



September 13, 2017

H. Artoush Ohanian
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BY EMAIL & FEDEX

Re: Electronic Communication Technologies, LLC – U.S. Patent No. 9,373,261

Dear Mr. Ohanian:

I write in response to Electronic Communication Technologies, LLC’s (“ECT”) letter of August 3, 2017 (the “Letter”) regarding the e-commerce website operated by Fairytale Brownies, Inc., found at www.brownies.com (“Fairytale Brownies”). In the Letter, ECT alleges that Fairytale Brownies infringes patents allegedly owned and/or controlled by ECT, naming specifically claim 11 of U.S. Patent No. 9,373,261 (“the ’261 patent”). The Electronic Frontier Foundation represents Fairytale Brownies, an Arizona corporation, who since 1992 has sold various baked goods to consumers across the country from its place of business in Phoenix, Arizona.

Fairytale Brownies has reviewed ECT’s letter and Fairytale Brownies declines to license the ’261 patent. Fairytale Brownies does not believe any license from ECT is necessary for myriad reasons, some of which are discussed below.¹

I. Based on ECT’s own allegations of what constitutes infringement of the ’261 patent, the ’261 patent is invalid as both anticipated and obvious.

The asserted claim of ECT’s patent is invalid based on the prior art. Attached as Exhibit A is a claim chart showing excerpts from Amazon.com, Inc. emails automatically generated in response to orders from prior to 2002. As you can see, Amazon engaged in the exact behavior ECT now accuses of infringement more than one year before the alleged “invention” claimed in the ’261 patent and purportedly infringed by Fairytale Brownies. As a consequence, the asserted claim of the ’261 patent is invalid under 35 U.S.C. § 102(b) (pre-AIA). Having asserted infringement against a system that is in all

¹ Fairytale Brownies reserves the right to raise any other defense or claim relating to ECT’s assertion of the ’261 patent, including without limitation that Fairytale Brownies does not infringe the patent, that ECT engaged in inequitable conduct in securing the ’261 patent, and that the ’261 patent is not entitled to claim priority to 2003. For purposes of this response only, Fairytale Brownies assumes that ECT properly construes and asserts its patent.

material respects identical to one that existed and was in public use before the patent's priority date, ECT cannot in good faith defend the validity of that claim. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1321 (Fed. Cir. 2006) ("That which infringes if later, anticipates if earlier.").

Amazon.com was not the only company existing prior to 2003 to publicly disclose what ECT now claims it patented. Included with this letter are claim charts demonstrating that the asserted claim of the '261 patent is also invalid under 35 U.S.C. § 102(a) and (b) (pre-AIA) based on the disclosures of additional third-parties.

The voluminous prior art includes:

- (1) Prior art showing the claimed "notification system" was in use and publicly disclosed by NewEgg.com prior to May 23, 2002;
- (2) Prior art showing the claimed "notification system" was in use and publicly disclosed by CrateandBarrel.com prior to May 23, 2002;
- (3) Prior art showing the claimed "notification system" was in use and publicly disclosed by Vacuum-Outlet.com prior to May 23, 2002;
- (4) Prior art showing the claimed "notification system" was in use and publicly disclosed by Crabtree-Evelyn.com prior to May 23, 2002;
- (5) Prior art showing the claimed "notification system" was in use and publicly disclosed by Oldnavy.com prior to May 23, 2002;
- (6) Prior art showing the claimed "notification system" was in use and publicly disclosed by CafePress.com prior to May 23, 2002;
- (7) Prior art showing the claimed "notification system" was in use and publicly disclosed by Thinkgeek.com prior to May 23, 2002;
- (8) Prior art showing the claimed "notification system" was in use and publicly disclosed by Gap.com prior to May 23, 2003;
- (9) Prior art showing the claimed "notification system" was in use and publicly disclosed by BMGMusicService.com prior to May 23, 2003;

