

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE DIRECTOR

**Microsoft Corporation**

Petitioner,

v.

**RealD Spark, LLC**

Patent Owner.

IPR2023-01046

U.S. Patent No. 10,740,985

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

**MEMORANDUM AND ORDER**

On January 29, 2025, patent owner RealD Spark, LLC (“RealD”) filed a request to extend the time to seek judicial review of the Patent Trial and Appeal Board decision in the underlying IPR proceeding (“Request”). On January 31, 2025, Petitioner Microsoft Corporation (“Microsoft”), filed a response to RealD’s Request saying that it did not oppose the Request.<sup>1</sup> The PTAB’s decision issued on November 19, 2024. 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. Under

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<sup>1</sup> While the Director notes Microsoft’s response, neither 37 C.F.R. § 90.3 nor its predecessor 37 C.F.R. § 1.304(a)(3) (2012) provides for opposing or otherwise responding to a time-extension request. Thus, as explained in prior time-extension decisions, “parties should not expect the opportunity to file responsive papers, or that they will be considered if submitted.” *UWA v. AZL*, Decision on Request Under 37 C.F.R. § 1.304(a)(3)(i) at 4, Int. No. 106,013 (Feb. 26, 2016); *see Ho v. Furcht*, Decision on Request Under 37 C.F.R. § 1.304(a)(3)(i) at 2 n.2, Int. No. 105,953 (Dec. 12, 2014). As those decisions explain, however, the Director has discretion to consider any “opposition” or “reply” thereto.

37 C.F.R. § 90.3(a)(1), RealD’s Notice of Appeal was due to be filed by January 21, 2025. RealD seeks an extension of time until February 12, 2025 to file its Notice of Appeal, twenty-two (22) days after the deadline.

Rule 90.3(c)(1) allows parties extra time to file a notice of appeal in the Federal Circuit 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(VI); *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) explained 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*, 1997 WL 473051 at \*6 n.7 (T.T.A.B. 1997). Here, with respect to the third factor, RealD explains that the Notice of Appeal was late due to unexpected circumstances involving RealD’s attorney, Timothy Gorry. Request at 1. After RealD’s lead attorney, Jennifer Mauri, left Michelman & Robinson, LLP, Ms. Mauri relied on Mr. Gorry to handle the filing. *Id.*; Declaration of Timothy J. Gorry (“Decl.”) at ¶ 2. However, Mr. Gorry was displaced by the Palisades Fire on January 7, 2025, and spent 17 days in temporary housing while dealing with home remediation, insurance, and other urgent matters. Request at 1-2; Decl. at ¶¶ 4-6. Although he was aware of the deadline and intended to file on time, he ultimately misjudged his ability to do so under the extenuating circumstances. Request at 2; Decl. at ¶¶ 7-9. The Director finds this a reasonable explanation for missing the deadline. The Request and supporting declaration indicate that, at most, RealD inadvertently missed the filing deadline due to intervening circumstances beyond RealD’s control.

There is also no indication of bad faith under the fourth *Pioneer* factor. For example, there is no evidence that RealD chose to “flout” the filing deadline. *See Pioneer*, 507 U.S. at 388. The failure to comply was not in bad faith. *See Pioneer*, 507 U.S. at 395.

There is also no evidence of prejudice to the USPTO or Microsoft 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 appeal filing deadline and eventual filing of the Notice of Appeal will 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 RealD’s requested twenty-two day extension.

#### ORDER

Upon consideration of RealD’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**. RealD’s filing deadline to appeal from the underlying Board decision is extended from January 21, 2025 to February 12, 2025.

COKE MORGAN STEWART

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

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By: Farheena Y. Rasheed  
Solicitor

DATE: February 4, 2025

cc (via email):

Timothy J. Gorry  
MICHELMAN & ROBINSON LLP  
tgorry@mrlp.com

Alexander B. Stein  
Morgan, Lewis & Bockius LLP  
Alexander.stein@morganlewis.com

Andrew V. Devkar  
Morgan, Lewis & Bockius LLP  
Andrew.devkar@morganlewis.com