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May 6, 2014

Deandra M. Hughes, Examiner
Art Unit 3992
Confirmation No. 5286
U.S. Patent Office Mail Stop: Inter Partes Reexam
Central Reexamination Unit
FAX: (571) 273-9900

*Re: LTI0002-RXM, App. No. 95/001,261
U.S. Patent No. 7,139,761 McKibben et al
Request for Rescission and Full Disclosure of Conflicts of Interest*

Dear Ms. Hughes:

After further review of the Office's actions, we conclude that the third reexamination is without justification. It demands rescission and referral to an unbiased tribunal. The lack of propriety is appalling and not worthy of the trust we place in the agency.

On June 1, 2012, the Office told Senator Jon Kyle in a FOIA response that "there was no input from anyone outside of the USPTO" (Exhibit A). Therefore, the Office presumably relied upon 37 CFR 1.520, Ex parte reexamination at the initiative of the Director.¹

No "rare" or "compelling" circumstances exist. Undisclosed personal holdings and relationships among Patent Office personnel do not qualify as rare and compelling for the purposes of 37 CFR 1.520

The rules state: "A decision to order reexamination at the Director's initiative is, however, rare. *Only in compelling circumstances.*" (emphasis added).

No such rare and compelling circumstance exists regarding patentability. In this third reexamination, the Examiner merely recited worn out

¹ "2239 Reexamination Ordered at the Director's Initiative [R-08.2012]." M.P.E.P. U.S.P.T.O., Web. 07 May 2014.

arguments that Facebook had already presented and lost three times—at trial and in two previous reexaminations.

At trial, four highly published computer science professors presented evidence for two days to reach the conclusion that Facebook literally infringes on 11 of 11 claims of our patent, and there is no prior art. It is unconscionable that the PTAB is second-guessing this part of trial since due process was actually followed (a rarity in this case) and where Leader won fair and square.

However, Director David J. Kappos had compelling personal financial interests that substantially benefited from decisions favorable to Facebook. Despite the stonewalling of various FOIA requests by FOIA Officer, Kathryn W. Siehdnel, researchers have learned pertinent facts about the backgrounds of the personnel involved in this reexamination.

The record shows that the PTAB staff counsel in this matter have issued over 50 patents to IBM, Microsoft and Xerox. They are very evidently cozy with these companies—all of who are holders of Facebook interests and substantially benefit from decisions favorable to Facebook. Tellingly, Facebook's arguments cite Microsoft and Xerox art—arguments that they are trying to resurrect by stealth after losing them in a fair court fight.

Appearances of Impropriety:

- (1) David J. Kappos worked for IBM for over 20 years.
- (2) On Feb. 10, 2007 Barack Obama began a Facebook Page that now has over 40m "likes."
- (3) On Jul. 29, 2009, at his Senate confirmation hearing, Mr. Kappos pledged to the American people the following ethical practice:

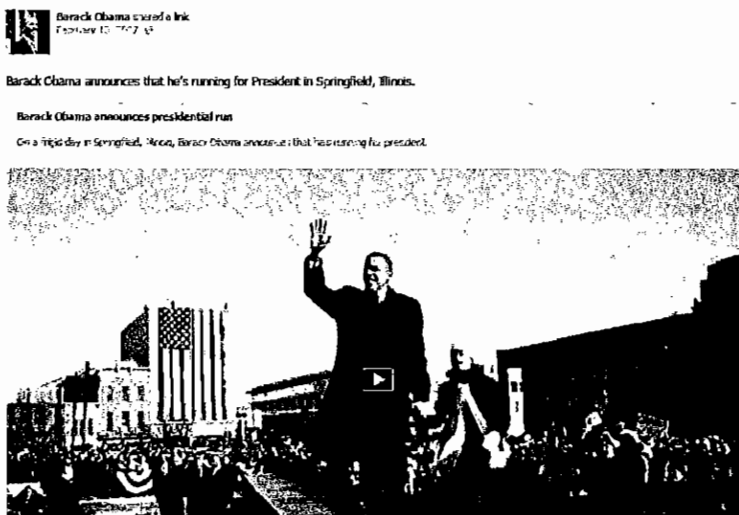


Figure 2: Barack Obama announces candidacy and starts his Facebook Page, Feb. 10, 2007. <https://www.facebook.com/barackobama>

