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Leader Files Petition For Rehearing at the Federal Circuit in *Leader v. Facebook*

Petition Cites Numerous Contradictions with Supreme Court Decisions

Case turns on the definition of “is”

PART I IMPORTANT PATENT ISSUES LOOM

Columbus (June 7, 2011) – Attorneys for Leader Technologies filed a petition today for a rehearing of *Leader Tech v. Facebook*, Case No. 2011-1366 before the Federal Circuit.¹ Leader argues that the Court allowed Facebook to use conflicting interpretations of verb tense to confuse and mislead the jury, resulting in a verdict that is contrary to numerous decisions of the US Supreme court and would dramatically undermine well-settled patent law.

Facebook’s underlying platform is stolen property

Evidence has confirmed that Mark Zuckerberg not only possessed Leader’s white paper containing the specifications of Leader’s technology, but also illegally obtained a copy of Leader’s actual source code in late 2003.

Leader Chairman & Founder Michael McKibben said, “In my opinion, Facebook has resorted to trickery, lies, influence peddling and worse to try and win this lawsuit. They fear open competition with the real deal. Our Leader Phone® product was proven trustworthy during the largest natural disaster in the history of the United States. Facebook, on the other hand, was perfecting their theft of our technology while we had our heads down helping [Governor Kathleen Blanco](#) and the people of Louisiana to recover from [Hurricane Katrina](#). Facebook has a public record of deceiving the common man, as is evident in the recent IPO.”

Facebook wastes judicial resources

This case boils down to Facebook’s tampering with the definition of “is.” McKibben continued, “Facebook wastes tens of millions of dollars of judicial resources arguing that ‘is’ is a past tense verb. How ludicrous is that? Grade school children know this answer.”



Fig. 1 - [Federal Circuit](#) Judges in focus (left to right): [Kimberly Moore](#), [Alan Lourie](#) and [Evan Wallach](#). Photos: *Federal Circuit*.



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¹ United States Court of Appeals for the Federal Circuit in Washington, D.C; this case is an appeal of *Leader Technologies, Inc. v. Facebook, Inc.*, 08-cv-862-JJF-LPS (D.Del. 2008).

Zuckerberg testimony was blocked by the district court

McKibben said, “We were prevented by the court from putting Mark Zuckerberg on the stand to ask him directly, ‘Did you steal Leader’s source code?’”² He continued, “On the other hand, the court permitted Facebook to sandbag my testimony and present doctored evidence with impunity. Any attorney can cut-and-paste his way to jury deception if allowed.”

Tip line established

To process new information about Mark Zuckerberg’s possession of Leader’s white paper and source code, Leader Technologies has established an anonymous automated-operator tip line. Individuals can provide information by phone, or by sending an anonymous email to facebook-tipline@leader.com. Those with information about events in 2002-2004, jury tampering, judicial intimidation, sudden unexplained wealth, destruction of evidence, theft of trade secrets, inequitable conduct in patent applications, influence peddling, breach of attorney-client privilege, insider trading or related topics are asked to provide contact information, either directly or through an intermediary. A reward is being offered.

Report Facebook Tip Line

Leave a voicemail with the automated attendant at:

(419) 395-9150

Or, email:

facebook-tipline@leader.com

Is any patent safe from predators like Facebook?

McKibben said, “We engaged two world-renowned patent and security experts as our first two directors. One was Professor James P. Chandler,³ author of the Economic Espionage Act of 1996 and the Federal Trade Secrets Act and a member of President Clinton’s National Infrastructure Assurance Council, and another was Major General James E. Freeze (US Army, ret.),⁴ former chief of the US Army Security Agency. Both gentlemen have consulted to Congress and the Judiciary many times. We followed their advice meticulously. If our measures to protect our inventions are judged to be less than reasonable by the courts, then no patent is safe from predators like Facebook.” With new information emerging in this case, the specter of copyright infringement, misappropriation of trade secrets and other breaches of confidentiality privileges is now looming as well as the adjudged patent infringement.

