

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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GERSH KORSINSKSY,
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Plaintiff,
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-against-
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NICHOLAS GODICI, commissioner of the Patents,
United States Patent and Trademark Office,
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:
:
Defendants.
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_____ X

05 civ. 2791

**AFFIDAVIT OF
DAVID W. R. BROWN**

STATE OF FLORIDA)
) **ss.**
COUNTY OF HILLSBOROUGH)

I, David W. R. Brown, depose, affirm and say that:

1. I reside at 1805 Burlington Circle, Sun City Center, Florida 33573-5219 and have personal knowledge and competency to the matters stated herein.

2. I was the plaintiff in six actions in which the United States Patent and Trademark Office ("USPTO") was among the defendants. All of the actions were filed in the Tampa Division, Middle District of Florida, United States District Court. The case numbers were 8:03-cv-2501-T, 8:04-cv-1914-T, 8:04-cv-1960-T, 8:04-cv-1971-T, 8:04-cv-2013-T and 8:04-cv-2033-T.

3. All six actions were related in one way or another to the USPTO Form PTO/SB/65 ("65") which is the "Petition to Accept Unavoidably Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(b))." (See Exhibit 1: 1996-1999, Exhibit 2: 2000-2002, Exhibit 3: 2003-2004 & Exhibit 4: 2005-2006.)

4. The six actions were resolved by a Settlement Agreement among the parties in which, among other things, the USPTO agreed to now put the required Privacy Act Statement on '65. (See Exhibit 5.)

5. I have information of facts concerning the matters of the instant action. To compile these facts, I made quite a number of Freedom of Information Act ("FOIA") requests. In addition, I visited the USPTO headquarters in Arlington, VA where I copied a number of documents submitted by inventors in connection with '65.

6. Based upon information and belief, many hundreds of inventors have lost their self-created intellectual and art properties, i.e. patents, by using '65 and its processing which is improper and violates a number of laws.

7. From my review, it is apparent, and there is compelling supporting evidence, that the USPTO and their associated entities violated at least the following statutes in connection with '65:

- a. Paperwork Reduction Act: 44 USC 3501-3521.
- b. Privacy Act: 5 USC 552(a).
- c. Internal Revenue Code: 26 USC 6103 and 26 USC 7431.
- d. Criminal Codes: 18 USC 1001(a)(1), 18 USC 1001(a)(2)&(3), 18 USC 1018 and 18 USC 1341.
- e. Administrative Procedure Act: 5 USC 702-706.

Paperwork Reduction Act:

8. The Paperwork Reduction Act [44 USC 3501-3521] ("PRA") controls the collection of information on particular forms by federal agencies. It severely limits the collection of information by mandating very stringent standards for what (and how) it can be collected. It takes precedence over all other laws, except the Privacy Act. A FOIA response from the USPTO acknowledged that they are beholden to the PRA. (See Exhibit 6.)

9. The USPTO may not conduct or sponsor, and a person is not required to respond to, nor be penalized for failing to comply with, a collection of information that does not display a valid control number [44 USC 3512]. The PRA is administered by the Office of Management and Budget ("OMB"). The Director of OMB is charged with the responsibility to administer the law throughout, and with the cooperation of, all federal agencies, including the USPTO [44 USC 3504(c)(1)]. The OMB Director and the agencies are required to obey the law. A valid control number cannot be assigned to a form if it is not "consistent with applicable law" [44 USC 3504(a)(2)].

10. A request for information on a form under the PRA must be written using "plain, coherent, and unambiguous terminology and is understandable to those who are to respond" [44 USC 3506(c)(3)(D)]. Based on a FOIA response, from 1995 to 2000, about 840 '65 petitions were filed. Of these, about 768 were initially denied. This represents a failure rate of over 91% by respondents to "understand" the showing statement. Form '65 has had the same two-sentence showing statement since its inception. (See Exhibit 7 based on Exhibits 1 to 4.)

