

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CXLOYALTY, INC.,
Petitioner,

v.

MARITZ HOLDINGS INC.,
Patent Owner.

Case CBM2018-00037
Patent 7,134,087 B2

Record of Oral Hearing
Held: September 17, 2019

Before MICHAEL R. ZECHER, JUSTIN T. ARBES, and
JON B. TORNQUIST, *Administrative Patent Judges*.

Case CBM2018-00037
Patent 7,134,087 B2

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The above-entitled matter came on for hearing on Tuesday, September 17, 2019, commencing at 1:04 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

1 PROCEEDINGS

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3 JUDGE ARBES: Good afternoon. This is the Oral Hearing in Case
4 CBM2018-00037 involving Patent 7,134,087. Can counsel please state their
5 names for the record?

6 MR. LIEBERMAN: Steven Lieberman and Lawson Allen, and my
7 colleague Richard Wydeven, for the Petitioner.

8 MR. EVANS: Robert Evans, Your Honor. Here for the Patent
9 Owner, Maritz Holdings, with my colleague, Kyle Gottuso. And also here
10 today is Steve Gallant, our General Counsel.

11 JUDGE ARBES: Thank you. Per the Trial Hearing Order, each party
12 will have 60 minutes of time to present arguments. And the order of
13 presentation is, first, Petitioner will present its case regarding the alleged
14 unpatentability of the challenged claims and proposed substitute claims in
15 Patent Owner's motion to amend. Petitioner may reserve time for rebuttal,
16 but no more than 30 minutes.

17 Patent Owner then will respond to Petitioner's presentation and
18 present its case as to whether the motion to amend meets the requirements of
19 37 C.F.R. 42.211. Patent Owner may reserve time for rebuttal, but no more
20 than 15 minutes.

21 Petitioner then may use any remaining time to respond to Patent
22 Owner, and finally Patent Owner may use any of its remaining time for a
23 brief surrebuttal, responding to Petitioner's rebuttal arguments.

24 Two reminders before we begin. To ensure that the transcript is clear,
25 please try to refer to your demonstratives by slide number. And also if either
26 party believes that the other party is presenting an improper argument, I

1 would ask you to please raise that during your own presentation rather than
2 objecting at the time and interrupting the other side.

3 Any questions before we begin?

4 MR. EVANS: No, Your Honor.

5 MR. LIEBERMAN: No, Your Honor.

6 JUDGE ARBES: Thank you. Counsel for Petitioner, you may
7 proceed. And would you like to reserve time for rebuttal?

8 MR. LIEBERMAN: I would, Your Honor. Unless I'm more verbose
9 than I intend to be on my initial presentation, I'd like to reserve 30 minutes
10 for rebuttal, please.

11 Judge Arbes, and may it please the Board. My name is Steve
12 Lieberman. In this Board's institution decision, the Panel concluded that the
13 Petitioner, which is now known as CxLoyalty, Inc., had demonstrated that
14 it's more likely than not, that each of the 15 original claims in the 087 Patent
15 are unpatentable for failing to meet the eligibility requirements of Section
16 101.

17 The principal Section 101 questions for this trial, I submit fall into
18 two broad categories. First, did the Board err in the preliminary conclusions
19 set forth in the institution decision? Or does the evidence submitted by the
20 party subsequent to the institution decision or compel a different result with
21 respect to the original claims? Our view, you might not be surprised to
22 learn, is that you did not err, and that the subsequent evidence makes no
23 difference with respect to your preliminary conclusion.

24 The second category of issues is whether a different conclusion
25 regarding eligibility should apply with respect to the proposed substitute
26 claims. And in connection with that second point, I intend to address the

1 difference in the claims between the substitute claims and the original
2 claims. The 2019 guidance that came out in January after the institutional
3 ruling including example 42 which is a focus of some of the submissions
4 from Maritz, and the second Weiner declaration which was the only
5 additional evidence that was submitted after the institution decision.

6 So those are the questions upon which I principally intend to focus on
7 the initial presentation. Let me begin with the 087 Patent itself. The first
8 sentence of the abstract of the patent describes it as a system for permitting a
9 participant to transact the purchase using awarded points with a vendor
10 system which transacts purchases in currency.

11 Of course, in our analysis we are going to be focusing on the claims.
12 In its institution decision this Board explained that the claims as a whole
13 were directed to the abstract idea of facilitating or brokering a commercial
14 transaction between the purchaser, using a first form of value that would be
15 points and that seller transacting in the second form of value which would be
16 currency or money.

17 As the Board correctly concluded in the institution decision
18 those claims were similar to the claims that the Supreme Court and held to
19 be ineligible in both *Bilski* and *Alice*, and I would note that in the *Alice*
20 case, the patent had as one of the claim elements something that the
21 Supreme Court called shadow records.

22 And I would submit I'll talk about this in a little more detail
23 later, that shadow records are very similar to the program account upon
24 which Maritz relies very heavily, this program account which I say is hidden
25 from the participants, and is intended to hide from the participants, or

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