*See Exhibits B-J.*²

It is not surprising that so many invalidating references exist. By 2003, at the time of ECT's claimed "invention," many widely available e-commerce solutions automated the order/shipment process, and allowed users to customize the contents of confirmation emails. *See, e.g.,* Microsoft Commerce Server 2000; Intershop; OSCommerce. E-commerce constituted over \$11 billion in sales per quarter in the U.S. *See* U.S. Dept. of Commerce, Economic and Statistics Administration, U.S. Census Bureau, *Quarterly E-*

² Exhibits A-J have been redacted to remove the personally identifiable information ("PII"). Unredacted versions of Exhibits A and C-K can be made available upon request, subject to confidentiality restrictions.

Commerce Report, Q1 2003.³ And well-known e-commerce companies such as Amazon.com Inc., eBay Inc., and Alibaba.com had existed for years. *See, e.g.*, Exhibit A.

The prior art shows that under ECT's own conception of the "invention," the '261 patent is invalid under 35 U.S.C. § 102 or 35 U.S.C. § 103. Specifically, in ECT's words, each of the prior art websites above demonstrate that:

The automated messaging features of [the prior art] Order Confirmation and also its Shipping Confirmation online system [invalidate] at least U.S. Patent No. 9,373,261. [The prior art predates] the patented systems and methods to authenticate information sent to customers when orders are processed for shipping or when shipped. [The prior art] includes customer information within these notifications/messages to give confidence to the notification-receiving party that the order confirmation and or shipment notifications is from [the prior art website] (the proper authorized source) and if more information about the shipment is needed, the link/s may be trusted and used within the confirmation or notification – its verified to not be a Phishing email or part of an email fraud system that emulates [the prior art website's] email notifications.

Letter at 3.⁴

II. As ECT is well-aware, the '261 patent is likely invalid based on 35 U.S.C. § 101.

The claims of the '261 patent are ineligible for patentability under 35 U.S.C. § 101. *See Alice Corp. Pty. Ltd, v. CLS Bank Int'l*, 537 U.S. ___, 134 S. Ct. 2347 (2014) ("*Alice*"). In particular, the claims are ineligible precisely for the reasons that numerous claims from other ECT (f/k/a Eclipse IP) patents were invalidated in *Eclipse IP, LLC v. McKinley Equip. Corp.*, No. 8:14-cv-742, 2014 WL 4407592 (C.D. Cal. Sept. 4, 2014). In that case, the court explained that the various asserted claims implemented abstract ideas regarding notifications and were "untethered to any specific hardware" and thus contained no inventive concept sufficient to limit the abstract idea in a meaningful way.

³ Available at <https://www2.census.gov/retail/releases/historical/ecommm/03q1.pdf>.

⁴ Public records of the U.S. Patent and Trademark Office indicate that ECT is currently pursuing at least two patents related to the '261 patent. *See* U.S. Pat. App. No. 14/590,528 and U.S. Pat. App. No. 14/592,199. We remind ECT of its duties of disclosure pursuant to, *inter alia*, 37 C.F.R. § 1.56. ECT's construction of its patents, and how its claimed invention is clearly disclosed by prior art, are likely material to the patentability of any future related patent. *See* MPEP 2001.06(c) ("Where the subject matter for which a patent is being sought is or has been involved in litigation, the existence of such litigation and any other material information arising therefrom must be brought to the attention of the U.S. Patent and Trademark Office.").

See id. at *6-11. The district court invalidated all 21 asserted claims from the three Eclipse IP patents and the ruling became final after Eclipse IP voluntarily dismissed its appeal.

The *Eclipse* court's reasoning applies directly to the claims you have now asserted against Fairytale Brownies. Indeed, the invalidated *Eclipse* patents share the same specification with the patent you now assert. All of the claims in this patent family are directed to abstract ideas and include no inventive concept or meaningful limitations that would amount to significantly more than the abstract idea. The asserted claims merely cobble together generic computer components and then claim the end result of an automated notification system that is not limited to a specific non-conventional mechanism for achieving that result.

