

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US INVENTOR, INC.,
3429 18th Street
Plano, TX 75074

Plaintiff,

vs.

UNITED STATES PATENT AND
TRADEMARK OFFICE,
600 Dulany Street
Alexandria, VA 22314

Defendant.

Civil Action No. 1:21-cv-2894

Hon. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for injunctive, declaratory, and other appropriate relief. Plaintiff US Inventor, Inc. (“US Inventor”) challenges the failure of the United States Patent and Trademark Office (“USPTO”) to respond to requests for copies of records pursuant to FOIA request F-21-00186 seeking documents regarding delegations of authority within the USPTO, related documents and notifications.

2. This case seeks declaratory relief that the USPTO is in violation of the FOIA, specifically, 5 U.S.C. § 552(a)(3)(A), for failing to provide US Inventor all responsive records, 5 U.S.C. § 552(a)(6)(A), for failing to provide US Inventor with a determination on its request within 20 business days, and 5 U.S.C. § 552(a)(4)(A), for failing to comply with the FOIA deadlines, as well as injunctive relief ordering Defendant to process and release to US Inventor immediately the requested records in their entirety.

Jurisdiction and Venue

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). The Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201(a), and 2202. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B).

4. Venue lies in the United States District for the District of Columbia under 5 U.S.C. § 552(a)(4)(B).

5. The USPTO has FOIA regulations mandating its requirements to respond to FOIA requests. 37 C.F.R. § 102 *et. seq.*

6. By statute, 5 U.S.C. § 552(a)(6)(C)(i), a requester satisfies constructive exhaustion if the agency fails to meet any of the deadlines of 5 U.S.C. § 552(a)(6). The USPTO failed to meet the FOIA deadlines, and thus US Inventor benefits from constructive exhaustion.

Parties

7. Plaintiff US Inventor is a non-profit, inventor-led, and inventor-funded organization organized under section 501(c)(4) of the Internal Revenue Code. US Inventor represents more than 10,000 independent inventors and the small businesses they founded, own, and operate. Its mission is to educate inventors, lawmakers, agencies, and courts on matters affecting their inventor members and to participate in shaping and reforming those policies. US Inventor is committed to protecting the rights of citizen inventors and proponents of the patent system in order to “promote the Progress of Science and the useful Arts[,]” as described in Article 1 of the Constitution. U.S. Const., art. 1, § 8, cl. 8. As a part of this mission, US Inventor works to inform its membership and the public about the official activities, rulemaking, and procedures of the USPTO, as well as public perception of the USPTO. As a part of this mission, US Inventor works to provide information about the activities of government officials at the USPTO, and to ensure the integrity of the USPTO. US Inventor

regularly makes records obtained from the USPTO or their analysis publically available on US Inventor's website at <https://usinventor.org/ptab-foia-documents> for use by journalists, scholars, students, and interested members of the public at no charge, and uses the information in reports, newsletters (www.usinventor.org/subscribe), and other public disseminations to advance US Inventor's educational mission.

8. Defendant USPTO is an agency within the meaning of 5 U.S.C. §§ 552(f)(1) and 701(b)(1). Defendant has possession and control of the requested records and is responsible for fulfilling Plaintiff's FOIA request.

Statutory and Regulatory Background

9. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

10. 5 U.S.C. § 552(a)(6)(A) gives an agency twenty (20) business days after the receipt of the request to either produce the requested documents, or provide a "determination" letter that includes all of the following components: the determination and the reasons therefor, the right of the requester to seek assistance from the FOIA Public Liaison of the agency, if the determination is adverse, the right of the requester to appeal the agency's determination to the agency head, if the determination is adverse, the right of the requester to seek dispute resolution services from the PTO's FOIA Public Liaison or Office of Government Information Services, a date for production which may be extended no more than ten additional days, with an explanation of "unusual circumstances" specified by 5 U.S.C. § 552(a)(6)(B) (all of which relate to documents not within the control of a single custodian), an explanation of "exceptional circumstances," or a further explanation and invitation to reframe the request as specified by 5 U.S.C. § 552(a)(6)(B)(ii). Any adverse action "shall set forth the names and titles or positions of each person responsible for the denial of such request." 5 U.S.C. § 552(a)(6)(C)(i).

