

**From:** Aaron Greenspan [mailto:aarong@thinkcomputer.com]  
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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.

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Think

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