INTERFERENCE TRIAL SECTION PRECEDENTIAL OPINION

The opinion in support of the decision being entered today is binding precedent of the Interference Trial Section of the Board of Patent Appeals and Interferences. The opinion is not otherwise binding precedent. The decision was entered on November 10, 1998.

Paper No. 168

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

ARJUN SINGH,

Junior Party,
(Application 07/552,719),

v.

ANTHONY J. BRAKE,

Senior Party
(Patent 4,870,008).

Patent Interference No. 102,728

Before: McKELVEY, Senior Administrative Patent Judge, and SCHAFER and LEE, Administrative Patent Judges.

McKELVEY, Senior Administrative Patent Judge.

MEMORANDUM OPINION AND ORDER

A. Introduction

The Chief Judge has referred (Paper 167) the above-identified interference to the Trial Section for consideration of a request (Paper 166) filed by Singh for additional time (1) to file a request for reconsideration or (2) file an appeal to the Federal Circuit or seek judicial review in a district court of a final decision entered by a merits panel on August 31, 1998 (Paper 164).

B. Findings of fact

1. A final decision by a merits panel was entered in this interference on August 31, 1998 (Paper 164).

2. According to the last page of the opinion in support of the final decision, copies of the opinion were to be mailed to both:

   a. Thomas E. Ciotti, Esq., of Morrison & Foerster, 755 Page Mill Road, Palo Alto, CA 94304-1018 (counsel for Brake) and

   b. R. Danny Huntington, Esq., of Burns, Doane, Swecker & Mathis, P.O. Box 1404, Alexandria, VA 22314-1404.

3. The last day for filing a request for reconsideration was September 30, 1998. 37 CFR § 1.658(b).

4. The last day for filing an appeal to the Federal Circuit or seeking judicial review in a district court was November 2, 1998. 37 CFR § 1.304(a).

5. On November 4, 1998, Singh filed a document styled PETITION TO RESTART PERIOD FOR ACTION (Paper 166).

6. According to the petition, on November 3, 1998, counsel for Singh received a phone call from counsel for Brake.

7. As a result of the phone call, counsel for Singh is said to have learned for the first time that the final decision had been entered on August 31, 1998.

8. In the petition, counsel for Singh "states that [as of November 4, 1998, a copy of the opinion in support of] the Final Decision dated August 31, 1998 was not received in the office of ***" counsel for Singh.

9. On November 5, 1998, Brake filed a document styled BRAKE OPPOSITION TO PETITION TO RESTART PERIOD FOR ACTION (Paper 165).[1] The opposition was filed by facsimile in response to a telephone call to counsel for Brake from Yolunda Townes, a paralegal in the Trial Section, making inquiry as to whether the Singh petition would be opposed.

10. According to Brake, "Singh has failed to provide evidence adequate to justify grant of the petition ***" (Paper 165, page 3).

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[1] For some reason, Brake's opposition (Paper 165) was entered in the interference file ahead of Singh's request (Paper 166).

11. A telephone conference call was held on Monday, November 9, 1998, at approximately 1:30 p.m. (13:30 hours E.D.T.), involving:

a. R. Danny Huntington, Esq., counsel for Singh;

b. Thomas E. Ciotti, Esq., counsel for Brake; and

c. Fred E. McKelvey, Senior Administrative Patent Judge.

12. During the telephone conference call, Mr. Huntington orally represented that there is no indication in the records of his law firm (Burns, Doane, Swecker & Mathis) that a copy of the final decision had been received by the law firm prior to November 4, 1998.[2]

13. During the telephone conference call, Mr. Ciotti suggested that the evidence filed to date by Singh was not sufficient to show excusable neglect. See 37 CFR § 1.304(a)(3)(ii).

14. Nevertheless, there is no reasonable basis for doubting the truthfulness of the representations made by Mr. Huntington.

15. As of close of business on November 4, 1998, a copy of the final decision had not been received by Burns, Doane, Swecker & Mathis.

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[2] Personnel of the law firm picked up a copy of the final decision at the Office of the Clerk on November 5, 1998.