11. My '65 petition was denied on July 27, 2000. (See Exhibit 8.)

12. I sent a letter to my Congressman complaining about having to submit so much data (see Exhibit 8, pages 3 & 4) just to pay an overdue fine. He forwarded my letter to the USPTO. The response was three letters from high-level USPTO personnel advising me to look, not at the showing statement on '65, but rather at the resulting decision for the "required additional information." These three letters were from (1) the Director of the Officer of Petitions who is the boss of the GS-15 and GS-7's who process '65s (see Exhibit 9), (2) the Administrator for External Affairs who is the link between the USPTO and Congress (see Exhibit 10), and, (3) none other than the Director of the USPTO himself (see Exhibit 11).

13. As noted earlier, all "collections of information" must be preapproved, otherwise the form is in violation of the law and, as such, a penalty, such as the loss of one's patent, cannot be based on it [44 USC 3512]. A "collection of information" is determined to be identical requests for information posed to ten or more individuals [44 USC 3501(3)(A)(i)]. Based on my very small sample of copied documents (from my visit to the USPTO) which contained the USPTO requirements for additional information, Exhibit 12 shows at least ten identical requests for information for particular financial information. Based on information and belief, there are no Approval Request documents in existence that show that the different additional requests for medical, financial or docket information were ever included in any Approval Requests for '65.

14. Exhibit 13 is eleven pages from the USPTO 2003 Approval Request.

15. The Paperwork Reduction Act mandates that each collection of information is to be necessary, have practical utility [44 USC 3506(c)(3)(A)] and that the

agency is to have the capability to process such information in a timely and useful fashion [44 USC 3502(11)].

16. Exhibit 14 is an extract from the 1996-1999 Approval Request for '65. In it, at circle 3, the USPTO states that '65 was processed by a GS-15 employee in about two hours. Exhibit 15 is the Job Description for that GS-15 Petitions Examiner.

17. Exhibit 16 is an extract from the 2000-2002 Approval Request for '65. In it, at circle 3, the USPTO states that '65 was processed by a GS-7 in about 30 minutes.

18. Exhibit 17 is an extract from the 2003-2005 Approval Request for '65. In it, at circle 3, the USPTO states that '65 continued to be processed by a GS-7 in about 30 minutes.

19. Exhibit 18 is a summary of the stated burden hours from the previous three exhibits showing the drop in the Cost-per-Year to process '65s when the Examiner Grade and Hours-per-Form are lowered.

20. However, since 1999, the '65 decisions have continued to be lengthy, legalistic and signed by USPTO personnel who are GS-15s and GS-16s - not the lower paid and lower qualified GS-7s. This is exemplified in my '65 decision. (See Exhibit 8.)

21. The PRA requires that specific forms, like '65, which collect information must have on them an accurate time burden for the user to 'gather, prepare and submit' the form [44 USC 3504(c)(5), 44 USC 3506(c)(1)(A)(iv), 44 USC 3506(c)(1)(B)(iii)(III)]. The USPTO requires extensive information to accompany '65. Exhibit 19 shows a number of fairly typical additional information requirements. Exhibit 20 shows a few examples of more extreme additional information requirements demanded by the USPTO in order to pay the overdue fine. The material in Exhibits 19 and 20 are from documents that I copied during my visit to the USPTO.

22. From 1996 to 2002, '65's time burden was stated as "1 hour" to "gather, prepare and submit." (See Exhibits 1 & 2 at circle 1.) I made a FOIA request for the back-up documentation for the 1-hour time burden calculation used prior to 2003. There was no documentation. (See Exhibit 21.)

23. Since 2002, the time burden to "gather, prepare and submit" a '65 is stated as "8 hours." (See Exhibits 3 & 4 at circle 1.) I made a FOIA request for the back-up documentation for the 8-hour time burden calculation. The only documentation was a

single sentence from a single email. (See Exhibit 22.) The PRA explicitly states the prescribed methodology to calculate the time burden at 44 USC 3504(c)(5), 44 USC 3506(c)(1)(A)(iv) and 44 USC 3506(c)(1)(B)(iii)(III). And the USPTO procedures, whether they were used or not, do exist for the calculation of that time burden. These procedures are known as "Patent And Trademark Office Burden Estimation Techniques - Appendix C". (See Exhibit 23.)

