



Think

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September 9, 2019

The Honorable Chris Coons
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20515

RE: United States Patent and Trademark Office Patent Trial and Appeal Board

Dear Senator Coons:

After I reached a settlement agreement with Mark Zuckerberg and Facebook, Inc. in May 2009, I wanted to work on a project that I thought would be important, but that also would make use of faces in a novel way as my initial Facebook did at Harvard College in 2003. I developed a mobile payment system called FaceCash that was both less expensive than traditional credit card processing systems and more powerful, on account of its ability to capture and store line-item data. Before he passed away, I spoke with Apple, Inc. founder Steve Jobs about it and held several meetings with Apple executives about the possibility of my system being incorporated into the iPhone.

Since my experience with Mr. Zuckerberg had taught me in rather definitive terms not to trust that my intellectual property would be safe—something I recently testified before a sub-committee of British Parliament about,¹ though Congress has for some reason never taken an interest—I decided to file for a patent. I engaged a Stanford lecturer who also worked as a patent attorney to assist me, and after many years of correspondence with the United States Patent and Trademark Office (USPTO) patent examiner and roughly \$100,000 worth of legal fees, I was awarded United States Patent 8,396,808 B2: Method and system for transferring an electronic payment.

The quick summary of the patent is that it claims a mobile payment system where an image of the purchaser's face appears on the screen of the digital cash register (which is far more secure than a signature or an embedded chip), and where any purchaser can also be a seller for any given transaction if he or she so

1 [See http://parliamentlive.tv/Event/Index/d434d37f-c020-44b4-bda8-11bbad29ac58](http://parliamentlive.tv/Event/Index/d434d37f-c020-44b4-bda8-11bbad29ac58).

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chooses. No other system with these features existed when I filed for the patent, nor had any such system been fully described in the literature.

The FaceCash payment system was shut down due to circumstances beyond my control when financial lobbyists for Western Union and MoneyGram—two repeat AML offenders—made it spontaneously illegal to operate as a money transmitter in California. A constitutional lawsuit opposing the lobbyists' new law, the California Money Transmission Act of 2010, failed to yield any relief due to a four-year delay by the judge. To my knowledge, it represented the longest delay on a motion to dismiss in Northern District of California history. Fortunately, I still had my patent.

In 2014, my small software company, Think Computer Corporation, sued Square, Inc. for violating the patent's claims.² Square promptly took the patent to the Patent Trial and Appeal Board (PTAB), where it relied on expert testimony from a Carnegie Mellon University professor who was only too happy to receive an enormous retainer for his "expertise." In fact, under oath, this expert, who had last ventured into the payments space more than a decade prior, admitted that he had not written 90% of his declaration, despite previously claiming under penalty of perjury that he had written it all. As is routine before the PTAB (but not in federal court), Square's lawyers had actually written it, and they deliberately glossed over key distinctions that made all the difference in the case. On other matters, they simply lied, as lawyers so often do.

Due to Square's false expert testimony—as well as the fact that the chief PTAB Administrative Judge on the panel in my case happened to previously work for the same law firm that Square employed—the PTAB was persuaded that there was nothing new in my patent. It refused to entertain a motion for sanctions against the expert witness by ruling via e-mail, which was unappealable, since the PTAB was only just starting to codify its policies and procedures. And since the PTAB's legal standards are far lower than those in District Court, there was no precedent to call out the expert witness's obvious perjury or bad faith acts.

In short, my experience revealed the PTAB to be a sort of kangaroo court with noble aims but a laughable track record that routinely works against independent inventors and small companies and in favor of large technology firms, most with venture capital backing. I appealed the PTAB's outrageous decision in my case to the Court of Appeals for the Federal Circuit in 2016, whose confused judges rubber-stamped PTAB the ruling. Today, most of the claims in my patent have been invalidated as a result.

There are serious questions about the PTAB's constitutionality that should be examined, and furthermore, the USPTO's own statistics reveal that cases handled earlier in the PTAB's tenure as a Board were not given the same weight and consideration as cases later on due to "growing pains," which manifested in constant regulatory changes. Having started in 2014, my company's two PTAB proceedings involving Square (both related to the same patent) were among the earlier ones. When Square didn't get what it wanted the first time around, it just filed again—something that would never happen in federal court.

