ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

July 2, 2018

Christopher P. Foley
Two Freedom Square
11955 Freedom Drive
Reston, VA

**BY EMAIL**

Dear Mr. Foley:

I write on behalf of Mihalis Eleftheriou regarding his Language Transfer project. In your letter of June 19, 2018, you suggested that Language Transfer audio courses infringe U.S. Patent No. 6,565,358. You demanded that Eleftheriou cease making courses available in the United States and that he also abandon plans to publish a book about language teaching. The '358 patent is invalid under both § 101 and § 103 of the Patent Act. Your demands have no basis in law and my client will not comply.

Eleftheriou has been a peace activist and an NGO worker. He now devotes himself to teaching languages. He provides numerous free online courses through his Language Transfer project. He does not charge any fees for these courses and they do not contain any advertising. Eleftheriou's primary goals in running the project are to bring people together and to help them learn. He hopes that the Language Transfer project can raise both consciousness of, and curiosity for, language.

In your letter, you state that Hodder & Stoughton Limited is the "exclusive licensee" of Michel Thomas's "publishing rights" and holds a license to the '358 patent from the heirs of Michel Thomas. It is unclear from your letter if Hodder & Stoughton holds an exclusive license to the patent that would give it standing to assert the patent against an accused infringer. *See Textile Prods., Inc. v. Mead Corp.*, 134 F.3d 1481 (Fed. Cir. 1998) ("bare licensee" lacked standing to sue for infringement). For the purposes of this letter, I will assume your client has such standing. Your client's claims would still fail because the patent is invalid.

The '358 patent, which is directed to an ordinary cassette tape with a recording of a language lesson, is invalid under *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). In *Alice*, the Supreme Court confirmed that an abstract idea does not become eligible for patent protection merely by being implemented on generic or conventional technology. *See* 134 S. Ct. 2353-59. The '358 patent is a quintessential example of a patent that fails this test.

815 Eddy Street • San Francisco, CA 94109 USA
voice +1 415 436 9333 fax +1 415 436 9993 web www.eff.org email information@eff.org

Claim 1 of the ’358 patent reads as follows:

> 1. *A recorded medium adapted to be played on a predetermined playing device having a stop button for use in the learning of a target language by a target student who has a home language that differs from the target language comprising: a plurality of expression segments, each of said segments containing in sequence:*
>
> a. *a recorded first sub-segment containing a first expression in the home language of the target student,*
> b. *a pause constituting a second sub-segment, said pause being sufficient to permit the target student to activate the stop button associated with the playing device in which said medium is played,*
> c. *a recorded third sub-segment containing a translation of said first expression by a first example student, said first example student translation being provided regardless of any error contained in said example student translation, and*
> d. *a recorded fourth sub-segment containing a translation of said first expression by a teacher skilled in said target language.*

The only other independent claim (claim 7) is a method claim directed to the use of the recorded medium described in claim 1. The independent claims merely add details like having multiple segments with the same expression or a second example student.

The ’358 patent plainly claims an abstract idea: teaching a second language via presenting a question, a sample answer, and then a teacher’s correct answer. Courts routinely find similar claims to be directed to ineligible subject matter. *See Planet Bingo, LLC v. VKGS LLC*, 576 Fed. Appx. 1005, 1007 (Fed. Cir. 2014) (claims “drawn to patent-ineligible subject matter [of] managing a bingo game while allowing a player to repeatedly play the same sets of numbers in multiple sessions”); *RaceTech, LLC v. Kentucky Downs, LLC*, 167 F. Supp. 3d 853 (W.D. Ky. 2016) (invalidating claim directed to “fundamental human activity of wagering on sporting contests”); *Open Text S.A. v. Box, Inc.*, 78 F. Supp. 3d 1043, 1047 (N.D. Cal. 2015) (claims directed to a “system for groups of people to collaborate and share information” found ineligible); *KomBea Corp. v. Noguar L.C.*, 73 F. Supp. 3d 1348 (D. Utah 2014) (prerecorded scripts, live voice, and interjections to tailor telemarketing call found abstract).

Educators have been teaching foreign languages for centuries. It is well-established that longstanding methods of organizing human activity qualify as ineligible abstract ideas. *See, e.g.*, *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1313 (Fed. Cir. 2016); *RaceTech, LLC*, 167 F. Supp. at 862. And even if the particular teaching sequence claimed in the ’358 patent was new at the time of filing (it was not), that would not make it eligible subject matter. An abstract idea, even if novel, remains abstract. *See Parker v. Flook*, 437 U.S. 584, 588 (1978); *see also Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012) (“Einstein could not patent his celebrated law that

$E=mc^2$"); *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (rejecting patent owner's argument that "the addition of merely novel or non-routine components to the claimed idea necessarily turns an abstraction into something concrete").

Since the claims of the '358 patent are directed to an abstract idea, a court would move to the second step of the two-step *Alice* test. This involves evaluating whether the claim elements transform the nature of the claims into a patent-eligible application. *See Alice*, 134 S. Ct. at 2355. The '358 patent fails this test. In *Alice*, the Supreme Court held that claims directed to an abstract idea do not become patent eligible if they "merely require generic computer implementation." *Id.* at 2357. While the '358 patent does not require a computer, it uses technology even more conventional and generic: an ordinary cassette tape. I am sure you are aware that such technology predates your client's patent application by many decades.

The use of a stop or pause button cannot save the '358 patent. Again, this is generic technology that had been in widespread use well before the patent was filed. *See, e.g.*, Carl Franzen, *The history of the Walkman: 35 years of iconic music players*, The Verge (July 1, 2014), https://www.theverge.com/2014/7/1/5861062/sony-walkman-at-35. Moreover, a student pausing a lesson at home is merely the learn-at-home equivalent of a student asking a teacher for an extra moment to solve a problem.