24. As part of the showing statement to accompany my '65, I was required to come up with 'all income (not just taxable), expenses, assets, credit, and obligations' for each of 38 months. (See Exhibit 8 at pages 3 & 4.)

25. Exhibit 24 is an analysis that I did of how long it would have taken me to "gather, prepare and submit" the required additional information using IRS Estimated Preparation Times. The IRS estimates the time to arrive at the income aspects of just one time period at over 14.6 hours. (See Exhibit 24-1.) By multiplying that time burden by the five financial amounts times 38 months (periods), I arrived at an estimate of 2102 hours for my completing the USPTO's required information to accompany '65. (See Exhibit 24-14.)

26. The USPTO's Chief Information Officer is designated as the person to receive the public's comments concerning the estimated time to "gather, prepare and submit" '65 to the USPTO. (See Exhibits 1 to 4 at the bottom of the first pages.) I wrote to the USPTO's Chief Information Officer in September of 2000 commenting on '65's time burden. (See Exhibit 25.)

27. As part of '65's approval process the USPTO authored and published a tentative Approval Request in the Federal Register ("FR") which solicited comments from the general public. (See Exhibit 26.) A FOIA response showed that twenty-nine individuals contributed over sixty comments. The first page of Exhibit 27 is a Summary of the FR comments. The remainder of Exhibit 27 is the comments themselves. The Summary that I did shows that 41% of the individuals mentioned Privacy concerns, 51% questioned the Time Burden Estimates and 10% were never even refunded their money after the USPTO denied their PTO/SB/65 petition.

28. A number of statutes require the USPTO to respond with explanations to all of the FR comments. (See Exhibit 28.) Likewise, OMB is required to consider all FR

comments in approving '65 for further use. (See Exhibit 29.) The USPTO ignored a number of the comments, including some of mine, with the single phrase that the comments weren't "reasonably germane." (See Exhibit 13-2 at circle 1.)

29. The OMB Desk Officer left a message on my answering machine in May of 2002 related to '65. Exhibit 30 is a transcript of his statement - minus the "errs" and "ahhs." An audio recording of his message is available if the court would like to hear it.

Privacy Act:

30. The Privacy Act [5 USC 552a] was enacted to protect citizens against the release of their private information collected by the government. To pay an overdue fine on a patent, an inventor sends in '65 along with the maintenance payment, overdue fine and a "showing" of why the inventor was late paying the fee. (See Exhibits 1 to 4.) As previously noted in paragraph 10, after receiving the form, the USPTO almost always (91% of the time) dismisses the petition and then lists all of the additional information (sometimes of a very personal nature) which must be supplied for reconsideration. (Again, see Exhibits 19 & 20.)

31. If the required additional information is of a financial and medical nature, it comes under the Privacy Act because it includes "financial transactions, medical history" [5 USC 552a(a)(4)] maintained in a "system of records" that can be retrieved by the name of the individual [5 USC 552a(a)(5)]. The information that the USPTO collects becomes part of the patent's "wrapper" which is available to the general public, both at the USPTO headquarters and over the internet at www.uspto.gov.

32. The Privacy Act absolutely requires a very lengthy "Privacy Act Statement" on or attached to any form that collects information. The statement informs the users of their rights and how their information is going to be protected [5 USC 552a(e)(3)]. The required Privacy Act Statement has been totally missing on '65 from its inception until January 2005. (See Exhibits 1 to 3.) In the Settlement Agreement, the USPTO did not deny their wrongdoing and committed to putting the required Privacy Act Statement on '65, henceforth. (See Exhibit 5.)