"I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests."²

- (4) On Oct. 27, 2009, Mr. Kappos sold his IBM stock and bought approximately \$1,000,000 in Vanguard funds,

During the pendency of the Leader Technologies, Inc. vs. Facebook, Inc. case

- (5) Between 2010 and 2012, Vanguard purchased pre-IPO Facebook private shares, along with many foreign investors, including Russian oligarch Alisher Usmanov, now called "The Richest Man in Russia," and his associate Yuri Milner. Together Usmanov and Milner moved billions of dollars from wealth whose "origin ... is not clear" according to *Fortune* magazine, to buy Facebook stock. Mr. Kappos and his friends participated in this unregulated private market underwritten by Usmanov's Moscow partner, Goldman Sachs, according to S.E.C. records and major press reports.³ These Russians became the second largest investors in Facebook after the IPO. Mr. Kappos clearly benefited from their funds to boost the value of his shares.

- (6) On May 10, 2010, Director Kappos started a Facebook Page for the USPTO and invited his 14,000+ employees to visit it daily. His participating Office personnel presumably included all of the personnel involved in the Leader patent re-exam.

Could the bias be any more apparent? How could Leader hope to get an unbiased assessment within an agency that was actively promoting Facebook?



Figure 3: USPTO, David J. Kappos, Director, Facebook Page, Aug. 19, 2013. Director Kappos established the Facebook Page on May 10, 2010. He then promoted it heavily throughout the Office. <https://www.facebook.com/uspto.gov>

² May 16, 2010, David J. Kappos, signed Ethics Statement pledge, p. 1.

³ Hempel, Jessi. "Facebook's Friend in Russia." *Fortune Tech*, 4 Oct. 2010. Web. 07 May 2014.

- (7) On Mar. 22, 2012, IBM sold 750 patents to Facebook.⁴
1 month later
- (8) On Apr. 17, 2012, Mr. Kappos ordered the third reexam of Leader's patent.
1 month later
- (9) On May 15, the Office issued an unsupported, ambiguous order that relies on such freewheeling statements as "the statute is silent as to the procedural housekeeping issue."
- (10) On May 18, Facebook went public.

Director Kappos shows holdings of approximately \$1m in Vanguard Funds on his Office of Government Ethics Form 278 financial disclosure for 2008⁵. It is notoriously known that Mr. Kappos' Vanguard funds had purchased 9,600,000 shares of Facebook before Jul. 2012, much of it likely well before the May 2012 IPO.⁶ Vanguard and Mr. Kappos benefitted substantially by the Facebook IPO, which occurred within just weeks of his order. The timing alone has the appearance of impropriety and was enough to dictate recusal.

It is also public knowledge that Mr. Kappos was the former IBM General Counsel for intellectual property.⁷ IBM sold 750 patents to Facebook on or about Mar. 22, 2012, ***just three weeks*** before this order, and during the pendency of this matter. Given the close association among IBM, Microsoft, Mr. Kappos and other members of the PTAB staff working on this matter, the bias is evident.

⁴ Levine, Dan, and Alexei Oreskovic. "Facebook Buys 750 Patents from IBM: Source." *Reuters*. Thomson Reuters, 22 Mar. 2012. Web. 07 May 2014.

⁵ David J. Kappos, Financial Disclosure, U.S. Office of Government Ethics.

⁶ Demos, Telis. "Who Else Has a Big Bet on Facebook." *Deal Journal*. Wall Street Journal, 24 Aug. 2012. Web. 07 May 2014.

⁷ S. HRG. 111-695, PART 3 - CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS, David J. Kappos, Y 4.J 89/2, <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62345/pdf/CHRG-111shrg62345.pdf>

Conflicting Kappos Interests Equation:

Kappos \Rightarrow IBM, IBM \Rightarrow Facebook ∴ Kappos \Rightarrow Facebook

This bias is reinforced by the USPTO Facebook Page promoted by Director Kappos during the pendency of this case.

Between May 14, 2010 and Nov. 9, 2012, Mr. Kappos made **302 posts**. **40 posts mentioned Mr. Kappos by name** and he had **15 photos of himself** posted. Very clearly this is a person and USPTO who relied on Facebook and could not be impartial. Exhibit B.

