

/// Market Impact in an Evolving World

By Donna Kline — www.DLKIndustries.com

Donna Kline Now!



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LEADER V. FACEBOOK PRESS BACKGROUND

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

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/// First thoughts after leaving courthouse March 5, 2012

Here is a quick run down of all that went on in Courtroom 402. *Sorry for the late posting. DreamHost, our hosting provider, had an outage a good portion of this afternoon.*

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to listen
to a



*United States Court of Appeals
for the Federal Circuit*

recording of today's hearing (35 min. 28 sec.).[1]

The day began with me approaching one of Facebook's attorneys, Jeffrey Norberg of Cooley Godward LLP, for a statement but he declined to comment. I then ran into CNBC reporter, Eamon Javers, who was there to cover the hearing as well. Please see his story [here](#) and let him/me know what you think.[2]

The proceedings began with Leader's appellate attorney, Daryl L. Joseffer of King & Spalding LLP, presenting first to begin his fifteen minutes of argument. When he began, he addressed three main points: **"interrogatory #9," "on sale bar" and "clear and convincing evidence."**[3] About six minutes in, he was asked by the panel to slow down so the judges could get a clear grasp on his position. Ultimately, there was a very engaging interchange between Mr. Joseffer and members of the three judge panel.

After 15 minutes and 33 seconds, it was time for Facebook's appellate attorney, Thomas Hungar of Gibson, Dunn & Crutcher LLP, to respond. From where I sat, it appeared he had to do quite a bit of back peddling during his allotted 15 minutes. At one point when he addressed the source code Leader provided at the first trial, he complained that the code Facebook received was not "pristine."[*] This prompted one judge to question, "What does that mean, 'pristine?' Did it have a coffee stain on it?" Mr. Hungar continued on to present different pieces of product information and press releases that "implied" that Leader was offering the software before the date in question. This too was challenged by the judges as they continued to ask for "clear and convincing evidence;" the high standard needed to prove "on sale bar." At 15 minutes and 5 seconds, his time was up. My take from this is the *federal* judges were not going to allow Facebook to gloss

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/// First thoughts after leaving

over any supposed “evidence.” Perhaps those tactics work in a lower court, but clearly not the Federal District Court of Appeals.

Per court procedure, Leader’s attorney, Mr. Joseffer was then allowed the remainder of his 15 minutes (3 min. 33 seconds which accounted for the extensive Q&A by the judges) to clarify the facts of Leader’s side of the case.

This all makes me wonder if the proceedings did not sit well with Facebook’s counsel, who was heard saying to fellow attorney, Jeffrey Norberg at the end of the hearing, “I’m sorry.” To which Mr. Norberg responded, “Don’t apologize.” Unless Mr. Hungar stepped on this foot, I don’t know what else he would be “sorry” about.

Please view this quick video for more of my take of the hearing. Much more to follow!

* NOTE: I used the word “precise” in this rustic little clip. The word is “pristine” as I cited above.

Footnotes:

[1] *Leader Tech v. Facebook*, Case No. 2011-1366. Hearing of the United States Court of Appeals for the Federal Circuit, Mar. 5, 2012. Sound Recording. Washington D.C. Federal Circuit website. MP3. Accessed Mar. 6, 2012. <<http://www.ca9.uscourts.gov/oral-argument-recordings/search/audio.html>>.

[2] Eamon Javers. “Facebook Stole Our Invention: Tech Company Founder.” *CNBC*, Mar. 5, 2012. Accessed Mar. 6, 2012. <<http://www.cnn.com/id/46631326>>.

[3] NOTE: I have copies of prior cases that discuss the legal requirements to prove “on sale bar,” “invalidity,” “clear and convincing evidence” and “burden of proof” which I will post tomorrow.

Posted by [Donna Kline](#) on Monday, March 5, 2012, at 6:06 pm.

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1. [Mark Grossman](#) | March 6, 2012 at 1:44 pm | [Permalink](#)



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