In contrast, my company's experience before the far more established USPTO Trademark Trial and Appeal Board (TTAB) has shown that it mostly works as it should, and adjudicates disputes in a fair and reasonable manner. Despite its similar name, the PTAB appeared to me to be entirely different.

2 [See https://www.plainsite.org/dockets/24u13j6tr/california-northern-district-court/think-computer-corporation-v-square-inc/.](https://www.plainsite.org/dockets/24u13j6tr/california-northern-district-court/think-computer-corporation-v-square-inc/)

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Overall, the experience of filing for a patent, narrowing its claims, taking an infringing party to court, and losing to an immensely corrupt and broken system, made me realize once again that there is no such thing as justice, that it's nearly impossible to be an inventor in the United States, and that even as of 2014, America was a deeply corrupt society where government was (and remains more than ever) subservient to monied interests. My formal comments to the USPTO on problems with the PTAB never yielded any response, directly or indirectly so far as I could tell. In all, obtaining a patent was a massive waste of time and money, but a huge victory for the financial lobbyists and thieves of various stripes who so often populate law firms and large technology companies.

Given the time limitations involved in getting this letter to you, I will simply enclose the aforementioned formal comments to the USPTO in lieu of a detailed set of recommendations. Should you have any further questions, I can be reached by e-mail at aarong@thinkcomputer.com.

The patent system is not the most broken part of American governance at the present time, but it is quite broken, and once it is finished impeaching Donald Trump and addressing global warming and gun control, among other urgent priorities, Congress should do everything it can to fix it.

Best regards,



Aaron Greenspan
President & CEO
Think Computer Corporation

Enclosures (2)

From: Aaron Greenspan [mailto:aarong@thinkcomputer.com]
Sent: Friday, September 12, 2014 3:44 PM
To: TrialsRFC2014
Subject: Comments Regarding PTAB

To Whom It May Concern:

The following comments represent the views of Think Computer Corporation.

Think Computer Corporation holds two U.S. patents, one of which is being challenged in a CBM petition before the PTAB. The company also operates PlainSite (<http://www.plainsite.org>), which correlates a large amount of USPTO data for public use. We therefore have experience with the PTAB from two different perspectives.

Even on the "wrong" end of the process, Think believes that the PTAB serves a vital purpose. From the perspective of a company involved with the petition process, it has been relatively smooth thus far, but only because we agreed to hire a lawyer. Filing a petition or responding to one should not require a lawyer, and the PTAB has provided little to no guidance for independent inventors or small businesses who may want to challenge a patent's validity, or respond to a challenge. Its fees are far too high, even for most technology startups (who should qualify for "micro" status, which it is not clear that the PTAB initiation fees recognize; the fees should be discounted if they are not already).

Rather than using extremely long PDF documents for petitions, the PTAB should build error-checking web-based forms that allow even novice users to construct their arguments about how various statutes and pieces of prior art invalidate (or do not invalidate) a given patent. This would streamline proceedings and make them more understandable to the average person.

Think's patent at issue in CBM proceedings is obviously financial in nature given that it concerns a mobile payment system, but the PTAB has ruled that some patents are "financial" when it is obvious that they are not, and merely mention some word related to finance only once in passing. The PTAB needs to distinguish between invalid patents that simply attempt to claim obvious concepts in banking or mathematics, and patents that actually move the financial industry forward into the twenty-first century. To the extent that PTAB judges working on CBM petitions have not yet been trained in the payments industry, they should be.

It also appears that a very common practice is for expensive law firms to write the opinions of their highly-paid "objective" expert witnesses, and then have those witnesses sign their names to the documents they supposedly "authored." The views of the witness—really, the law firm—can then be reiterated in the petition. This practice should be absolutely forbidden and sanctionable with hefty fines. Objective opinions should be objective.

From a bulk data perspective, the PTAB is a complete failure. No bulk data is available from the PTAB in XML format, as is the case for patent and trademark applications, assignments, and TTAB proceedings. This glaring omission needs to be remedied as soon as possible. Additionally, the PTAB docketing system is horrendous. The USPTO should issue an RFQ for a

new docketing system to replace it, and should make a point of using a different vendor than the one responsible for the current mess (PegaSystems).

Information about PTAB proceeding should also be integrated into the same database(s) where other patent information can be found. The most logical place for it to be right now would be PAIR, but since PAIR is a colossal disaster of its own, the USPTO should also issue an RFQ for a new public-facing integrated database system/portal to work alongside or on top of PE2E.