Logic Symbols Legend: \Rightarrow = implies ∴ = therefore

This same logic equation holds true for the loyalties to IBM, Microsoft, Boston Scientific and Xerox of other Office personnel including, but not limited to. Kimberly Jordan, Daniel Ryman, William J. Stoffel and Pinchus M. Laufer

Indeed, the only thing that is compelling in these circumstances is ***impropriety and the appearance of impropriety***. Director Kappos' duty was to recuse himself and the members of his staff who had financial holdings and relationships with Facebook interests. Instead, the Office circled the wagons and tried to hide their conflicts of interest.

Constructive Fraud

Citizens have a right to rely upon the ethical oaths taken by public officials. When those oaths are betrayed, citizens are defrauded if they have relied on those promises and are damaged as a result, even if the person did not defraud intentionally.

Director Kappos evidently assigned IBM and Microsoft loyalists to this reexamination to control the outcome in support of their collective Facebook interests. This is constructive fraud, for sure, even if not actual fraud.

On May 15, 2012, Counsel Pinchus M. Laufer stated:

"First, the statute is silent as to the procedural housekeeping issue of merger. Second, the relevant regulation makes it clear that the Office has discretion when deciding whether or not to merge an ex parte reexam proceeding with an inter partes reexamination proceeding. See 37 CFR 1.989(a)."⁹

Mr. Laufer then wrote in the footnote that "a decision may be made to merge the two proceedings or to suspend one of the two proceedings..."

This interpretation is not relevant since neither of those circumstances were present. The Office had *already merged* the proceedings and the Examiner, Deandra M. Hughes, had *already issued her decision*.¹⁰

Dubious authority cited

A self-respecting policy writer could only give this next instruction a failing grade.

"The Office retains the right to merge the present proceedings or to suspend one (or more) of the proceedings for a limited time at a later date, should circumstances change such that the situation warrants such action."¹¹

The Office is essentially saying the rules be damned, we'll do whatever we want. The Office abused its discretion and acted outside its authority.

In addition to the impropriety of unmerging the previously merged reexaminations during appeal, after prosecution had **closed**, the Office **added 24 more un-litigated claims** to the mix. These are claims that not even the Requester challenged, nor had those claims ever been litigated. Indeed, these new claims were *fabricated* by the Office for no good reason other than to support the evident Facebook bias at the Patent Office.

⁹ Decision Denying Merger of Reexam Proceedings, 05-15-2012. p. 5.

¹⁰ See "Action Closing Prosecution (nonfinal), Dec. 02, 2010.

¹¹ Decision, *Id.*

Mr. Pinchus laments that the statute is silent in discussing the specific configuration of hoops he wanted to jump through to justify reopening the reexamination and adding 24 new claims. Indeed, the statute is silent about many things that are not permitted or reasonable. The statute is silent because the statute considers the desired action outside the bounds of propriety. In this case, a silent statute placed the actions out of bounds. It was not a lapse in rulemaking judgment. Discretion is not a license to custom-design rules to support the personal investment portfolios of public officials.

The statute is logically silent on the conduct of the Office in this matter because the statutes did not contemplate the Office merging two proceedings, then unmerging them to accommodate the evolving political, financial and crony-relationship needs of the Office personnel. Needless to say, such conduct undermines the trust of the public in the Patent Office.

Nowhere do the rules contemplate an Office second-guessing its own prior merger order on the basis of the losing party's appeal. Appeal arguments are meant to narrow the scope of the proceedings, not blow them open, as has occurred here.

The Office's admission of motivation is grounds for dismissal

The PTAB reasons for reopening the reexamination were not based upon "rare" or "compelling" new findings

In fact, citing Facebook's appeal argument as its independent reason for this Director's action shows that the Office is either not telling the truth or is confused. Director actions are supposed to be "rare" and reserved for new evidence ***independently gathered*** by the Office, not supplied by the Requester. The admission that the Requester's writings sparked this reexam is by itself grounds for dismissal.

The MPEP rebuts just this sort of action. In the case cited below, the requester sought to expand the scope of her claims late in the game, just like Facebook has done here with an allegedly unbiased Office action (that just happens to use all Facebook's arguments, verbiage and "permissible" style). By expanding the claims from 11 to 35, they now seek to wipe the patent from the books. But Facebook did not invent U.S. Patent No. 7,139,761, Leader

did, and Facebook's claims, no matter how one dresses them up, are still illegitimate.

