

# /// Market Musings – PBR

By Donna Kline — [www.donnaklinenow.com](http://www.donnaklinenow.com)



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

## LEADER V. FACEBOOK PRESS BACKGROUND

1. Brief Summary (PDF)
2. Backgrounder (PDF)

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## /// What happens on March 5th, 2012?

### ***When the Leader v. Facebook attorneys meet in D.C.***

Updated 2/20/2012 8:25 PM—On March 5th, 2012, lawyers for both Facebook and Leader Technologies, will present their oral arguments at the Federal District Court of Appeals in Washington D.C. (<http://www.ca9.uscourts.gov/>)

The briefs for each team have been submitted and are available to the public on the PACER website (<http://www.pacer.gov>). The case is listed as *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.).

For your convenience, I have included links to the Federal Circuit appeal briefs here:

1. [Leader's Opening Brief \(White Brief\)](#)
2. [Facebook's Response Brief \(Red Brief\)](#)
3. [Leader's Reply Brief \(Gray Brief\)](#)

### **(YOU'RE WELCOME 😊 )**

In addition to these written briefs, the trial record, government and judicial records, and all post-trial motions for the justices to review, each side will have precisely 15 minutes to present their oral arguments to a panel of three judges. Each judge will also have an opportunity to question the attorneys about their case.

The three judges are chosen from an existing pool of 12 judges (there are 17 altogether, but some appear to be honorary or part-time positions). According to the [Federal Judicial Center](#) the judges are usually assigned by random assignment. (<http://www.ca9.uscourts.gov/judges>)

This case has a number of possible outcomes. (1) The justices could remand the entire case back to the Delaware district court for a new trial. (2) The justices could remand only the “on sale bar” claim for retrial. (3) The justices could overturn the “on-sale bar” verdict against Leader for lack of “clear and convincing” evidence (actually no evidence that I can find in the record – the NDA “no-reliance” clause alone kills Facebook’s argument that offers were made [not to mention Facebook’s doctoring of Interrogatory No. 9]). In this case, the district court will

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conduct the second half of the trial for damages, willful infringement (**up to 3x \$\$\$ billions in damages**) and injunction (**shut down Facebook???!!!**). (4) The justices could leave the lower court verdicts unchanged, in which case Leader would presumably file an "en banc" appeal to ask all 12 justices to hear the appeal.

The U.S. Supreme Court is the next appeal step after that. Since the subject of Leader's appeal is the "clear and convincing" evidence standard, it is highly likely that the Supreme Court would hear this case if it came before them since they left their ruling in *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238 (Supreme Court 2011) ([here's the opinion](#)) unspecific about the "clear and convincing" evidence standard. This case seems a perfect candidate for the court to rule more specifically on what it means (since Facebook won the "on-sale bar" verdict with attorney "dark arts" games and no hard evidence.) See "[Facebook's burden never shifted to Leader](#)" which discusses the recent *Microsoft vs. i4i* decision.

Federal judges are nominated by the President and confirmed by the United States Senate as stated in the Constitution. The Constitution does not set forth any specific requirements for nomination. (<http://www.uscourts.gov/common/FAQs.aspx>)

According Attorney Mark Grossman of [Grossman Law Offices](#) (GLO), whose firm specializes in intellectual property litigation, not one of the sitting judges on the panel has served as a trial attorney for a patent case.

Here is a summary of the current judges. Justices at the Federal Circuit Court of Appeals as of Feb. 11, 2012 are (NAME, TITLE, APPOINTED BY, YEAR (<http://www.cafc.uscourts.gov/judges>):

Justices of the Federal Circuit Court of Appeals, Washington D.C.				
<a href="#">RANDALL R. RADER</a>	Chief Judge	Geo. H.W. Bush	1990	
<a href="#">DANIEL M. FRIEDMAN</a>	Circuit Judge	Jimmy Carter	1978	senior status
<a href="#">PAULINE NEWMAN</a>	Circuit Judge	Ronald Reagan	1984	
<a href="#">HALDANE ROBERT MAYER</a>	Circuit Judge	Ronald Reagan	1987	senior status
<a href="#">S. JAY PLAGER</a>	Circuit Judge	Geo. H. W. Bush	1989	
<a href="#">ALAN D. LOURIE</a>	Circuit Judge	Geo. H. W. Bush	1990	
<a href="#">RAYMOND C. CLEVINGER, III</a>	Circuit Judge	Geo. H. W. Bush	1990	senior status
<a href="#">ALVIN A. SCHALL</a>	Circuit Judge	Geo. H. W. Bush	1992	senior status
<a href="#">WILLIAM C.</a>	Circuit	William J.	1994	