Attached as Exhibit K is a motion currently pending related to the '261 patent explaining exactly why it fails to claim patentable subject matter. Should this matter proceed to litigation, Fairytale Brownies will file a similar motion against ECT.

III. Continued assertion of the '261 patent would constitute bad faith.

If ECT insists on continuing to allege infringement against Fairytale Brownies, please provide an explanation as to why ECT's continued assertion of infringement in light of the prior art and *Alice* is not in bad faith. *See C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1368-69 (Fed. Cir. 1998) ("Conduct prohibited under antitrust law includes bringing suit to enforce a patent with knowledge that the patent is invalid or not infringed").

Fairytale Brownies will consider the continued assertion of patent infringement as evidence of ECT making or continuing to make an assertion of patent infringement despite the fact that ECT "knew or should have known that the assertion is without merit," forming a basis for Fairytale Brownies to bring a claim for violation of Arizona law. Ariz. Rev. Stat. § 44-1421 *et. seq.* (2016) (the "Patent Troll Prevention Act"). We note that despite claiming rights in multiple patents, ECT does not list or describe any other patent allegedly infringed by Fairytale Brownies. To the extent you believe that Fairytale Brownies infringes any other patent or claim owned and/or controlled by ECT, you have failed to provide the information required by the Patent Troll Prevention Act. *See id.* at § 44-1422(A)(1). We would consider any belated assertion of any other patent or claim, or a modification of your allegations in an attempt to avoid prior art, to thus be indicative of ECT's bad faith.

IV. Renounce any allegation of infringement.

Given that ECT is now unquestionably aware of the invalidity of its patent, we sincerely hope ECT will have the good sense not to trouble a court of law with this

matter. However, if ECT does intend to file suit⁵ or if ECT does not affirmatively abandon its claim against Fairytale Brownies, be assured that our client is prepared to defend itself against ECT's spurious claims, and will seek its attorneys' fees and costs. *See Vehicle Interface Techs., LLC v. Jaguar Land Rover N.A., LLC*, No. 12-1285-RGA, 2015 WL 9462063, at *3-5 (D. Del. Dec. 28, 2015) (awarding fees to defendants where patent infringement lawsuit became objectively baseless after patent owner was put on notice of invalidating prior art), *aff'd without op.*, 2017 WL 2558247 (Fed. Cir. June 13, 2017); *SFA Sys. LLC v. Newegg, Inc.*, 793 F.3d 1344, 1350 (Fed. Cir. 2015) (“[A] pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits of one’s claims, is relevant to a district court’s exceptional case determination under § 285.”). We ask that ECT immediately withdraw its allegation of infringement before Fairytale Brownies is forced to incur further legal fees.

All further correspondence from ECT in this matter should be exclusively directed to my attention. Please feel free to call me at (415) 436-9333 x160 should you have any questions.

Very truly yours,



Vera Ranieri
Staff Attorney

⁵ We note that ECT would have no basis for alleging that venue for any lawsuit is proper in Florida or Texas. *See* 28 U.S.C. § 1400(b) (restricting venue for patent infringement lawsuits to where company is incorporated or where there is both (a) acts of alleged infringement and (b) a regular and established place of business); *TC Heartland LLC v. Kraft Foods Group Brands, LLC*, ___ U.S. ___, 137 S. Ct. 1514 (2017); *Townsend v. Brooks Sports, Inc.*, 2-17-cv-00062, slip op. (M.D. Fla. Aug. 31, 2017); *cf. Gust, Inc. v. AlphaCap Ventures, LLC*, 226 F. Supp. 3d 232, 249 (S.D.N.Y. 2016) (awarding fees against attorneys pursuant to 28 U.S.C. § 1927 based on, *inter alia*, a patent owner’s frivolous objection to a motion to transfer).