The Office should heed its own advice here when J.P. Lucas writes:

"It is noted that, in an instant where reexamination is not requested as to a claim, the Requester cannot complain as to the Office's decision not to examine that claim in the reexamination, since Requester was free to request reexamination of all the claims of the patent, but made the choice not to do so." Clarification of Office Policy, J.P. Lucas, Oct. 5, 2006; See MPEP 2200, and *Ex Parte* MPEP 2600 Inter Partes.

PTAB surrogates for IBM/Microsoft/Facebook are barred from making new claims for Facebook and should have recused themselves

In Leader's case, the Office acted unilaterally to give Facebook what it had not even asked for until appeal. To ask for it now, through surrogates at the PTAB, makes the action too late and fraudulent. The facts did not change; only Facebook's desires did.

A change of desire is not "rare" or "compelling" enough to overturn a patent validly issued by the People of the United States of America to Leader Technologies, Inc. Facebook did not invent and patent U.S. Patent No. 7, 139,761, Leader did.

Requests:

- (1) We respectfully request a rescission of the results of the third reexamination and a referral of this matter to an unbiased tribunal.
- (2) We respectfully request a conflicts log for each of the judges and USPTO staff who worked on our case during its pendency.
- (3) We respectfully request copies of the annual financial disclosures for each of the judges and USPTO staff for each year they worked on this case.

- (4) We restate our two previous requests as if fully incorporated herein.
- (5) We look forward to your compliance with these requests.
- (6) Finally, please cite the precise legal authority for the following statement made by the Office in its remand notice:

"The Office retains the right to merge the present proceedings or to suspend one (or more) of the proceedings for a limited time at a later date, should circumstances change such that the situation warrants such action."¹²

Yours sincerely,


Michael T. McKibben
Co-inventor, U.S. Patent No. 7,139,761
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cc. Paul J. Andre, Kramer Levin LLP

Enclosures:

Exhibit A – Senator Jon Kyle letter from USPTO, June 1, 2012

Exhibit B – Analysis of USPTO Facebook Page from May 14, 2010 to Aug. 21, 2013

¹² Decision, *Id.*



USPTO, page 10 of 11

Exhibit A

Senator Jon Kyle letter from USPTO, June 1, 2012



JUN 04 2012

UNITED STATES PATENT AND TRADEMARK OFFICEUNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

The Honorable Jon Kyl
United States Senator
220 East Camelback Road, Suite 120
Phoenix, AZ 85016-8301

JUN - 1 2012

Dear Senator Kyl:

Thank you for your letter on behalf of Mr. and Mrs. [REDACTED]
regarding reexamination control numbers 9/010,591 and 95/001,261 involving Leader
Technologies.


The matter of concern to [REDACTED] is being handled by the United States Patent
and Trademark Office (USPTO) in a routine manner consistent with prior established practice,
internally between the Board of Patent Appeals and Interferences (BPAI) and the Central
Reexamination Unit (CRU) with no input from anyone outside of the USPTO.

In accordance with 37 CFR 41.64, reexamination control numbers 90/010,591 and 95/001,261,
which are reexamination proceedings filed on U.S. Patent Number 7,139,761, were forwarded to
the BPAI as a merged proceeding. During the BPAI's review of the record of the merged
proceeding, it became evident that the status of some of the claims was ambiguous. In such a
situation, it is standard practice for the management of the BPAI to contact the Director of the
Technology Center that handled the proceeding to ascertain the best course of action to clarify
the ambiguity to provide the BPAI with the clearest record possible.

In this instance, following standard practice, the management of the BPAI brought the ambiguity
of the status of some of the claims in the merged proceeding to the attention of the management
of the CRU. The CRU management agreed during this discussion, between only the CRU
management and the BPAI management, that the best course of action in this proceeding would
be to return the merged proceeding back to the CRU to allow the CRU to fix the oversight by
clarifying the status of the claims on the record. The CRU is currently working expeditiously to
resolve this oversight.

We trust the foregoing will be useful in responding to your constituent. For your information,
similar letters about this matter are being sent to Senator Dan Coats and Representative Mike
Pence.

