

Donna Kline Now!



/// 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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{ 2012 03 07 }

/// Facebook *ordered* pharma users to allow comments, yet will not return phone calls now

Two days after the oral arguments for *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.) a few more thoughts have bubbled to the surface. Most of which were triggered by several quotes in [this CNBC article](#).

The irony of the CNBC Facebook quote is that no other reporter I know of has gotten Facebook to respond to any inquiries. Contrast the current Facebook conduct with their directive to pharma users a year ago ([read here](#)) ordering them to open their fan pages to comments. You can see NBC4i (NBC-TV Columbus) Marcus Thorpe's attempts to contact Facebook ([view here](#)). This lack of comment contradicts the purpose of an S-1 public disclosure filing—which is to solicit public scrutiny.

I will try to be gentle here, as a professional courtesy. First of all, I am pleased that the author of the article linked above, [Eamon Javers](#), took time out of his day to come to the Federal Circuit hearing and explore this very important case. However, the resulting article, in my opinion, is misleading in its use of terminology and its comments.

Javers quoted an unnamed Facebook source who said:

"Monday's court room battle is much more professional, but no less intense. A Facebook spokesman called McKibben's hacking allegation "false and ridiculous" and noted that his son's involvement in the ongoing court battle between McKibben's company and Facebook."

1. "False and ridiculous" — Unless this statement was from Mark Zuckerberg, then this is hearsay at best. Zuckerberg claims to have created all of Facebook by himself from the time of the hacking in Oct. 2003 through Feb. 4, 2004. See [Zuckerberg April 25, 2006 Deposition. Tr. 42:17-20](#).
2. Zuckerberg claims to have had other sources for his ideas, but could not recall them. [Id., Tr. 36:21-22](#). Therefore, given the circumstances surrounding this case, the proximity of McKibben's son in the dorm next to Zuckerberg, the admitted hacking of email accounts, the statistically impossible similarities between Facebook's first platform, and the Leader

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white paper, the statement is hardly “ridiculous” and has not been proven untrue. See [“Facebook founder Mark Zuckerberg ‘hacked into emails of rivals and journalists’.”](#)

3. The issue of the Leader white paper was and still is at issue in this court battle. See [Leader v. Facebook Doc. No. 470, Joint Evidence List](#). See also [Zuckerberg Oct. 28, 2003 Online Hacking Diary](#) where he admits hacking into the Harvard House sites. More importantly, see [Leader v. Facebook Doc. No. 260, Feb. 24, 2010 Judge’s Conference Transcript, Tr. 3574:5-3580:7](#) discussing the hacking incident as one reason to allow Leader to depose Zuckerberg.
4. Note: There are Leader filings discussing the hacking and the white paper which have been shown to the judge and Facebook. The judge split the trial into two pieces; this evidence, while known to the court, has yet to be presented to a jury because of this splitting of the case between (a) infringement, and (b) damages, willful infringement (which means Facebook could be liable for 3 times the damages figure), and injunction. The Zuckerberg hacking evidence speaks to willful infringement (i.e., he knew he was copying Leader’s invention). Also keep in mind that while many articles speculate about damages in the millions of dollars, it could also rise into the *billions* of dollars. This is why this financial reporter is flabberghasted that Facebook did not specifically disclose this risk in their S-1 public disclosure filing. While we are on this subject, Zuckerberg’s lead funder and board member, Accel Partners, knew Leader’s technology was “patent pending” as early as 2005 ([see McKibben interview](#)).

Therefore, the statement of the Facebook spokesman is fallacious.

Now let’s address this part of the Facebook comment:

“... and no ed ha s no a ssue n he ongo ng cour ba e be ween McK bben s company and Facebook.”

Of course hacking was not the issue at hand in court Monday. That’s because Facebook has **already been found guilty** of infringing Leader’s patent in the original trial (*Leader Technologies, Inc. v. Facebook, Inc.*, 08-CV-862-LPS (D.Del. 2008)). *Regardless* of how Zuckerberg created the code, a jury has already found that Facebook’s code “literally infringes” Leader’s invention.

The purpose of Leader’s appeal is to reverse the “on sale bar” verdict that Facebook won in the original trial. *This* is the main point at hand. If Facebook *cannot disprove* the fact that their code “literally infringes” Leader’s invention, then they have to prove that somehow the code was in the public domain (as a product for sale) more than 12 months before the patent was filed. That’s their only defense.

The fact that there was no “clear and convincing” evidence in this regard presented to the court in the original trial is

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one of the reasons the Federal District Court of Appeals agreed to hear the case.

There *are* many facts that were not addressed during the *oral* arguments, that is because they were already addressed in the post-trial motions (each called a "Motion for Judgment as a Matter of Law" or "JMOL") and the appeal briefs filed before this Federal Circuit hearing. Here are the Federal Circuit appeal briefs:

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

Some reporters have presented this story with more facts than fluff. (See [CBS-TV-SF's Julie Watts](#) and [NBC-TV-CMH's Marcus Thorpe](#) news clips.) Click [here](#) read the most recent article I just found.

Why aren't all of the facts in this case revealed by the mainstream media? As I have suggested in a [previous post](#), it could be that the details of this case are difficult to grasp. Personally, it took me *many hours* of reading and studying to understand patent law, terminology and how it all relates to *Leader v. Facebook*. I have a genetics degree and an MBA, so I guess I am not considered a layperson. I'm an independent blogger. I don't have editors to please, a network name to protect, I don't have to write to the layman, and I don't have a deadline to meet. I don't need to include the Winklevoss twins in every post. 😊 I can throw as many facts at you as I want. If you're interested, you'll take the time to understand them (although I have done my best to break them down). And lastly, I am happy to assist reporters to understand the case. I direct them to this blog, I talk to them in person and on the phone. I have no desire to withhold my sources or access to factual links for competitive reasons. Unfortunately, not every reporter has these luxuries, which I understand. Hopefully, they keep coming to this blog for updated information. As this case moves toward a decision, there may be enough facts in the blogosphere to provide fuel for accurate reporting.

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Posted by [Donna K. ne](#) on Wednesday, March 7, 2012, at 11:58 am.

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