11. No statute authorizes the agency to extend beyond the 20 days of 5 U.S.C. § 552(a)(6)(A) unless accompanied by a showing of “unusual circumstances” or “exceptional circumstances.”

12. An agency’s failure to make this determination within 20 business days is subject to judicial review without exhausting administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

Factual Background - FOIA Request No. F-21-00186

13. US Inventor’s FOIA request of August 3, 2021 included requests for records of delegation of authority to perform the functions and duties of the PTO Director to Andrew Hirshfeld, and other records of delegation for specified Administrative Patent Judges to decide on institution and adjudicate on the merits in certain identified proceedings. (Exhibit A).

14. The USPTO acknowledged receipt of US Inventor’s request on August 5, 2021, designating it as “FOIA Request No. F-21-00186,” and stated that it “expects to send its response to this request no later than Wednesday, September 01, 2021. You will be notified if it appears that additional time is required.” (Exhibit B).

15. No response came as the USPTO promised on September 1, 2012. Instead, on September 22, 2021, the USPTO sent a letter stating that the “request was perfected on August 4, 2021. The twenty-day statutory response period for the Agency’s initial determination is September 22, 2021,” and that “the response time limit is hereby extended ten additional working days to October 6, 2021.” (Exhibit C).

16. US Inventor took issue with the USPTO’s alleged compliance with the FOIA deadlines and on September 23, 2021 US Inventor sent a response stating that the USPTO letter of September 22, 2021 did not correctly count business days. It asked the USPTO to “identify (by listing) the exact dates which you count as ‘20 statutory business days’ from August 4 to September 22 and identify (by listing) all dates which you do not count as statutory business days.” (Exhibit D).

17. On September 24, 2021, the USPTO replied, stating: “The agency's initial determination date should have been September 1, 2021 and a 10-day letter should have gone out on September 15. I do apologize for the computer glitch and the delay. We will do our best to get you the responsive documents requested as swiftly as possible.” (Exhibit E).

18. US Inventor’s FOIA Request F-21-00186 fully complied with USPTO FOIA Regulations and the records requested were described in enough detail to enable USPTO personnel to locate them with a reasonable amount of effort.

19. Neither the records sought, nor the reasons for their non-disclosure have ever been provided by the USPTO in response to the F-21-00186 FOIA Request. At a minimum, pursuant to 5 U.S.C. § 552(a)(6)(C)(i), US Inventor has effectively exhausted all applicable administrative remedies with respect to its requests.

PLAINTIFF’S CLAIM FOR RELIEF

COUNT I

Failure to Produce Documents or Determination Within Statutory Time Limit

20. Plaintiff repeats, re-alleges, and incorporates paragraphs 1-19.

21. Plaintiff properly asked for records within the custody and control of the USPTO, and complied with USPTO regulations for making such request and properly sought a waiver of fees as a part of its public interest and educational mission with respect to the operations of the USPTO.

22. Defendant USPTO wrongfully withheld agency records requested by Plaintiff, and failed to comply with the statutory time limits including for making the determination required by 5 U.S.C. § 552(a)(6)(A)(i).

23. Plaintiff US Inventor is therefore entitled to injunctive and declaratory relief with respect to the immediate processing and disclosure of the records requested in its FOIA request.

Requested Relief

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Order Defendant USPTO to immediately and fully process US Inventor's FOIA request F-21-00186 and to disclose all non-exempt documents immediately to Plaintiff;
- (2) Issue a declaration that Plaintiff is entitled to immediate processing and disclosure of the requested records;
- (3) Provide for expeditious proceedings in this action;
- (4) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- (5) Award Plaintiff its costs and reasonable attorneys' fees in this action; and
- (6) Grant such other relief as the Court may deem just and proper.

Dated: November 2, 2021

Respectfully submitted,

/s/Brian Medich

Brian Medich (DC Bar Id. 1671486)
bmedich@dbllawyers.com
Dunlap Bennett & Ludwig PLLC
1200 G St. NW
Suite 800
Washington, D.C. 20005
T: 571-919-6734

*Attorney for Plaintiff
US Inventor, Inc.*

EXHIBIT A



August 3, 2021

VIA ELECTRONIC MAIL FOIARequests@uspto.gov; efoia@uspto.gov

USPTO FOIA Officer
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Re: US Inventor Freedom of Information Act Request on Delegation of Authority.