² *Leader v. Facebook*, 08-cv-862 (D.Del.), Jul. 19, 2010, Trial Transcript (JUDGE LEONARD P. STARK: “With respect to the witnesses for Tuesday, let me give you my rulings. First, Mr. Zuckerberg, I am sustaining Facebook’s objections. I found that the designated testimony lacks relevance to issues in this case.”).

³ [Prof. James P. Chandler](#); See e.g. S.Hrg. 104-499 - Economic espionage: Hearings before the Select Committee on Intelligence, United States Senate, and the Subcommittee on Terrorism, Technology, and Government Information of the Committee on the Judiciary, United States Senate, 104th Congress, Second Session, Feb. 28 (1996).

⁴ [Maj. Gen. James E. Freeze \(US Army, ret.\)](#); See e.g., H.Hrg. 106-148 - Hearing on the WEAKNESSES IN CLASSIFIED INFORMATION SECURITY CONTROLS AT DOE’S NUCLEAR WEAPON LABORATORIES, 106th Congress (citing “The 1990 Freeze Report”).

District court blocked testimony that would have proved Facebook’s allegations groundless

McKibben said, “Professor Chandler authored our nondisclosure agreement that contained the no-reliance clause, but we were blocked by the district court from obtaining testimony from Professor Chandler and General Freeze. Also at trial, the court set aside Facebook’s eighteen-month-old false marking claim, making the way clear for them to press their new on-sale bar claim. This is akin to the court ordering us at the last minute to use cricket gear to play baseball. This was ‘abuse of judicial discretion’ in my book.”

Jurors

McKibben said, “When the jury was asked after trial what evidence was used to rule against Leader for on-sale bar, the outspoken jury foreman, a prison guard, said that they had none, but based their decision solely on disbelief of McKibben. The judge heard this jury admission, yet sustained the verdict anyway, based on what the definition of ‘is’ is.”

Inventor or Predator? Who is the Court going to affirm?

McKibben continued, “We spent more than \$10 million and 145,000 man-hours to invent our technologies. Our investors took the risk and deserve their payday. Patent rights are the only property rights actually mentioned in the U.S. Constitution.”⁵

“Why should inventors bother to invent, and investors invest, if our inventions are just going to be stolen by ‘venture capital’ with the blessing of the federal courts?” “By contrast, Mark Zuckerberg says he built the whole Facebook platform in “one to two weeks” while studying for finals. Anyone with expertise in software development would know that Zuckerberg could only have done that so quickly with Leader’s source code. The district court prevented us from telling this part of the story to the jury.”

PART II BACKGROUND—THE LEGAL ISSUES

The legal issue in its simplest terms means that if you say, for example, “The Coke in my glass is 45 degrees,” then a reasonable person knows you are speaking only about the present temperature of your Coke, not past temperatures of past Cokes. This case turns on having to argue such wasteful nonsense about the meaning of the present and past tenses of the verb “to be.”

⁵ U.S. Constitution Article 1, Section 8: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

The engine running Facebook is Leader's invention

On July 27, 2010 Leader won on 11 of 11 counts a verdict against Facebook of “literal infringement” of its U.S. Patent No. 7,139,761. In other words, ***Leader proved that the engine running Facebook is Leader's invention.*** Leader also proved that no prior art to the invention existed, even after Facebook had invited the world hacker community to help them find prior art.

Facebook flip-flopped their claims (allowed after discovery was closed) and the court prevented additional defense preparation

The sole win for Facebook was an obscure law called “on-sale bar,” which accused Leader of selling its invention too soon. This allegation was a direct contradiction of Facebook's entire pretrial claim that Leader had invented nothing and was “falsely marking” its products. At the last minute, after the close of discovery, Facebook flipped its allegations, and alleged the exact opposite—that Leader had an invention and tried to sell it too early.

