risks for their users and advertisers. Facebook has added the possibility of their criminal liability to the mix, which further increases user and advertiser liability.

What are the legal implications and risks of these circumstances for social media users and advertisers? Plenty, including:

- Patent infringement
- Copyright infringement
- Communications violations
- It is unlikely that your current insurance policy covers these liabilities. This makes you and your firm personally liable for damages.

BACKGROUND

Leader Technologies, Inc. ("Leader") holds multiple patents and copyrights on the core technology which are Facebook's technical foundations. U.S. Pat. No. 7,139,761; U.S. Pat. No. 7,925,246; U.S. Pat. No. 8,195,714; U.S. Copy. No. TXu001114757; U.S. Copy. No. TX0005811257. By law, United States patents are presumed valid and their property rights are fully enforceable.[3]

On July 27, 2010, a verdict in *Leader Technologies, Inc. v. Facebook*, Inc., 08-cv-862-JJF-LPS (D.Del. 2008) occurred. The court ruled that Facebook is guilty of infringing 11 of 11 claims of Leader's U.S. Patent No. 7,139,761. Additionally, the court ruled that there is no prior art in spite of Facebook's assertions to the contrary.

The ruling also allowed Facebook to prevail on the unproven allegation that Leader had tried to sell the invention too soon—legally called "on-sale bar."

Subsequent appeal rulings have discredited *all* the Facebook evidence relied upon by the jury and the lower court for on-sale bar.

In addition, it was learned that two of the three appeals judges ruling on the case held stock in Facebook, but failed to disclose that and disqualify themselves. This is a bedrock violation of the Code of Conduct for U.S. Judges. These same judges also ignored compelling new proof that Facebook attorneys withheld 28 computer hard drives of evidence and Zuckerberg's Harvard emails from Leader Technologies during discovery. These hard drives could have provided evidence for not only infringement, but also outright copying, theft of trade secrets, not to mention fraud.

[3] 35 U.S.C. § 282(a)("A patent shall be presumed valid.").

Whatever the eventual outcome of the *Leader v. Facebook* case, Facebook leaves its users and advertisers exposed to their legal obligations to Leader Technologies as the holder of ***valid and enforceable*** social networking patents and copyrights.

QUESTION #1

Q: Does Facebook's dubious on-sale bar partial "win" in *Leader v. Facebook* absolve Facebook advertisers and users of liability for infringement, even temporarily?

A: No.

When patent claims are tested in federal court, those claims are fact specific. While a defendant in a new case has a right since *Blonder-Tongue*[4] to plead that the decisions in the Facebook case should be applied to their new claims, they must still make their argument based upon the new facts. Since each infringer has unique circumstances, decisions in a new case must be tried on the new facts. Facebook's partial "win" can only be applied if the circumstances are materially the same.

Besides, Leader was blocked by the Delaware U.S. District Court from introducing their source code and expert testimony, which could have easily proven Facebook's claim false. Therefore, any attempt to use the Facebook "win" as an argument will fail.

Further, since the Federal Circuit invalidated Facebook's only remaining evidence to support on-sale bar, other infringers have no evidence from *Leader v. Facebook* on which to rely. The new facts conjured up by the compromised Federal Circuit panel (after they had invalidated all of Facebook's appeal evidence) used facts that were never tested in the lower court. Therefore, that evidence is not valid as a matter of law— law which the Federal Circuit panel scandalously ignored.

Facebook's on-sale bar is a paper tiger defense because the Federal Circuit invalidated **all** of Facebook's evidence. If you tried to use it, you would also be forced to overcome incontrovertible proof from Leader's source code, judicial misconduct, and Zuckerberg's fraudulent concealing of 28 computer hard drives and Harvard emails. Graphic: Planet Happy.

In short, Facebook's "win" is a paper tiger. Notwithstanding the evident judicial misconduct and ignoring of material new evidence, the Facebook "win" has no legal foundation since none of the well-established legal tests for on-sale bar were used. One of those tests, namely *Group One vs. Hallmark Cards*, was written by Presiding Judge Alan D. Lourie himself.[5] Put simply, Judge Lourie ignored his ***own*** legal test for Facebook's evidence! (Judge Lourie also failed to disclose his stock holdings in Facebook.) Evidently, this was the best defense Facebook's highly-paid law firms could conjure up. This defense does not bode well for users and advertisers who use Facebook for commercial purposes.

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[4] *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 US 313 (Supreme Court 1971).
[5] *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041 (Fed.Cir.2001).

Q: Does Facebook's user agreement protect me and my firm from liability?

A: No.

QUESTION #2

George Orwell
ca. 1941-43

George Orwell wrote in his novel *1984* about "doublespeak" where the definitions of words are changed to fool unsuspecting people and maintain power and control over them. Facebook's user agreement is Orwellianism at its finest. It can mean whatever Facebook's attorneys want it to mean. The terms in Facebook-speak often mean the opposite of their dictionary meaning.

For example, Facebook makes no affirmative statements about their ownership of rights to use the technology upon which they rely. *See* Facebook Terms and Policies.[6] In fact, Facebook says the opposite. Facebook claims "Facebook has been developed from the ground up using **open source software."**[7] This is a misrepresentation. Even the Federal Circuit in *Leader v. Facebook* discredited every bit of Facebook's evidence they used to try and prove this assertion. Leader's technology was and is certainly NOT open source software. It was and is proprietary.

Here is the real message that Facebook should be telling its advertisers and users:

YOU ARE ON YOUR OWN

In their attempt to avoid charges of exposing their users and advertisers to joint infringement, Facebook threw their users and advertisers under the bus. They sought and received a jury decision of "no control or direction."[8] This occurred despite: (a) Leader's attorneys reading directly from the Facebook user policy that Facebook ***owned and controlled all user data***, (b) Facebook could cancel a subscription anytime, and (c) common knowledge that Facebook snoops user accounts, sells that data to third parties, censors opinions, creates fake accounts, creates "dark profiles" of users who are not subscribers (gathers data on them anyway – *total control*),[9] and censors "private" chats.