Dear FOIA Officer:

US Inventor, a not-for-profit § 501(c)(4) corporation, hereby requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and 37 C.F.R. § 102.4, the following records from the U.S. Patent & Trademark Office (PTO) regarding delegation of authority to various PTO employees:

1. Please provide copies of all communications, documents, orders, or letters delegating to Mr. Andrew Hirshfeld the performance of the functions and duties of the Director effective after January 20, 2021, including the identification of the PTO officer who made the delegation, and any documents evidencing Mr. Hirshfeld's acceptance of that delegated authority.
2. Please provide copies of the notifications that the PTO provided under 5 U.S.C. § 3349(a)(1) to the Comptroller General of the United States and to each House of Congress of the vacancy that occurred in January, 2021, in the office(s) whose functions and duties were delegated to Mr. Andrew Hirshfeld.
3. Please provide copies of all communications, documents, orders, or letters delegating to the Administrative Patent Judges (APJs) listed in Attachment 1 the Director's authority under 35 U.S.C. §§ 314, 324 to institute the respective trial proceedings identified in Attachment 1, and any documents evidencing each of these APJ's acceptance of that delegated authority. The records under this request also include but are not limited to records of delegation and sub-delegation of other persons in the chain of delegation from the Director to the APJs, including any documents evidencing each of these persons' acceptances of such delegated authority.
4. Please provide copies of all communications, documents, orders, or letters designating under 35 U.S.C. 6(c) the Administrative Patent Judges (APJs) listed in Attachment 1 to perform the duty of adjudication on the merits in the respective proceedings identified in Attachment 1, and any documents evidencing each of these APJ's acceptance of that duty. The records under this request also include but are not limited to records of delegation and sub-delegation



of other persons in the chain of designation to the APJs, including any documents evidencing each of these persons' acceptances of such delegated authority.

Please provide the requested material in its native electronic form such as Excel, MS Word or PDF documents, preferably by email to rlinventor@protonmail.com.

Definitions

"Director" means the Under Secretary of Commerce for Intellectual Property and Director of the PTO.

"Records" are defined at 44 U.S.C. § 3301, and per 5 U.S.C. § 552(f)(2), include "any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format." The terms "and" and "or" shall be construed both conjunctively and disjunctively.

Public Interest Fee Waiver

Because records requested herein were identified explicitly and may be readily located without undue search burden, US Inventor anticipates that under 37 C.F.R. § 102.11(d)(4), no fees should be assessed. However, in the event that the PTO intends to assess fees for this request, US Inventor requests a public interest fee waiver because the requested records directly concern and bear upon the government's operations and activities, will be highly informative to the general public regarding the PTO's policies, including on matters directly affecting thousands of patent and trademark holders and applicants.

Upon receipt, we will make these records or their analysis publically available on our website at <https://usinventor.org/ptab-foia-documents> for use by journalists, scholars, students, and interested members of the public at no charge, and use the information in reports, newsletters (www.usinventor.org/subscribe), and other public disseminations to advance our educational mission. Therefore, disclosure of the requested information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester,"¹ a 501(c)(4) corporation.

¹ 5 U.S.C. § 552(a)(4)(A)(iii); 37 C.F.R. § 102.11(k)(1).



U.S. Inventor prefers to receive the documents by email, at rlinventor@protonmail.com or some other electronic form that preserves all document integrity.

We may be reached at the address below, if you have any questions.

Respectfully submitted,

A handwritten signature in blue ink, which appears to read "Randy Landreneau", is written over a faint, light blue circular watermark.

