

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

Zillow Group, Inc., Zillow, Inc.
Petitioner,

v.

International Business Machines Corp.
Patent Owner.

IPR2022-00646, IPR2023-00259
U.S. Patent No. 7,631,346

Decision on Request for
Extension of Time under
37 C.F.R. § 90.3(c)(1)(ii)

MEMORANDUM AND ORDER

On January 11, 2024, Petitioners Zillow Group, Inc., Zillow, Inc. (“Zillow”) filed a request to extend the time to seek judicial review of the Patent Trial and Appeal Board decision in the underlying IPR proceedings (“Request”). The PTAB’s decision issued on October 11, 2023. Under 37 C.F.R. § 90.3(a)(1), judicial review of a Board decision must be sought within sixty-three (63) days of the Board decision. Patent Owner International Business Machines Corp. (“IBM”) properly filed a Notice of Appeal with the United States Court of Appeals for the Federal Circuit (“CAFC”) on November 20, 2023. Under 37 C.F.R. § 90.3(a)(1) and Fed. R. App. P. 4(a)(3), Zillow’s Notice of Cross-Appeal was due to be filed by December 13, 2023. However, Zillow filed a Notice of Cross-Appeal on December 15, 2023, two (2) days after the deadline.

Rule 90.3(c)(1) allows parties extra time to file a notice of appeal in the

CAFC under two circumstances: Rule 90.3(c)(1)(i), in which the Director may extend the time for filing an appeal requested before the expiration of the period for filing an appeal with good cause, and Rule 90.3(c)(1)(ii), in which the Director may extend the time for filing an appeal requested after the expiration of the period for filing an appeal due to excusable neglect. The extension request at issue here, filed after the expiration of the period for filing the appeal notice, falls under the “excusable neglect” provision of 37 C.F.R. § 90.3(c)(1)(ii). The request is GRANTED for the reasons set forth below.

The Director may extend the time for filing a notice of appeal after the expiration of the period for filing an appeal “upon a showing that the failure to act was the result of excusable neglect.” 37 C.F.R. § 90.3(c)(1)(ii); *see also Mitsubishi Cable Indus., Ltd., et al. v. Goto Denshi Co., Ltd.*, Memorandum and Order at 2-7, Paper 28 (IPR2015-01108) (May 3, 2017) (“*Mitsubishi*”) (explaining why the Director retains authority to decide Rule 90 time-extension requests where an untimely notice of appeal has concurrently or subsequently been filed). The authority to decide such requests has been delegated to the Solicitor. *See* MPEP § 1002.02(k)(3).

In determining excusable neglect, the USPTO applies the standard used by the Federal Courts. *See* MPEP § 1216; *Pioneer Inv. Servs. Co. v. Brunswick*

Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993); *see, e.g., Mitsubishi*, Mem. Op. at 7-14; *IpVenture, Inc. v. FedEx Corp.*, Memorandum and Order (*Inter Partes* Reexamination Control No. 95/001,896) (Apr. 4, 2017). The Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) made clear that “‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *See Pioneer*, 507 U.S. at 394. In *Pioneer*, the Court explained that determining whether “excusable neglect” occurred is “an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer*, 507 U.S. at 395. And in determining whether a party’s failure to comply with a deadline was excusable, it is proper to rely on the acts and omissions of a party’s chosen counsel where relevant. *Id.* at 396-97. Generally, the factors to be considered in determining whether negligence is excusable include: [1] the danger of prejudice to another party, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith. *Id.* at 395.

The third *Pioneer* factor—relating to why the filing was delayed—is generally considered the most important factor in the analysis, although it does not

control the inquiry. *See, e.g., FirstHealth of the Carolinas, Inc. v. Carefirst of Maryland, Inc.*, 479 F.3d 825, 829 (Fed. Cir. 2007); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1587 n.7 (T.T.A.B. 1997). Here, with respect to the third factor, Zillow’s counsel explains that the Notice of Cross-Appeal was late due to a secretary’s docketing error. Request at 2-3; Affidavit of Giovanna Eby at ¶¶ 3-4. The December 13, 2023 filing deadline was missed because “the secretary mistakenly relied on the monthly calendar for January 2024 (in which the 13th is on a Saturday) rather than December 2023 (in which the 13th is a Wednesday). Request at 3; Affidavit of Giovanna Eby at ¶¶ 3-4. There is no evidence that Zillow chose to “flout” the filing deadline. *See Pioneer*, 507 U.S. at 388. Instead, the Request and supporting documentation indicate that Zillow was at most, careless. *See Pioneer*, 507 U.S. at 381 (“Congress plainly contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party’s control.”); *Mitsubishi*, Mem. Op. at 11 (*Pioneer* “adopted a broader and more flexible test for excusable neglect . . . to include more than simply intervening circumstances beyond the party’s control.”) (internal citations and quotes omitted).

There is also no indication of bad faith under the fourth *Pioneer* factor. Zillow’s counsel acted to remedy the missed deadline immediately, by filing a

Notice of Cross-Appeal on December 15, 2023. The failure to comply was inadvertent and done in an affirmative effort to comply with the Notice of Cross-Appeal deadline. *See Pioneer*, 507 U.S. at 395.

There is also no evidence of prejudice to the USPTO or IBM under the first *Pioneer* factor. Nor is there evidence of potential negative impact to any judicial or administrative proceedings, as relevant under the second *Pioneer* factor. The delay between expiration of the cross-appeal filing deadline and filing of the underlying Notice of Cross-Appeal did not result in any meaningful delay in the proceedings under the second *Pioneer* factor. These facts all weigh in favor of granting the Request.

Thus, the Director finds that application of the *Pioneer* factors here weighs in favor of granting Zillow's requested two (2) day extension.

ORDER

Upon consideration of Zillow's request for an extension of time under 37 C.F.R. § 90.3(c)(1)(ii), it is ORDERED that the request is **granted**. Zillow's filing deadline to appeal from the underlying Board decision is extended from December 13, 2023 to December 15, 2023.

KATHERINE K. VIDAL
Under Secretary of Commerce for
Intellectual Property and Director of the
U.S. Patent and Trademark Office

/s/ Farheena Y. Rasheed
By: Farheena Y. Rasheed
Acting Solicitor

DATE: January 19, 2024

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