In fact, Facebook's *Leader v. Facebook* litigator Michael Rhodes even made an impassioned plea to the jury: "There's 500 million of you people out there. We can't control it." *Leader v. Facebook*, July 27, 2010, Tr. 11479:7-8. Facebook controls when it wants to, and throws up its hands at other times. They want to have it both ways when it suits their purposes. But both ways can't be true. And it is clear that Facebook is indeed in control. The image of boxing shadows comes to mind.

Consequently, the message to advertisers and users is, at least as far as infringement liability is concerned, that Facebook has refused to take responsibility for any underlying intellectual property infringement liability that you may have as a consequence of your use of the Facebook platform.

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[6] Facebook Terms and Policies. Accessed Mar. 10, 2013 <http://www.facebook.com/policies/?ref=pf>.
[7] Open Source. Accessed Mar. 19, 2013 <https://developers facebook.com/opensource/>.
[8] *Leader v. Facebook* Jury Verdict Form, July 28, 2010, Sec. 3.
[9] Daniel Bates. "Facebook's secret profiles." *Daily Mail Online*, Jun. 27, 2012 <http://www.dailymail.co.uk/sciencetech/article-2165543/Facebooks-Dark-Profiles-twisted-genius-Mark-Zuckerbergs-quest-total-domination.html>.

LIABILITY ASSESSMENT (any "Yes" means you are at risk):

A. PATENT & COPYRIGHT INFRINGEMENT LIABILITY

Advertisers certainly have risk. The question is how much?

Yes——Unknown——No Have you declined patent and copyright infringement insurance?

Yes——Unknown——No Are other social media platforms upon which you rely also infringing Leader's patents and copyrights?

Yes——Unknown——No Should this uncertainty prompt you to take remedial action to mitigate your risks regarding your Facebook advertising?

Yes——Unknown——No Do advertisers have direct and/or contributory liability, or both?

Yes——Unknown——No Can Facebook sustain further legal challenges from Leader Technologies regarding Leader's many other patent and copyright claims?

Yes——Unknown——No Will Facebook leave users and advertisers to fend for themselves?

B. CONTRIBUTORY INFRINGEMENT LIABILITY

The legal standards are fairly straightforward:

Yes——Unknown——No 1. **You knew and allowed it:** If you rely upon the conduct of another, knowing the conduct is infringing the rights of another, *you are liable*.

Yes——Unknown——No 2. **You knew and could have stopped it:** If you use the property of a third party when you are in a position to say yes or no to that use, *you are liable.*

Yes——Unknown——No 3. **The medium has no non-infringing uses:** The medium relies on core technology that has no non-infringing uses. In other words, you have only one road through the functionality. *You are liable*.

C. COMMUNICATIONS VIOLATIONS LIABILITY

Yes——Unknown——No **You used an unauthorized technology pipeline:** If you use an unauthorized pipeline to transmit your ad to the user, then *you are liable* (e.g., it would be like using a stolen car. You are not innocent just because you did not steal the car yourself. Your use of the car, knowing it was stolen, is the same as if you had stolen the car yourself).

CONCLUSION

Social media advertisers have relied upon technology that Facebook's best claim is "open source from the ground up." However, Facebook literally infringes one of Leader Technologies' patents.[10] Ironically, in contrast to Facebook's assertions of openness and open source, they are filing for and purchasing patents at a feverish pace. They have filed for or have purchased over 1,000 patents. Yet Facebook recently received a 20-year sanction by the Federal Trade Commission for "unfair and deceptive practices." Facebook's willingness to make false statements about their code being open source raises questions about their future **INTENTIONS**. Will they continue to expose their users and advertisers later on with additional intellectual property liability?

The risks for advertisers grow each day. Their revenue stream is based on pirated technology.

SOCIAL MEDIA LIABILITY COVERAGE

The proper way to protect Facebook's advertiser clients would be for them to purchase licenses from Leader Technologies for the use of the Facebook platform. But since Facebook has not stepped up to the plate on behalf of its advertisers, it falls upon those advertisers to fend for themselves. To resolve this issue for author Erik Lohmeier's company, Social Fifth Media, Mr. Lohmeier has entered into a license with Leader Technologies. The authors also asked Leader to consider some form of licensing so other firms in the industry could mitigate their evident risks.

Leader may be willing to explore licensing options to social media advertisers on an annual use basis. Advertisers could then simply eliminate any risk of Leader claims.

Experts estimate that Facebook may have invested up to $20 million in its *Leader v. Facebook* defense (not counting stock option awards to inside counsel Theodore W. Ullyot and others). Even so, the best they could achieve was an adverse decision that they literally infringed on all 11 of 11 claims, and the adverse decision that no prior art existed before Leader. This means that as a commercial Facebook user that **you are separately liable for your use of the infringing technology**.

The worst case scenario for Leader in *Leader v. Facebook* is that Leader's 11 claims would be invalidated forever and all times, which is preposterous. But even so, that patent has 24 other claims. In addition, in 2012 Leader was awarded a new patent for social apps. That patent has 35 claims. Leader also holds two very strong federal copyrights. Therefore, the prospect that an advertiser can overcome these intellectual properties is remote.

Leader appears ready to consider a tiered licensing structure that incents advertisers to license sooner than later. The scale could be graduated, based upon the timing of the license's effective date.

Advertisers interested in following Erik Lohmeier's lead can contact the authors for further discussion and consultation.

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[10] There is little reason to believe they are not infringing other related Leader innovations.

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CREDITS

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