Leader was denied the customary opportunity to prepare additional evidence and expert witness testimony to defend against this new on-sale bar claim, because the judge permitted no new discovery. The judge also let Facebook simply drop its false marking claim on the eve of trial. In short, Facebook was able to press its on-sale bar claim without procedural obstruction.

As a matter of law, Facebook's irreconcilable arguments cannot stand

Facebook presented two diametrically opposite theories to the jury.

On the one hand, Facebook's expert Dr. Saul Greenberg argued that the source code in Leader's provisional patent application submitted on Dec. 11, 2002 to the Patent Office **did not practice** the invention. This was the only Leader source code presented by Facebook at trial. The jury affirmed this position, and, based on Greenberg's argument, did not give Leader the benefit of the earlier priority date. Had this date been recognized, the on-sale bar claim would be moot.

On the other hand, Facebook also argued the opposite—that this same code **did practice** the invention before that time and was offered for sale. However, Facebook produced no additional source code to prove this claim.

Since the jury was convinced that the *only* hard source code evidence presented at trial by Facebook *did not practice the invention*, it follows that no invention could have been offered for sale prematurely, by Facebook's own evidence. In fact, Facebook's attorney Mark Weinstein had told the court six months earlier that without source code he couldn't prove anything about what code was behind Leader2Leader. See [Weinstein Letter, Jan. 27, 2010, Item 8](#).

Leader argues that the Federal Circuit misapprehended the irreconcilable contradiction of these two Facebook claims.

Misapprehension of the present tense “is” in Interrogatory No. 9

In addition, Leader argues that once the Court agreed that inventor testimony cannot be used as evidence of an opposite, then the Court was left with only **one remaining legal question**: “Can the use of the present tense verb “is” in [Interrogatory No. 9](#) be applied to the past?” The Court sloughed over this crucial legal question.

Leader points out that the Supreme Court is quite clear that verb tense is important in law and that present tense does not include past events.

In 2009 Facebook asked Leader in Interrogatory No. 9 to identify any “claim of the ‘761 Patent that [Leader] contends is practiced by any products(s) and/or service(s).” Leader answered “Leader2Leader® powered by Digital Leaderboard®.” Un-refuted trial testimony confirmed that this response referred to Leader’s products in 2009 and was not making a statement about the past versions of the products. Facebook never asked questions about Leader’s technology in 2002. Surprisingly, Judge Kimberly Moore made this point during the [hearing](#), but her perspective was absent in the opinion.

“The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.”

Bronston v. U.S., 409 US 352
(Supreme Court 1973)

READ: If Facebook wanted answers about Leader’s technology in the past, they had the burden to ask specifically. They did not. Leader cites numerous Supreme Court cases affirming the serious attention given to verb tense in law. As recently as June 2011, in *McNeill v. U.S.*, S.Ct. 2218, 2222 (2011), the Supreme Court unanimously affirmed that present tense language could not refer to the past.

TOP TEN REASONS why the Federal Circuit misperceived the evidence, and should have readily determined that on-sale bar was not relevant:

1. "No-reliance" clause in the Leader NDA blocked *all* discussion from being offers (the parties agreed that no discussions could become legally binding), as a matter of law (e.g. [Group One, Uniform Commercial Code, R.2nd Contracts §21](#));
2. Facebook's expert testimony that the source code in the provisional patent application did not practice the invention and was not ready for patenting (e.g. [Pfaff](#));
3. No evidence that the alleged offers for sale contained the invention (no element-by-element prior art analysis performed); Federal Circuit is not permitted to waive its own precedent cases (e.g., [Pfaff](#), [Helifix](#));
4. No evidence that the alleged offers "rise to the level of a commercial offer for sale" per contract law (e.g., [Group One](#));
5. No full examination of the Interrogatory No. 9 was permitted (highly prejudicial) (e.g., [Wigmore, Evid., 3rd](#) (doctrine of completeness));
6. No evidence that Leader did not practice reasonable measures to protect its secrecy (e.g., [Lange](#) (deeds test));
7. No evidence that the alleged uses were anything other than experimental at best and therefore exempt (e.g., [Allen, EZ Dock](#));
8. Universally accepted English usage rule that "is" is the third person singular present tense form of the verb "to be;" this usage recently re-affirmed by the U.S. Supreme Court; Interrogatory No. 9 did not refer to the past (e.g., [McNeil, Carr, Dole, Barrett, Gwaltney, Bronston](#));
9. The "clear and convincing evidence" standard must stand on solid ground, and the infringer must bear the "heavy burden" of proof beyond mere trickery (e.g., [Microsoft v. i4i, RCA Corp.](#)); and
10. The U.S. Patent and Trademark Office examined and properly awarded the patent to Leader and only “clear and convincing” evidence that Leader does not deserve the patent can reverse that (e.g., [35 U.S.C. §282, American Hoist](#)).