33. "Each agency that maintains a system of records shall maintain in its records only such information about an individual as is relevant and necessary..." [5 USC 552a(e)(1)]. I went to the File Information Unit at the USPTO in Arlington, Virginia

which is where the general public can copy the contents of any patent file wrapper. I was there from November 8 - 15, 2002. I freely examined hundreds of patent wrappers and made copies of other people's personal information. Exhibit 31 is a very small sample of the documents that I copied and includes income tax returns with Social Security numbers, Social Security documents, payroll documents, bank statements, check books, doctor's examination notes, medical and hospital records, a job termination letter, counseling session notes for an alcoholic patent attorney, a state aid application based on psychiatric problems, personal narratives of misfortune, long form Death Certificates.

34. Exhibit 32 is a guide to "Identity Theft and Fraud." It was downloaded from the Department of Justice's website at www.usdoj.gov.

35. Exhibit 33 is the "Report On Privacy and Public Access to Electronic Case Files" prepared by the Judicial Conference Committee on Court Administration and Case Management. It was downloaded from their site at ww.privacy.uscourts.gov/policy.htm. On page 6 it includes recommendations on the release of civil case files by the court which include Social Security numbers, dates of birth, financial account numbers and names of minor children.

36. Exhibit 34 is an article from the Tampa Tribune (November 26, 2003) about the release of sensitive legal information at the state court level.

37. Exhibit 35 are analyses of a couple of court cases related to the release of Social Security numbers. They were downloaded from the Department of Justice's website at www.usdoj.gov.

Internal Revenue Code:

38. Some inventors are required to submit Income Tax Returns with '65. (See Exhibit 19-3+.) These returns are then made public by the USPTO. (See Exhibits 31-1 to 31-5.) The release of income tax returns is controlled by 26 USC 6103. I extracted just the headers of that section of the Code. (See Exhibit 36.) Based on this information and my belief, the USPTO is not included among those who can release income tax information. The Internal Revenue Code provides for relief [26 USC 7431] when a federal employee discloses "any return or return information" who isn't allowed too.

Criminal Codes:

39. Federal employees who are not performing a government function are subject to the Criminal Codes [*U.S. v. Singleton*, 165 F.3d (10th Cir. 1999)]. (See Exhibit 37.) Based on this information and belief, *U.S. v. Singleton* established that only a federal employee specifically performing a government function, like wire-tapping, is exempt from Criminal Codes, but that all others are subject to them. Based on information and belief, examples of federal employees' not performing a government function would be like when they lie or falsify documents.

40. Relative to the information in paragraph 20 and based on information and belief, the five sections of the Criminal Codes that may be relevant to the processing of '65 can be found in Exhibit 38 and are:

18 USC 1001(a)(1) - Falsifying a material fact.

18 USC 1001(a)(2) - Making a false, fictitious or fraudulent statement.

18 USC 1001(a)(3) - Making a false writing.

18 USC 1018 - Making any false statement.

18 USC 1341 - Frauds and swindles via the postal service.

Administrative Procedure Act:

41. Based on information and belief for all the matters of this affidavit, I found that the Administrative Procedure Act [5 USC 702, 703, 704 & 706] is a very powerful law - short and to the point. If judicial action is not provided for under some other statute, then it takes over. It provides that if an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority, the litigation shall not be dismissed nor relief therein be denied. That is, it provides that a person suffering legal wrong, adversely affected or aggrieved by agency action is entitled to judicial review. If the particular relief sought is not money, the court cannot dismiss just because it is against the United States. If money is sought, the court has the discretion to dismiss or not to dismiss. And it applies to both civil and criminal cases. The APA serves as a catch-all for relief based on being "adversely affected or aggrieved by agency action." Statutes 5 USC 702, 703, 704 & 706 are included as Exhibit 39.

Journal of Law and Technology:

42. Exhibit 40 is an article from the *Journal of Law and Technology* which was downloaded from their website. It is entitled "The Maintenance Fee System And Policy Of The Patent And Trademark Office: Arbitrary, Irresponsible And In Need Of Reform."

43. If desired, I will be pleased to appear to discuss and amplify on any of these facts and affirmations.

Dated: Sun City Center, FL
June 24, 2005

David W. R. Brown
1805 Burlington Circle
Sun City Center FL 33573-5219
Phone: (813) 634-6048

Subscribed and sworn to before me
this 24th day of June, 2005.

Notary Public