## THE FACEBOOK

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### KC-CA on /// Big trouble ahead for Facebook IPO? Backgrounder

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<a href="#">BRYSON</a>	Judge	Clinton	1994	
<a href="#">ARTHUR J. GAJARSA</a>	Circuit Judge	William J. Clinton	1997	
<a href="#">RICHARD LINN</a>	Circuit Judge	William J. Clinton	1999	
<a href="#">TIMOTHY B. DYK</a>	Circuit Judge	William J. Clinton	2000	
<a href="#">SHARON PROST</a>	Circuit Judge	George W. Bush	2001	
<a href="#">KIMBERLY A. MOORE</a>	Circuit Judge	George W. Bush	2006	
<a href="#">KATHLEEN M. O'MALLEY</a>	Circuit Judge	Barack Obama	2011	
<a href="#">JIMMIE V. REYNA</a>	Circuit Judge	Barack Obama	2011	
<a href="#">EVAN J. WALLACH</a>	Circuit Judge	Barack Obama	2011	

In September of last year, President Barack Obama signed a patent reform law titled “America Invents Act” that the White House was touting as their “commitment to job creation.” When enacted, the bill will shift the U.S. patent system from a first-to-invent to a first-to-file nation thereby speeding up the patent application process.

“Right now, there are about 700,000 applications that haven’t even been opened yet. These are jobs and businesses of the future just waiting to be created,” Obama said at Thomas Jefferson High School for Science and Technology in Alexandria, Va., where the signing took place. “Somewhere in that stack of applications could be the next technological breakthrough.”

“This bill is an important step forward for the nation’s patent system and represents consensus among many key stakeholders and broad support across various industries,” the Coalition for Patent Fairness — which represents Apple, Cisco, Dell and Google — said in a statement. The America Invents Act “will harmonize America’s patent system and allow us to continue to compete in the international marketplace.”

But inventors and entrepreneurs are skeptical that the bill will ease the nation’s patent litigation crisis and it may hurt small startups. In the weeks prior to the bill’s passage, Web entrepreneurs had complained the bill gives high-tech corporations an advantage in securing patents because they can afford to hire teams of patent lawyers.”

(<http://www.politico.com/news/stories/0911/63697.html>)

It currently takes about three years or more from the file date to get a patent approved. Some inventors wait a decade. The U.S. Patent and Trademark Office is even said to be rejecting patents without cause to force the inventor to appeal—creating yet more expense and filing fee costs. Large infringers are also filing for multiple “reexaminations” of existing patents at the Patent Office to drive up the inventor’s cost still further. Such practices are not consistent with the political rhetoric.


## Leader also won Facebook's Patent Office re-examination challenges

Facebook filed for two re-examinations ("inter partes" and "ex-parte") in *Leader v. Facebook*. The Patent Office docket on Leader's re-examination victories can be accessed at <http://portal.uspto.gov/external/portal/pair>. If you put in the application number (95/001,261) and click "Image File Wrapper" you can download them all. In this reexamination Facebook continued to allege to the Patent Office (as they had done and lost at trial) that prior art existed that invalidated Leader's claims. Facebook lost that argument again.

For your convenience, **Leader's Re-examination win notice** from the Patent Office docket can be obtained by [clicking here](#).

**(YOU'RE WELCOME 😊 )**

**It will be interesting to see if the current administration, in the midst of an election process, will be able to support their claims that innovators will be rewarded for their efforts, and larger companies will not be the only party able to control the patent market.**



## Big trouble ahead for the Facebook IPO? *PBR / YouTube*

### **Fig. 1 – Big trouble ahead for the Facebook IPO?**

Donna Kline reports for *Pittsburgh Business Report* and is a former reporter for *Bloomberg*.

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Posted by [Donna Kline](#) on Friday, February 17, 2012, at 2:00 pm.

Filed under [Investigation](#).

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<http://www.financetwitter.com/2011/02/obama-dinner-steve-jobs-mark-zuckerberg-are-vvip.html>  
This was an interesting read. A lot of angry people out there!

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