

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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| Christopher Roller,<br><br>Plaintiff,<br><br>v.<br><br>David Copperfield's Disappearing, Inc.,<br><br>Defendant. | Case No.: 07-CV-1182 (JNE/JJG)<br><br><b>DEFENDANT'S REPLY<br/>MEMORANDUM OF LAW IN<br/>SUPPORT OF ITS<br/>MOTION TO DISMISS</b> |
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**INTRODUCTION**

David Copperfield's Disappearing, Inc. ("Copperfield") has previously asked the Court to dismiss Plaintiff's claim that Copperfield is infringing on Plaintiff's nonexistent patent on "godly powers." In Plaintiff's response, he has changed his position from claiming that he has a patent to recognizing that no such patent has been issued, but asserting that he is entitled to damages for post-publication infringement nonetheless. In Plaintiff's latest brief, he now admits his case is meritless.

Despite his attempts to distort the law to his benefit, Plaintiff has not stated a claim upon which relief can be granted and now readily concedes that he has no case. Provisional remedies are only available retrospectively once a patent has been issued. Unless and until Plaintiff receives an issued patent, he does not have a claim under 35 U.S.C. § 154(d)(1) and, therefore, this suit must be dismissed.

Plaintiff also confuses subject matter jurisdiction and personal jurisdiction<sup>1</sup> in his “Memo in opposition to dismiss.” (“Mem. in Opp.” p. 3). Plaintiff correctly notes that a district court has exclusive jurisdiction for patent actions under 28 U.S.C. § 1338, but Plaintiff is not relieved of the burden of showing subject matter jurisdiction based on a live controversy. Plaintiff has not done so here and, as a result, his claim must fail.

### **FACTUAL BACKGROUND**

An extensive exploration of the factual background is presented in Defendant’s Memorandum of Law in Support of its Motion to Dismiss. (“Mem. in Supp.” pp. 2-4). Since that pleading, there have been three factual changes. First and foremost, Plaintiff admits that he has no claim for patent infringement, “[t]hus I do not have a case for patent infringement claim at present. I feel silly.” (Mem. in Supp. of Mot. for Partial S. Judgment, “Mem. for S. Judgment” p. 1). Second, Plaintiff has recharacterized his claim through his briefs to the Court. In his Complaint, Plaintiff stated that he has a patent. (Compl. p.1). Plaintiff now concedes that no patent has issued, but that he merely applied for a patent. (Mem. in Opp. p. 2). He further disregards the importance of this fact, stating that he is “going to call [his published patent application] a patent from now on.” (Mem. in Opp. p. 2).

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<sup>1</sup> As was noted in its previous brief to the Court, Copperfield is reserving its right to move for dismissal based on lack of personal jurisdiction. It has chosen to reserve this right to save the Court from expending resources on a factual finding that is unnecessary if the 12(b)(6) motion to dismiss is granted.

Third, this Court found that Plaintiff is abusing the judicial process. On June 4, 2007, Magistrate Judge Noel recommended that Mr. Roller's lawsuit against The James Randi Educational Foundation (Civil Case Nos. 06-4702 & 07-1296) be dismissed. The Court also recommended that Plaintiff be enjoined from bringing further suit in this Court unless the case is brought by an attorney:

A review of these two cases, Plaintiff's previous cases, and Plaintiff's pending cases [this includes the case at bar], combined with Plaintiff's assertion that he intends to sue ten percent of the United States, demonstrates that Plaintiff is misusing the judicial process by repeatedly filing cases that are so flawed that they are unable to withstand a motion to dismiss . . . . The Court agrees that the Plaintiff should be restrained from abusing the judicial process and recommends that the Clerk of court be directed not to accept any further cases filed by Plaintiff, unless the pleading is signed by an attorney admitted to practice before this Court.

(Report and Recommendation dated June 5, 2007) (emphasis added). Not surprisingly, this Report and Recommendation has had no effect on Plaintiff's harassing and abusive conduct. Just 15 days later, Plaintiff filed his Memo in Support of Motion for Partial Summary Judgment seeking one trillion dollars for an alleged and completely fabricated claim that David Copperfield (not a party to this lawsuit) attempted to harm Plaintiff, which motion is not based upon any claim actually asserted in Plaintiff's Complaint. Because Plaintiff continues to abuse this Court and Copperfield, Defendant urges the Court to consider more punitive sanctions including costs, reasonable fees, no new lawsuits, and no filings in pending lawsuits unless approved by the Chief Judge of this District or unless the pleading is signed by a lawyer admitted to practice before this Court as set forth in Defendant's Motion for Rule 11 Sanctions.

**ARGUMENT**

**I. PLAINTIFF ADMITS THAT HE HAS NO CASE FOR PATENT INFRINGEMENT, AND, THEREFORE, THE CLAIM MUST BE DISMISSED.**

Plaintiff readily admits that he has no case for patent infringement and that he has made a blunder. (Mem. for S. Judgment p. 1).<sup>2</sup> Even if Plaintiff had failed to face this undeniable truth, his patent infringement claim was still fatally flawed. In his Memo in Opposition to the Motion to Dismiss, Plaintiff concedes he has no real patent and instead believes that he has a “pseudo-patent” or a “provisional patent” on “godly powers.” (Mem. in Opp. p. 1-2). Setting aside the obvious problems with the patentability of the subject matter, there is no such thing as a “pseudo-patent” or a “provisional patent.” Plaintiff apparently misreads the patent statute to treat patent applications the same as issued patents and further believes that “provisional rights” arise once a patent application is published.<sup>3</sup> This is simply not the law.