Facebook took this present tense answer to the present tense question in Interrogatory No. 9 and confused the jury with their absurd argument that it also applied to *all* versions of Leader2Leader in the past, and especially in 2002.

Can a difference over the definition of “is” meet the clear and convincing standard and permit Facebook to infringe with impunity?

In any event, Leader argues that under the clear and convincing standard of evidence, the Court is not permitted in law simply to waive the well-accepted on-sale bar tests of prior art, secrecy and contract completeness on the basis of this dubious interpretation of “is.”⁶

Facebook trial theater — this case turned on this prejudice

Here is where Facebook’s trial antics kicked into high gear. Facebook first placed the few pages of a heavily blanked-out version of Interrogatory No. 9 (**innuendo created**) in the back of a three-inch thick jury binder (See Fig. 4), then filled the binder with copies of Leader engineering screen design graphics from 2000. See doctored Interrogatory No. 9 shown to jury at [Doc. No. 627-23](#) and [Doc. No. 627-24](#). Each of these drawings had a “Leader2Leader” brand logo (none of these drawings carried the phrase “Leader2Leader® powered by Digital Leaderboard® because these new logo designs were not registered trademarks in 2000). These user interface graphical designs looked impressive, as if to imply that the underlying software was already developed, although it was not.

After calling Michael McKibben to the stand (Day 4), Facebook zeroed in on an attorney-altered version of Interrogatory No. 9 in the back of the binder (See Fig. 4). This tactic forced McKibben and the jurors to leaf past three inches of graphics designs to get to the interrogatory. To a lay juror, the implication would be that since the “graphics showed the Leader2Leader logo, the software must already be written, when in fact, years of development were ahead of Leader. **Innuendo perfected.** The jury fooled.

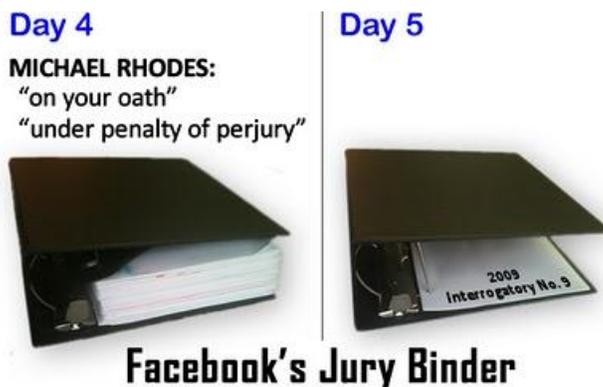


Fig. 3 - Facebook’s Jury Binder Sleight of Hand. [Tr. 10740:7-10749:3](#). Innuendo created, perfected, and locked-in. Graphic: <http://facebook-technology-origins.blogspot.com>.

⁶ Leader Attorney Paul J. Andre: “Based on my professional judgment, I also believe the panel decision is contrary to the following decisions of the Supreme Court of the United States or precedents of this Court:” *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238 (2011); *McNeill v. US*, 131 S.Ct. 2218 (2011); *Barrett v. United States*, 423 US 212 (1976); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 US 49 (1987); *Dole Food Co. v. Patrickson*, 538 US 468; *Carr v. US*, 130 S. Ct. 2229 (2010); *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339 (Fed. Cir. 2000); *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1048 (Fed. Cir. 2001); *U.S. v. Lange*, 312 F.3d 263 (2002).” Petition for Rehearing, Jun. 7, 2012 (Fed. Cir.).