Feel free to contact me with any questions.

Aaron



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From: Aaron Greenspan [mailto:aarong@thinkcomputer.com]
Sent: Friday, September 25, 2015 7:47 PM
To: Trialrules2015
Subject: Comment on RIN0651-AD01

To Whom It May Concern:

The following constitutes the views of Think Computer Corporation with regard to proposed changes in PTAB rules as set out in the Federal Register, RIN0651-AD01.

Think Computer Corporation is a software company located in Mountain View, California. It has been assigned patent rights in several U.S. and international patents. One of those patents was recently, and currently remains, the subject of multiple CBM proceedings before the USPTO. I am Think's CEO, a software entrepreneur, and an independent inventor. Think spent a significant sum of money to secure its first patent, which is both novel and substantive—only to have it dragged before the PTAB by a much larger company.

I. Duty of Candor

Unfortunately, the CBM proceedings that Think was subjected to were totally unnecessary and inappropriately instituted due to Think's opponent's complete failure to adhere to its duty of candor before the PTAB, and the PTAB's willingness to overlook that important duty. Think's opponent deliberately A) paid an "expert" witness double the standard hourly rate (\$625 per hour, as opposed to about \$300 per hour for most PhD expert witnesses) to submit false testimony, which that individual did not even write himself, but rather, the law firm "90%" wrote for him, as he later testified; B) did not correct the record when that witness lied under oath during a deposition; C) tried to sanction Think for (i) questioning the veracity of the witness's testimony and (ii) threatening a civil lawsuit over its inaccuracy, which the PTAB has no authority to stop or regulate; D) repeatedly attempted to blame Think for its own procedural errors before the PTAB; and E) failed to notify the PTAB that it had based its multiple, harassing petitions on objectively false factual information, even when Think's opponent had and passed up every opportunity to respond to the merits of Think's argument that the information was actually false.

In fact, even when explicitly reminded of their duty of candor before the PTAB, attorneys for Think's opponent repeatedly ignored Think's written reminder and took no action to inform the PTAB that it had submitted false arguments on a number of occasions. Instead, their client did the opposite: filing for several patent applications topically related to the CBM proceedings in which they failed to disclose their own prior art/exhibits from their CBM proceedings as potential prior art in their own patent applications.

Think was precluded from filing a motion to exclude evidence related to its opponent's fake expert witness because while the first petition and initial declaration was submitted in July, 2014, the witness was not deposed until the schedule called for it in March, 2015—yet 37 CFR § 42.64(b)(1) stipulates that objections to evidence (e.g. the witness's initial declaration) must be

submitted within 5-10 days for a motion to exclude to be valid. Think could not have possibly known that the declaration was faulty until the witness admitted it under oath several months later, so it was impossible for Think to file the requisite objection. 37 CFR § 42.64 must be amended accordingly.

When Think finally attempted to file a motion for sanctions against its opponent before the PTAB, Think's counsel was concerned that the judges in question would be annoyed by the request—which proved accurate. The PTAB refused to even entertain the requisite conference call necessary to gain authorization to file a motion, effectively mooting the other side's duty of candor. Frankly, the procedural hoop-jumping necessary to hold often-corrupt attorneys to account is outrageous and should be drastically revised. If at any time an attorney is not adhering to the rules, permission from the Board should not be required to point that out and have it addressed immediately.

II. Expert Witnesses

In particular, the *Pevarello v. Lan*, Patent Interference 105,394 MPT, slip op. at 20-22 (BPAI Jan. 12, 2007) (Paper 85) precedent suggesting that expert witnesses are not required to actually draft the majority of (or any of) their own declarations is morally bankrupt and defeats the purpose of having an expert witness or duty of candor in the first place. It should be overturned and clarified that expert witnesses must write their own declarations, even if attorneys help edit for clarity and typographical accuracy. This would be far more consistent with judicial rulings from numerous district courts across the country. See *Numatics, Inc. v. Balluff, Inc.*, 2013-11049, 2014 WL 7211167, at *4-5 (E.D. Mich. Dec. 16, 2014); *James T. Scatuorchio Racing Stable, LLC, et al v. Walmac Stud Management LLC, et al*, Case No. 5:11-cv-00374-DCR (E.D. Kentucky April 30, 2014); *Solaia Technology LLC v. ArvinMeritor, Inc., et al*, Case No. 1:02-cv-04704 at *12 (N.D. Ill. March 27, 2005); *Manning v. Crockett*, 1999 WL 342715 (N.D. Ill. May 18, 1999); *Reliance Ins. Co. v. Keybank U.S.A., N.A.*, Case No. 1:01-cv-62 (N.D. Ohio March 3, 2006).