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<sup>2</sup> On June 20, 2007, Defendant received Plaintiff’s Memo in Support of Motion for Partial Summary Judgment. Plaintiff’s filing is vague, ambiguous, irrelevant, largely incomprehensible, and is based upon no cognizable cause of action pled in the Complaint. Accordingly, Defendant, without waiving any of its rights, does not intend to respond to Plaintiff’s filings unless invited to or required by the Court. Defendant respectfully directs the Court to Defendant’s pending Motion to Dismiss and Motion for Rule 11 Sanctions.

<sup>3</sup> Plaintiff cites 35 U.S.C. § 154(d)(1), which states in relevant part:

(d) PROVISIONAL RIGHTS –

(1) IN GENERAL. – In addition to other rights provided by this section, a patent shall include the right to obtain a reasonable royalty from any person who, during the period beginning on the date of publication of the application for such patent under section 122(b) . . . and ending on the date the patent is issued . . . .

The use of the term “patent” in the statute refers only to *issued* patents, not published patent applications. Such a reading is consistent with the use of the word in the United States Code and by the United States Patent and Trademark Office (USPTO). *See e.g.*, 35 U.S.C. §§ 111, 122, 131, 151 (detailing the procedure through which an invention receives a patent)<sup>4</sup>; USPTO Patent Full-Text and Full-Page Image Databases, <http://www.uspto.gov/patft/index.html> (hosting two search engines, one for “Issued Patents” and the other for “Published Applications”). The statute is clear that a *patent* and a *published patent application* are two distinct items. *Id.*

Plaintiff also confuses the ripeness of his claim. “[Provisional rights] do[] not mature until a patent issues . . . .” *Plastic Recovery Techs., Inc. v. Container Components, Inc.*, No. 04 C 5249, 2004 WL 2583951, at \*1 (N.D. Ill. Nov. 12, 2004) (Ex. 1 to Affidavit of André J. LaMere (“LaMere Aff.”) filed herewith). The plain language of the statute reveals that, although a person with a published patent application

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<sup>4</sup> The procedure begins with a patent application that is published eighteen months after it is submitted. 35 U.S.C. §§ 111, 122. Once the application is reviewed, a patent will either be denied or will be issued. 35 U.S.C. § 131, 151. At all points prior to the issuance of a patent, the Code refers to patent applications and applications for patents, suggesting that the applicant is merely asking for a patent at that stage.

can recover damages based on another's use of the invention post-publication, that right only arises if a patent *has issued*.<sup>5</sup>

Publication of a patent application is simply not the same as being awarded a patent by the USPTO. Publication of applications is done automatically as a matter of course. 35 U.S.C. § 122(b)(1). Issuance of a patent occurs after examination and determination that the applicant meets specified statutory criteria.

Having conceded that he has no case and that no patent has issued, Plaintiff has failed to state a claim on which relief can be granted, and the claim must be dismissed.

**II. ALTHOUGH 28 U.S.C. § 1338 CONFERS SUBJECT MATTER JURISDICTION ON FEDERAL DISTRICT COURTS, THAT STATUTE IS INAPPLICABLE HERE.**

Copperfield has reserved the right to challenge personal jurisdiction under Fed. R. Civ. Pro. 12(b)(2). (Mem. in Supp. p. 7 n. 3). Plaintiff misunderstood that footnote as a challenge to subject matter jurisdiction under Fed. R. Civ. Pro. 12(b)(1), and in so doing has raised subject matter jurisdiction as an issue in this case. (Mem. in Opp. p. 3). While Plaintiff correctly asserts that a district court has exclusive subject matter jurisdiction over patent litigation, he is incorrect in believing that 28 U.S.C. § 1338 controls here.

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<sup>5</sup> Plaintiff quotes a passage from the USPTO website to argue that provisional rights arise upon publication. (Memo in Opp. p. 1). Had Plaintiff continued reading, however, he would have had to admit that his interpretation is flawed. The sentence following the excerpt used by Plaintiff states: "These rights provide a patentee with the opportunity to obtain a reasonable royalty from a third party that infringes a published application claim provided actual notice is given to the third party by applicant, and a patent issues from the application." (<http://www.uspto.gov/web/offices/pac/doc/general/index.html>, click on "Publication of Patent Applications").

For a case to “arise under” federal patent law, giving exclusive jurisdiction to the district court, the plaintiff’s well pleaded complaint must “establis[h] either that federal patent law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law.” *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.* 535 U.S. 826, 830 (2002) (citation omitted).<sup>6</sup> Plaintiff has failed to point to a statute creating a cause of action under which he can proceed and has also failed to show that there is a substantial question of federal patent law at issue in this case. As noted above, no substantial question of federal patent law can arise until or unless Plaintiff is actually issued a patent. Therefore, there is no active case or controversy (as Plaintiff readily admits) which arises under federal patent law conferring jurisdiction on this Court. Plaintiff’s Complaint must be dismissed as unripe for adjudication.

### **CONCLUSION**

Plaintiff has tried on many occasions to recover where he has suffered no legal injury. As has been done before, this Court must dismiss the claims currently before it for failure to state a claim and lack of subject matter jurisdiction. Plaintiff admits he has

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<sup>6</sup> In addition to lack of personal and subject matter jurisdiction, venue is not proper in this Court. 28 U.S.C.A. § 1400(b).

no case, admits he has received no patent and, as such, does not have an action for patent infringement.

Dated: June 21, 2007

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