Further, the claims of the '358 patent are not even limited to cassette tapes. The specification discusses using a "machine" with a "tape *or* recorded medium." *See* '358, 1:39-40 (emphasis added). The claims are similarly not limited to any particular kind of machine. *See Cyberfone Sys., LLC v. CNN Interactive Grp., Inc.*, 558 F. App'x 988, 992-93 (Fed. Cir. 2014) (claims failed step two when they suggested use of telephone but "provide[d] no guidance as to what particular machine is required"). In your letter, you wrote that the patent is "infringed by any recorded medium in which a student can pause the recording, be it on television systems, tapes, CDs or personal computing systems, having memory for storing a recorded expression that can be played on screen or through an audio player or mobile device." It would be difficult to construct a more compelling argument that the patent's claims fail step two of the *Alice* inquiry.

If Hodder & Stoughton files an infringement action against Eleftheriou, we will respond with motion to dismiss asking the court to find that claims of the '358 patent are ineligible under § 101. That motion would be granted. It would be a disservice to your client to advise it that any other result is likely.

You should also be aware that courts have awarded fees against patent owners that have asserted claims – like those of the '358 patent – that are plainly ineligible under *Alice*. In *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1378 (Fed. Cir. 2017), the Federal Circuit awarded the defendant attorneys' fees under § 285 in a case where the asserted claims were "manifestly directed to an abstract idea." District court judges have made similar awards. *See Shipping & Transit, LLC v. Hall Enterprises, Inc.*,

No. CV 16-06535-AG-AFM, 2017 WL 3485782, at *7 (C.D. Cal. July 5, 2017) (awarding fees where patent owner's arguments were "objectively unreasonable in light of the Supreme Court's *Alice* decision and the cases that applied that decision to invalidate comparable claims"); *eDekka LLC v. 3balls.com, Inc.*, No. 2:15-CV-541 JRG, 2015 WL 9225038 at *2 (E.D. Tex. Dec. 17, 2015) (awarding fees where patent claims were "clearly directed toward unpatentable subject matter, and no reasonable litigant could have reasonably expected success on the merits"). If anything, the claims of the '358 patent are even more manifestly ineligible under *Alice* that the claims considered in these cases. If Hodder & Stoughton filed suit, it would not only lose its patent, it would likely be liable for Eleftheriou's legal fees.

The claims of the '358 patent are also invalid as anticipated and obvious under § 102 and § 103 of the Patent Act. It is unsurprising that invalidating prior art can easily be found for the '358 patent. Any student that has ever sat in a language class has heard the sequence of "expression segments" claimed in the patent: 1) a teacher asks the class how to say something in the second language; 2) the students are given a moment to think about it; 3) the teacher calls on a student who tries to translate the phrase (whether correctly or not); and 4) the teacher provides the correct translation. Simply putting this sequence on tape is not inventive.[1]

In fact, a search quickly revealed prior art involving the named inventor himself. A 1997 documentary, called *The Language Master*, was broadcast on the BBC and included extended footage of Michel Thomas teaching a class. The movie is available on YouTube.[2] I particularly direct your attention to the audio from 12:15-14:46 and 36:53-39:26. In your letter, you contend that a recording done via "television system" would infringe the claims. By your own account, the BBC documentary anticipates the claims of the '358 patent. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1321 (Fed. Cir. 2006) ("That which infringes if later, anticipates if earlier.").

Your demand that Eleftheriou abandon plans to publish a book is a serious abuse of patent rights. First, Eleftheriou's book will be his own original work. It will be about languages and his language teaching method, and not about editing audio lessons. Second, as already noted, the patent is invalid. Even if it were not, a patent grants no right to censor

---

[1] Further, it is unlikely that the *content* of the claimed "expression segments" would be given any patentable weight at all. The printed matter doctrine provides that where printed matter is not functionally related to the substrate, it cannot distinguish the invention from the prior art in terms of patentability. *See Praxair Distribution, Inc. v. Mallinckrodt Hosp. Prod. IP Ltd.*, 890 F.3d 1024, 1032 (Fed. Cir. 2018). Stripped of the semantic content of the "expression segments," the claims are merely to a recorded medium, which of course predates the application by decades.

[2] The movie is available at https://www.youtube.com/watch?v=O0w_uYPAQic. Its IMDB page is at https://www.imdb.com/title/tt1356536/. The documentary was released on March 23, 1997. This is more than three years before the patent application was filed.

speech. The patent bargain is supposed to encourage people to make their inventions public so that others can learn from, discuss, and improve upon their work. *See Griffith v. Kanamaru*, 816 F.2d 624, 626 (Fed. Cir. 1987) (public disclosure is the "linchpin" of the patent system). Your demand is contrary to both the patent bargain and the First Amendment. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("A prior restraint on free speech is "the most serious and the least tolerable infringement on First Amendment rights.").

Given that Hodder & Stoughton is now unquestionably aware of the invalidity of the '358 patent, we sincerely hope it will have the good sense not to trouble a court of law with this matter. However, if it does intend to file suit or if it does not affirmatively abandon its claim against Eleftheriou, be assured that our client is prepared to defend himself against your client's spurious claims, and will seek his 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). We ask that Hodder & Stoughton immediately withdraw its allegation of infringement before Eleftheriou is forced to incur further legal fees.

Very truly yours,

Daniel K. Nazer
Senior Staff Attorney