US INVENTOR

Randy Landreneau

President

P.O. Box 2273,

Clearwater, FL 33757

rlinventor@protonmail.com

727-744-3748



ATTACHMENT 1

***SG Gaming, Inc. v. New Vision Gaming & Dvlpmt. Inc.*; CBM2018-00005, CBM2018-00006**

Frances L. Ippolito
Kevin W. Cherry
Christopher G. Paulraj

***Unified Patents, Inc. v. Mobility Workx, LLC*; IPR2018-01150**

Kara L. Szpondowski
Melissa A. Haapala
William M. Fink

***Unified Patents, LLC, v. B# On Demand, LLC*; IPR2020-00995**

Joni Y. Chang
Georgianna W. Braden
Arthur M. Peslak

***Amazon com, Inc. v CustomPlay, LLC*; IPR2018-01496**

J. John Lee
Jessica C. Kaiser
John R. Kenny

***Unified Patents, LLC v. SecureWave Storage Solutions, Inc.*; IPR2019-00501, IPR2019-00932**

Joni Y. Chang
Annette R. Reimers
Garth D. Baer
Kamran Jivani

***Canon USA, Inc. v. Cellspin Soft, Inc.*; IPR2019-00127**

Gregg I. Anderson
Daniel J. Galligan
Stacy B. Margolies

EXHIBIT B



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

Thursday, August 05, 2021

VIA EMAIL

Mr. Randy Landreneau
U.S. Inventor
17440 Dallas Parkway
Dallas, TX 75287

Dear Mr. Landreneau:

Your Freedom of Information Act (FOIA) and/or Privacy Act request was received by the United States Patent and Trademark Office (USPTO) FOIA Office on **Wednesday, August 04, 2021**.

Your request has been docketed as “**FOIA Request No. F-21-00186.**” Any further inquiries regarding your request should include that number. A copy of your request is attached for reference.

In the event your original request was incorrectly addressed, please address all inquiries regarding your request to:

FREEDOM OF INFORMATION ACT (FOIA) OFFICER
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Or via email to foiarequests@uspto.gov

The Agency expects to send its response to this request no later than Wednesday, September 01, 2021. You will be notified if it appears that additional time is required. You may check on the status of your request at the Agency’s website: www.uspto.gov, click on “Freedom of Information Act” at the bottom of the page, and then “Check FOIA Request Status.” You will need your request number, shown above, to check on the status of your request.

Sincerely,

USPTO FOIA Office

Enclosure

EXHIBIT C



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

September 22, 2021

VIA E-MAIL

Mr. Randy Landreneau
U.S. Inventor
17440 Dallas Parkway
Dallas, TX 75287
rlinventor@protonmail.com

Re: ***Freedom of Information Act (FOIA) Request No. F-21-00186***

Dear Mr. Landreneau:

This is the Agency's notice to extend the response time limit to your Freedom of Information Act (5 U.S.C. § 552) request for a copy of:

1. Copies of all communications, documents, orders, or letters delegating to Mr. Andrew Hirshfeld the performance of the functions and duties of the Director effective after January 20, 2021, including the identification of the PTO officer who made the delegation, and any documents evidencing Mr. Hirshfeld's acceptance of that delegated authority.
2. Please provide copies of the notifications that the PTO provided under 5 U.S.C. § 3349(a)(1) to the Comptroller General of the United States and to each House of Congress of the vacancy that occurred in January, 2021, in the office(s) whose functions and duties were delegated to Mr. Andrew Hirshfeld.
3. Please provide copies of all communications, documents, orders, or letters delegating to the Administrative Patent Judges (APJs) listed in Attachment 1 the Director's authority under 35 U.S.C. §§ 314, 324 to institute the respective trial proceedings identified in Attachment 1, and any documents evidencing each of these APJ's acceptance of that delegated authority. The records under this request also include but are not limited to records of delegation and sub-delegation of other persons in the chain of delegation from the Director to the APJs, including any documents evidencing each of these persons' acceptances of such delegated authority of other persons in the chain of designation to the APJs, including any documents evidencing each of these persons' acceptances of such delegated authority.

4. Please provide copies of all communications, documents, orders, or letters designating under 35 U.S.C. 6(c) the Administrative Patent Judges (APJs) listed in Attachment 1 to perform the duty of adjudication on the merits in the respective proceedings identified in Attachment 1, and any documents evidencing each of these APJ's acceptance of that duty. The records under this request also include but are not limited to records of delegation and sub-delegation of other persons in the chain of designation to the APJs, including any documents evidencing each of these persons' acceptances of such delegated authority.

The request was perfected on August 4, 2021. The twenty-day statutory response period for the Agency's initial determination is September 22, 2021.

In accordance with 37 C.F.R. § 102.6(c), the response time limit is hereby extended ten additional working days to October 6, 2021. This extension is necessary to consult with the subject matter expert and provider of the documents in question regarding release determinations. The Agency's response will promptly follow its review and final assembly of responsive documents.

