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UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

Patent Interference No. 105,684 (RT)

Horacio L. RODRIGUEZ RILO
and Arthor J. Helmicki
(11/748,735),
Junior Party,

v.

Daniel J. BENEDICT
and Lorna S. Mosse
(US 7,045,349),
Senior Party.

DECISION
Bd. R. 121
on suggestion for show-cause order

RICHARD TORCZON, *Administrative Patent Judge*.

Today there was a telephonic hearing to consider whether the junior party (Rilo) should be placed under an order to show cause. According to the senior party (Benedict), Rilo failed to demonstrate the existence of interfering subject matter between the parties. John Garred and Susan Mizer (with Charles Gholz) appeared for Rilo, while Robert Hahl appeared for Benedict. The suggestion is DECLINED.

As a junior-party applicant seeking an interference, Rilo was obliged to file a statement under Bd.R. 202 explaining what it thought the scope of the interference should be and why it would be entitled to prevail. The rule expressly provides for an order to show cause if the applicant fails to demonstrate facially why it would prevail on priority. Bd.R. 202(d)(2). There is no corresponding express authority for an order to show cause when there are other defects in the Bd.R. 202 statement. An administrative patent judge has authority, however, to enter non-final orders for the administration of the interference. Bd.R. 104(a). Orders under both rules are committed to the discretion of the administrative patent judge.

The Director of the United States Patent and Trademark Office has plenary authority to declare an interference between an application and an unexpired patent, provided the Director is of the opinion that they interfere. 35 U.S.C. 135(a). The requirements of Bd.R. 202 serve at least three purposes. The first two are somewhat like a complaint in that they, first, provide applicants with an opportunity to explain where they think the interference lies and, second, commit the applicant to certain facts necessary for the efficient administration of an interference. A third consideration is the aid they provide to the examiner and Board in evaluating the possibility of an interference.[1] Since the examiner may propose an interference without any applicant assistance, defects in the Bd.R. 202 showing do not prevent an administrative patent judge from provisionally determining that the Director

[1] Interferences form a miniscule fraction of the cases most examiners see. Consequently, few examiners are expert in interference practice. The Board, while technically qualified, 35 U.S.C. 6(a), does not necessarily have specific expertise in the subject matter of the interference.

is of the opinion that an interference exists.[2] In the present case, Rilo's sparse showing on how the claims interfere operates as an admission from Rilo that the differences would have been obvious. Admissions only bind the party making the admission.

An interference declaration is presumed to be correct. *Bilstad v. Wakalopulos*, 386 F.3d 1116, 1120-21 (Fed. Cir. 2004) (affirming placement of burden on threshold movant). Benedict's remedy is to seek authorization to file a motion for judgment of no interference-in-fact. Bd.R. 121(a)(1); Bd.R. 201, "Threshold issue". Under Board practice, a no interference-in-fact motion may be expedited. When Benedict seeks authorization, it may also suggest expediting the motion.

cc:

John Garred, Susan Mizer, and Michael Hudzinski, Tucker Ellis & West LLP, of Cleveland, Ohio

Robert Hahl and Rick Neifeld, Neifeld IP Law, PC, of Alexandria, Virginia

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[2] Ample precedent demonstrates that Office rules are for the Office to enforce and create no rights of enforcement in third parties. *E.g.*, *Exxon Corp. v. Phillips Petroleum Co.*, 265 F.3d 1249, 1254 (Fed. Cir. 2001) (no third-party enforcement of interference-estoppel rule).