McKibben was never asked about the three inches of engineering graphics, yet the jury was forced to continue carrying the heavy binders in and out of the courtroom during the day (with the ability to continue thumbing through the pages, silently and without the benefit of context or testimony).

The next morning (Day 5), in an episode that consumed nine pages of trial transcript (Tr. 10740:7-10749:3), Facebook's attorney Michael Rhodes claimed that he had "missed it" the day before and had not intended to include the three inches of Leader engineering graphics. Facebook asked that the graphics be removed from the jury binders. Leader objected vehemently to the obvious prejudice. Leader's attorney said no matter the explanation, it would look like Leader had asked for them to be removed; and their removal would prevent Leader from being able to cross-examine those documents.

After multiple transcript pages of wrangling, Judge Stark ordered the pages removed by his Clerks while the jury was at lunch, after which the three-inch binder contained nothing but the heavily-Facebook-attorney-altered Interrogatory No. 9. **Innuendo locked in** (See. Fig. 3). Hindsight shows that the case turned on this prejudice.

Facebook's deceptions were well-rehearsed

Participants in a pre-trial focus group session held in the state of Delaware have come forward to admit that they took part in the practice of this deceptive strategy over a two-day period a few months before trial. The group sat through a mock trial held by Facebook Cooley Godward LLP attorneys and were asked many questions about "believability." In other words, Facebook knew what they needed to do to create the appearance of evidence, and the way was cleared at trial for them to do so.

To make matters worse, the interrogatory itself had more than 60% of the text of Leader's answer blanked out, including all of Leader's objections (all text that would destroy the innuendo). On some pages even *parts* of sentences were blanked out. The judge overruled Leader's request to show the *whole* interrogatory and not just this attorney-altered version.

Michael McKibben confirmed that the Leader2Leader product in 2009 practiced the invention, but that the 2002 product did not; co-inventor Jeff Lamb also said the same. Surprisingly, even

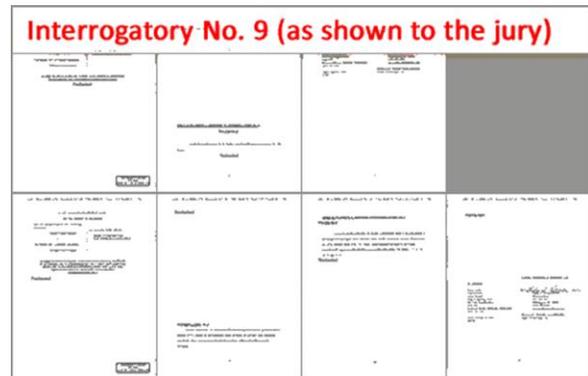


Fig. 4 - The version of Interrogatory No. 9 shown to the jury was more than 60% blanked out by Facebook's attorneys. Leader objected and asked that the entire contents be shown. The judge overruled Leader's objection and permitted Facebook to interrogate Michael McKibben based solely on the heavily-doctored "is" version. Leader's attorneys were not given an opportunity to cross-examine about these documents before they were removed at the beginning of Day. Graphic: <http://facebook-technology-origins.blogspot.com>.

Facebook's own expert witness testified that the provisional source code on Dec. 11, 2002 did not practice the invention.

Federal Circuit walked into Facebook's trap too?

Leader argues that by misperceiving these circumstances, the Federal Circuit judges walked into the same trap as the jury. They did not think through the *irreconcilable contradiction* of Facebook's two arguments, that: (1) the Leader product did not practice the invention in 2002 with respect to giving Leader the benefit of the earlier priority date, but (2) practiced the invention in 2002 for the purposes of on-sale bar.