Extraordinarily high hourly rates outside an average range should also be considered cause for the PTAB to be suspicious of the veracity of an expert's testimony.

III. Motions to Amend

Think's opponents lies only became apparent—because Think had been relying on those lies throughout the proceeding—toward the end of the process during the motion to amend stage. Think managed to properly put its argument, that the entire proceeding was moot and never should have been instantiated, in the reply to the motion to amend, but at oral argument the question arose as to whether it was proper to address such an issue so late in the process. The answer is clearly yes: if at **any time** during a PTAB proceeding it becomes clear that the entire proceeding was based on a bogus representation from either side, it should be considered entirely proper to make an argument that the proceeding should end, even if that involves no amendment at all.

The standard for what constitutes an acceptable definition of a key term in a motion to amend is also unclear. Think provided what it thought to be an acceptable definition of a term, only to be told at oral argument that a comprehensive, enumerated list of examples of that term (which does not appear in any dictionary) was potentially not clear enough. If the PTAB requires a non-example-based definition for unclear terms, it should state as much up front.

During the motion to amend phase of oral argument, Think was accused by the presiding administrative judge of having made a supposed error that it did not actually make, namely, requesting cancellation of a non-instituted dependent claim solely for the purpose of renumbering it only in the event that its instituted parent independent claim was cancelled. Aside from wasting time and appearing quite belligerent, the administrative judge revealed his own inexperience since this issue has surely arisen before the PTAB numerous times. The judge also questioned aspects of the patent that the PTAB had absolutely no jurisdiction to look into, such as whether the patent reduced costs. Almost all technologies reduce costs and can be viewed through that lens; the question is totally irrelevant to a § 103 CBM proceeding. None of the other judges spoke up, making the panel format seem anachronistic and/or ineffective. PTAB administrative judges clearly need better training.

IV. Oral Argument

The rule prohibiting new material at oral argument is overly restrictive and defeats the purpose of having oral argument at all. Think was hoping to submit a clarifying diagram on a confusing point, but counsel decided not to use it because it might have been considered "new material," having not previously appeared in briefs. Sure enough, the administrative judge was deeply confused on the point at issue and a diagram would have been incredibly helpful.

I am the sole inventor of the patent that was litigated before the PTAB, and I am the 100% owner of the corporation that it was assigned to, and I was a fellow at Stanford Law School, yet I was not permitted to personally defend my patent in any way at oral argument. (The USPTO TTAB has no such restriction for pro se trademark holders, who may represent themselves before the TTAB even if they represent their own corporations.) My expertise in the field of the patent was and is considerably greater by any objective standard than any of the attorneys who were in the room. It is outrageous that inventors can toil away (and wait) for years trying to get a patent, often at great expense, only to have a crowd of self-serving attorneys rip it apart based on their complete lack of understanding of a field.

V. Other

The PTAB's PRPS docketing system remains atrocious, difficult to use, and may actually violate several laws and/or regulations. Upon attempting to sign up **as the Patent Owner**, I was informed by PTAB staff that I could not (as CEO of Think Computer Corporation, **which is actually the patent owner**) because that would remove my attorneys' ability to view Think's proceedings. This is totally unacceptable. Given all the talk surrounding ultimate beneficial owners of patents, those entities should be able to sign onto the PTAB's system to track their cases!

All expenses regarding PRPS and its vendor, Pega Systems, Inc., have not been made public to my knowledge. They should be.

Bulk data from PRPS remains unacceptably spotty. The Reed Tech USPTO bulk download site only contains a fraction of the information on the system and is not updated regularly, and since the system is so poor, it is extremely difficult to analyze—and since the PTAB is so new, analysis of its actions is especially important.

Vi. Conclusion

Some patents clearly deserve to be cancelled as they are meritless, but it is a grievous error to cancel patents that actually contribute something innovative to the world, and it appears that is not a type of error the PTAB takes seriously.

Aaron



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