C. Discussion

There is a presumption that a copy of the opinion of the merits panel was mailed to the addressees at the addresses listed on the last page of the opinion. Stated in other terms, there is a presumption that personnel at the Patent and Trademark Office carried out their duties in a regular manner. Haley v. Department of the Treasury, 977 F.2d 553, 558 (Fed. Cir. 1992):

> There is a strong presumption in the law that administrative actions are correct and taken in good faith." Sanders v. United States Postal Serv., 801 F.2d 1328, 1331 (Fed. Cir. 1986). More specifically, "[i]t is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations and the burden is on the plaintiff to prove otherwise." Parsons v. United States, 670 F.2d 164, 166 (Ct. Cl. 1982) (citing United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926)).

It is the normal practice at the board to place decisions to be mailed in the board's outgoing mail box.

It is the normal practice of the Mail Room of the Patent and Trademark Office to pick up outgoing mail twice a day.

It is further the normal practice of the Mail Room to cause all outgoing mail to be deposited with the U.S. Postal Service.

There is also a presumption that a properly addressed piece of mail placed in the U.S. Postal Service, First Class mail,

postage pre-paid, was received by the addressee. Hoffenberg v. Commissioner of Internal Revenue, 905 F.2d 665, 666 (2d Cir. 1990).

However, both presumptions are rebuttable, not conclusive. As is readily apparent by manner in which mail is sent by the board via the Mail Room and from there through the U.S. Postal Service to an addressee that there are several possible steps during which a piece of mail inadvertently might be misplaced before it is able to reach an intended addressee.

An intended addressee of the opinion, Mr. R. Danny Huntington, Esq., has represented that a copy of the opinion was not received by his law firm. There is no reason to doubt the objective truth of the representations made by Mr. Huntington. It is true that more documentary evidence might have been submitted in support of non-receipt of the opinion. However, it should be emphasized that Singh in this particular matter is undertaking to prove a "negative," i.e., that some event did not happen. The proof of a negative is generally difficult. Under the facts of this case, Mr. Huntington's oral representations during the telephone conference call, coupled with the representation in the petition, constitute more than a sufficient basis upon which to find, by a preponderance of the evidence,[3]

[3] Something is established by a "preponderance of the evidence" when the existence of a fact is more probable than its nonexistence. Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622, 113 S.Ct. 2264, 2279 (1993).

that the copy of the opinion intended for Mr. Huntington was not received by his law firm (Burns, Doane, Swecker & Mathis) prior to November 4, 1998. There is no reason to complicate the record in this interference with additional evidence, particularly given the principle that interference cases are to be resolved in "a just, speedy, and inexpensive" manner. 37 CFR § 1.601.

During the telephone conference call, it was suggested by Mr. Ciotti that a declaration normally is needed to establish non-receipt of the opinion under the excusable neglect standard of 37 CFR § 1.304(a)(3)(ii). But, the request is not being construed solely as a request for an extension of time to take an appeal. Rather, the request is viewed as asking the board to reset the date of the final decision given that Mr. Huntington did not receive a copy of the opinion. Extending the time for taking an appeal under 37 CFR § 1.304(a)(3)(ii) would not extend the time for filing a request for reconsideration, which is governed by the good cause standard of 37 CFR § 1.645(b) for filing belated papers. Hence, the excusable neglect standard of 37 CFR § 1.304(a)(3)(ii) applies only in part. Moreover, under the circumstances of this case, the representations by Mr. Huntington constitute a sufficient basis upon which to find that there was excusable neglect or that there was good cause.

D. Order

Upon consideration of the record, and for the reasons given, it is

ORDERED that the date of the FINAL DECISION (Paper 164) is reset to **November 5, 1998**--the date by which both parties had received a copy of the opinion in support of the final decision.

ORDERED that on or before **December 7, 1998**,[4] Singh is authorized to file a request for reconsideration (37 CFR § 1.658(b)) of the final decision entered August 31, 1998.

FURTHER ORDERED that should Singh elect not to file a request for reconsideration, then the time for filing an appeal to the Federal Circuit or seeking judicial review in a district court will expire **January 5, 1999**.

FRED E. McKELVEY, Senior Administrative Patent Judge	)
RICHARD E. SCHAFER Administrative Patent Judge	) BOARD OF PATENT) APPEALS AND) INTERFERENCES
JAMESON LEE Administrative Patent Judge	)

[4] During the conference call, it was initially suggested that the date might be **December 10, 1998**.

cc (via facsimile and First Class Mail)

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