Sincerely,



Dana Robert Colarulli
Director
Office of Governmental Affairs

Exhibit B

Analysis of USPTO Facebook Page from May 14, 2010 to Aug. 21, 2013

Analysis of USPTO Facebook Page from May 14, 2010 to Aug. 21, 2013

Prepared: Aug. 21, 2013

Source: USPTO Facebook page at www.facebook.com/uspto.gov;

Summary of posts that mention Director Kappos by name, and identified if the post is accompanied by a Kappos photo or video.

Nov. 09, 2012 Kappos thanks veterans on Veterans Day

Oct. 1, 2012 Kappos promoting innovation (PHOTO)

Sep. 12, 2012 Kappos promotes his blog and opening of USPTO offices in Dallas-Ft. Worth, Denver and Silicon Valley (PHOTO)

Jul. 13, 2012 Kappos opens Detroit office

Jul. 12, 2012 Kappos promotes plan for new Denver office

Jul. 12, 2012 Kappos promotes opening of Detroit office

Jul. 6, 2012 Kappos: "I think this is really is the best time there's ever been to be an inventor"

May 3, 2012 Kappos speaks at National Inventors Hall of Fame (VIDEO)

Mar. 14, 2012 Kappos writes about Industry Day

Sep. 16, 2011 Kappos promotes his blog about the America Invests Act (PHOTO)

Sep. 16, 2011 Kappos at the White House promotes a live chat about the America Invents Act (PHOTO)

Sep. 9, 2011 Kappos congratulates the U.S. Senate on passing the America Invents Act

Jun. 20, 2011 Kappos promotes his blog about pro bono work for independent inventors (PHOTO)

Jun. 16, 2011 Kappos promotes LEGO league (PHOTO)

Mar. 13, 2011 Kappos promotes new quality measurements

Feb. 17, 2011 Kappos discusses Teresa Stanek Rea appointment as Deputy Director

Feb. 10, 2011 Kappos promotes his blog about ex parte rejections

Jan. 25, 2011 Kappos promotes his blog about computer system upgrades at the USPTO

Jan. 21, 2011 Kappos promotes his speech on innovation (PHOTO)

Jan. 15, 2011 Kappos promotes reengineering of the patent examiner's manual

Jan. 4, 2011 Kappos promotes his speech at UConn School of Law (PHOTO)

Dec. 10, 2010 Kappos promotes his blog on first action pendency

Dec. 6, 2010 Kappos promotes his blog on a roundtable public discussion

Nov. 16, 2010 Kappos promotes his blog the Board's sole authority to hold an appeal brief

Nov. 9, 2010 Kappos promotes 15th Annual Independent Inventors Conference (PHOTO)

Oct. 8, 2010 Kappos promotes his blog about USPTO staff meetings

Sep. 9, 2010 Kappos promotes appearance on Bloomberg TV about reducing patent pendency (VIDEO)

Sep. 8, 2010 Kappos promotes his blog about subscriptions to his blog (PHOTO)

Aug. 26, 2010 Kappos discusses the role of minority inventors

Aug. 19, 2010 Kappos promotes interview on NPR about patent applications (PHOTO)

Aug. 15, 2010 Kappos promotes his blog giving a pep talk to personnel

Jul. 26, 2010 Kappos promotes his blog about RCE filings

Jul. 20, 2010 Kappos promotes his blog about telecommuting (PHOTO)

Jun. 28, 2010 Kappos highlights the Bilski vs. Kappos case

Jun. 25, 2010 Kappos highlight meetings with the President of the German Patent Office (PHOTO)

Jun. 23, 2010 Kappos promotes his interview with Intellectual Assets Management magazine

May 29, 2010 Kappos promotes his blog about patent examination

May 26, 2010 Kappos highlights his speech to a DOJ, FTC, USPTO workshop (PHOTO)

May 20, 2010 Kappos invites USPTO employees to visit and "like" on Facebook daily (PHOTO)

May 14, 2010 Kappos promotes his interview on CBS

Statistics:

Total Posts	302
David J. Kappos mentioned by name	40
David J. Kappos photo posted	15
David J. Kappos video posted	2



Fax

To: Deandra M. Hughes, Examiner
Art Unit 3992 cert. No. 5286

From: Michael McKibben

Fax: 571-273-9900

Pages: 15 total

Phone:

Date: May 6, 2014

Re: Appl. No. 95/001,261
U.S. Pat. No. 7,139,761

CC: Paul J. Andre
Kramer Levin LLP

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