In law, Facebook cannot have it both ways, since Facebook used the only Leader source code introduced into evidence by Facebook to prove that an invention did not yet exist on Dec. 11, 2002. The testimony from both McKibben and Lamb was that they waited until the invention had been perfected before filing the source code in the provisional patent. Since Facebook's expert argued successfully that that source code did not contain an invention, Facebook itself then proved that no invention could have been offered for sale, since it did not exist. Put another way, the jury chose to believe Greenberg instead of McKibben and Lamb; therefore, they concluded that the invention did not exist at that point, and therefore could not have been for sale. Remember: Had the jury believed McKibben and Lamb, on-sale bar would be moot.

The Court relied on untested evidence

Probably the most obvious evidence of the Appeals Court's misperception of the evidence is its reference to American Express as an offer for sale. This evidence and argument is a clear mistake of law, since American Express was not a subject at trial. Such introduction of new evidence requires a full briefing before it could be admitted. Without such a briefing, Leader has been prejudiced as a matter of law, since the Court used this evidence in favor of Facebook.

The Court waived its own evidence standards

Leader states that even if the Court were to permit a past tense interpretation of Interrogatory No. 9, the Court nonetheless inappropriately waived its duty to evaluate whether any of the alleged offers for sale Facebook put forward "rise to the level of a commercial offer for sale" according to the Courts own precedent cases such as *Group One*, *Allen Engineering*, *EZ Dock*, and *RCA Corp*. The Court did not perform any of these tests to evaluate on-sale bar as a matter of law. Instead, the Court selected a "substantial evidence" standard that (a) was not argued by Leader; and (b) should have applied the well-tested standards for evaluating that evidence, and not merely pronounced an uncritical blessing over whatever was in Facebook's box.

Leader's well-respected attorney Paul Andre is not a happy camper given the inattention to the legal standards

Leader's attorney, Paul Andre, managing partner of the Silicon Valley office of Kramer Levin, in this petition refers to "the current anti-patent environment." Further, Mr. Andre states: "Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:" (Mr. Andre's four points are summarized below.)

1. **Verb tense:** Should courts be permitted to ignore uses of verb tense?
2. **Brand names & prior art tests:** Should courts be permitted to waive hard evidence standards, and merely make assumptions about the underlying technologies behind a product brand name without performing the well-accepted prior art standards of proof?
3. **Contract law tests:** Should courts be permitted to waive well-settled contract law analysis standards for alleged offers for sale?
4. **Secrecy reasonable measures tests:** Should courts be permitted to waive hard analysis of secrecy agreements and practices regarding public disclosure allegations?

Leader's attorney Paul Andre is raising the red flag in this petition. Will these Federal Circuit justices fix these misperceptions, or continue to support the predatory infringer and self-confessed hacker?

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About Leader®

Leader Technologies Incorporated is a software development and marketing company specializing in social networking and unified communications. Its technologies are patented and patent pending. Its brands include Leader2Leader® for enterprise social networking, Leader Phone® Pro & Lite Web 2.0 audio conferencing, Leader Meeting™ for web conferencing, Leader Alert® for alerting services, Leader News® for alerting with news services, and Leader Voice Mail® for remote IP-based voice mail services. Leader provided the primary communications and collaboration system for the Governor of Louisiana in the state's Hurricane Katrina disaster response. Leader has also provided counterterrorism support and alerting technologies to the Departments of Homeland Security and Defense. In the wake of the Virginia Tech tragedy, Leader Alert® is now deployed with increasing frequency within secondary and higher education for school safety and security applications.

Leader® recently launched the Leader Phone® iPhone Audio Conferencing App which is available free on the Apple® iTunes App Store.

Leader filed a patent infringement lawsuit against Facebook on November 18, 2008 —*Leader Technologies Inc. v. Facebook Inc.*, 08-CV-862-JJF, U.S. District Court for the District of Delaware re. U.S. Patent No. 7,139,761 which is now on appeal *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.).

For additional information, go online to www.leader.com or contact John Needham at (614) 890-1986.

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