Sincerely,

A handwritten signature in black ink, appearing to read 'KES', followed by a horizontal line extending to the right.

Karon E. Seldon
USPTO FOIA Specialist
Office of General Law

EXHIBIT D

From: Randy Landreneau RLinventor@protonmail.com
Sent: Thursday, September 23, 2021 5:25 PM
To: Seldon, Karon Karon.Seldon@USPTO.GOV
Subject: Re: FOIA Request F-21-00186 (10-day extension)

Dear Karon,

Your letter notifying me of an extension is astonishing in its novel count of business days. It states: "The request was perfected on August 4, 2021. The twenty-day statutory response period for the Agency's initial determination is September 22, 2021."

Please identify (by listing) the exact dates which you count as "20 statutory business days" from August 4 to September 22 and identify (by listing) all dates which you do not count as statutory business days.

Thank you in advance for responding to my question.

Best,

Randy

Randy Landreneau, President
US Inventor, Inc.
727-744-3748
Sent with ProtonMail Secure Email.

EXHIBIT E

On Friday, September 24th, 2021 at 7:10 AM, Seldon, Karon <Karon.Seldon@USPTO.GOV> wrote:

Good Morning Mr. Landreneau,

The agency's initial determination date should have been September 1, 2021 and a 10-day letter should have gone out on September 15. I do apologize for the computer glitch and the delay. We will do our best to get you the responsive documents requested as swiftly as possible.

Kind Regards,

Karon E. Seldon | FOIA | United States Patent and Trademark Office | Office of General Law

Direct: (571) 272-4307 | Fax: (571) 273-4307

Email: karon.seldon@uspto.gov

Mail: P.O. Box 1450, Office of General Law, USPTO, Alexandria, VA 22313-1450
600 Dulany Street, Alexandria, VA 22314

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

US INVENTOR, INC.

Plaintiff

v.

UNITED STATES PATENT AND TRADEMARK OFFICE

Defendant

Civil Action No. 1:21-cv-2894-TSC

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
UNITED STATES PATENT AND TRADEMARK OFFICE,
600 Dulany Street
Alexandria, VA 22314

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Brian Medich (DC Bar Id. 1671486)
bmedich@dbllawyers.com
Dunlap Bennett & Ludwig PLLC
1200 G St. NW
Suite 800
Washington, D.C. 20005

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: 11/04/2021



/s/ Natalie Guerra

Signature of Clerk or Deputy Clerk

RETURN OF SERVICE

UNITED STATES DISTRICT COURT
District of Columbia

Case Number: 1:21-CV-2894

Plaintiff:

US Inventor, Inc.

vs.

Defendant:

United States Patent and Trademark Office

For:

Dunlap, Bennett, & Ludwig

c/o Allconus

211 Church St SE

Leesburg, VA 20175

Received by Cavalier CPS to be served on **United States Patent and Trademark Office, 600 Dulany Street, Alexandria, VA 22314.**

I, Kevin Brillianda, do hereby affirm that on the **5th day of November, 2021** at **1:28 pm**, I:

Served Summons and Complaint for Injunctive and Declaratory Relief with Exhibits A-E; Civil Cover Sheet; Motion for Admission of Attorney Pro Hac Vice; Declaration of William W. Flachsbart in Support of Motion for Admission Pro Hac Vice; [Proposed] Order Granting Motion for Admission of Attorney William W. Flachsbart Pro Hac Vice; Notice of Right to Consent to Trial Before a United States Magistrate Judge; Declaration of William W. Flachsbart in Support of Motion for Admission Pro Hac Vice personally to Robert Walker as Executive Assistant of United States Patent and Trademark Office. Service occurred at 600 Dulany Street, Alexandria, VA 22314.

I am a natural person over the age of eighteen and am not a party to or otherwise interested in the subject matter in controversy. I am a private process server authorized to serve this process in accordance with relevant law. Under penalty of perjury, I declare that the foregoing is true and correct.


Kevin Brillianda

Cavalier CPS
823-C S King Street
Leesburg, VA 20175
(703) 431-7085

Our Job Serial Number: CAV-2021011602
Ref: matter # 58207-00

