UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

Facebook, Inc., et al.	)	IPR2017-01427
	)	
v.	)	Decision on Request
	)	under 37 C.F.R. § 90.3(c)(1)(ii)
Uniloc 2017 LLC	)	

MEMORANDUM AND ORDER

On November 30, 2018, the Patent Trial and Appeal Board ("Board") issued a single Final Written Decision addressing the patentability issues in both IPR2017-01427 ("-1427") and IPR2017-01428 ("-1428"), holding that Petitioners Facebook, Inc., et. al. ("Petitioners")[1] had demonstrated the unpatentability of claims 1–12, 14–17, 25, and 26 of U.S. Patent No. 8,995,433 B2 ("the '433 patent"). On January 17, 2019, the Board denied the request for rehearing filed in both IPR proceedings by Patent Owner Uniloc 2017 LLC ("Uniloc"). Under 37 C.F.R. § 90.3(a), Uniloc had until March 21, 2019, to file with the USPTO a notice of appeal to the United States Court of Appeals for the Federal Circuit in both the -1427 and -1428 proceedings.[2]

[1] The named Petitioners in IPR2017-01427 are Facebook, Inc., WhatsApp Inc., and LG Electronics, Inc. The named Petitioners in IPR2017-01428 are Facebook, Inc., WhatsApp Inc., LG Electronics, Inc., and Huawei Device Co., Ltd.

[2] While the Board addressed the patentability issues in the -1427 and -1428 proceedings in one decision, the Board never formally consolidated the two IPR proceedings.

Before the Director here is Uniloc's Request, filed on July 11, 2019, for additional time pursuant to 37 C.F.R. § 90.3(c) in which to appeal the Final Written Decision in the -1427 proceeding.[3] As explained below, the Director finds that the facts support a finding of excusable neglect and grants a limited four-day extension of time on Uniloc's notice of appeal in the -1427 proceeding.

Uniloc took steps to file a notice of appeal in the -1427 proceeding within the regulatory 63-day deadline. Uniloc's primary attorney—Ryan Loveless—instructed another attorney in his firm—Travis Richins—to file the appeal notice for the underlying proceeding with the USPTO, and provide copies to the Board, Federal Circuit, and opposing counsel. *See* -1427 Req. at 2-5. On March 21, 2019, Mr. Richins took steps to (1) file the appeal notice with the USPTO Office of the General Counsel (per 37 C.F.R. §§ 90.2 & 104.2), as well as (2) electronically file copies with the PTAB (using the Board's E2E system) and the Federal Circuit, and (3) email copies to opposing counsel. *See id.*

Per the certificate of service, Uniloc mailed the -1427 appeal notice to the USPTO Office of the General Counsel on March 21, 2019. *See* Loveless Decl., Exh. C (-1427 appeal notice filed with USPTO). Uniloc explains that it intended to use the United States Postal Service's ("USPS") "Priority Mail Express®" service to file the

[3] Uniloc filed a separate request in the -1428 proceeding.

appeal notice.[4] -1427 Req. at 4. Mr. Loveless explains that he intended to use the Priority Mail Express service to take advantage of 37 CFR § 1.10(a)(1), which provides that any paper filed with the USPTO using the Priority Mail Express® service "will be considered filed with the USPTO on the date of deposit with the USPS." *See* Loveless Decl. ¶ 12. However, Mr. Richins mailed the appeal notice using the USPS's "Priority Mail®" service. *See* -1427 Req. at 4; Loveless Decl., Exh. C. (date-stamped notice of appeal in -1427). The Solicitor's Office received the -1427 appeal notice on March 25, 2019. *See* -1427 Req. at 5; Loveless Decl., Exh. C.

Also on March 21, 2019, Mr. Richins attempted to provide the Board with a copy of the -1427 appeal notice using the E2E system. Here, the facts in both the -1427 and -1428 proceedings are relevant. Mr. Richins followed the same procedure for electronically submitting copies of the appeal notices to the PTAB in both proceedings on March 21, 2019, with apparently two different outcomes. *See* Richins Decl. ¶ 3.

In the -1428 proceeding, the E2E system confirmed that the PTAB's E2E system received a notice of appeal on March 21, 2019. *See* Richins Decl. ¶ 3; Loveless Decl., Exh. A (E2E filing notice in -1428). However, in the -1427 proceeding, the

[4] Uniloc used the term "Express Mail" in the certificates of service for the notices of appeal, which is the old name for the USPS's current "Priority Mail Express®" service. *See* -1427 Req. at 4; Loveless Decl. ¶ 12.

E2E confirmation received by Uniloc states that "a Notice of Appeal has been filed" but that no documents were submitted with "this request." *See* Loveless Decl., Exh. B (E2E filing notice in -1427). However, the E2E confirmation notice is not entirely accurate. The E2E docket in the -1427 proceeding shows that documents were attached to Uniloc's submission. Exhibit 2005 in the E2E docket for the -1427 proceeding shows that a copy of the decision being appealed—the final written decision in the -1427 proceeding—was received by the filing system on March 21, 2019. Nonetheless, it appears undisputed that the E2E system did not receive an appeal "notice" on March 21, 2019. On May 6, 2019, a copy of the appeal notice received in the Solicitor's Office (date-stamped as received on March 25, 2019) was apparently uploaded into the electronic docket for the -1427 proceeding. Mr. Richins does not know why the E2E system received all appeal notice papers electronically filed in the -1428 proceeding, but not the -1427 proceeding. *See* Richins Decl. ¶ 3.

Mr. Richins also filed copies of the -1427 appeal notice with the Federal Circuit. The Federal Circuit appeal docket associated with the -1427 proceeding indicates that the Court received the appeal notice on March 21, 2019, and the Court docketed the appeal the next day. *See Uniloc 2017 LLC v. Facebook Inc.*, Appeal No. 19-1688, ECF No. 1 (Mar. 22, 2019) (involving the -1427 proceeding). The facts in the appeal associated with the -1428 proceeding are the same. *See Uniloc 2017 LLC v. Facebook Inc.*, Appeal No. 19-1689, ECF No. 1 (Mar. 22, 2019) (involving the -1428

proceeding). The Federal Circuit later consolidated the two appeals. *See Uniloc 2017 LLC v. Facebook Inc.*, Appeal No. 19-1688, ECF No. 2 (Mar. 27, 2019).

Lastly, Mr. Richins states that on March 21, 2019, he emailed a copy of the appeal notice in the -1427 proceeding to opposing counsel. *See* Richins Decl. ¶ 4 & Exh (March 21, 2019 email to opposing counsel with copy of -1427 appeal notice).

On July 1, 2019, Appellee LG Electronics ("LGE") moved with the Federal Circuit to dismiss Appeal No. 19-1688 (related only to the -1427 proceeding) for lack of jurisdiction, arguing that Uniloc had failed to timely file the underlying notice of appeal in the -1427 proceeding with the USPTO. *See Uniloc 2017 LLC v. Facebook Inc.*, Appeal No. 19-1688, ECF No. 30 (Jul. 1, 2019). LGE did not move to dismiss Appeal No. 19-1689, associated with the -1428 proceeding.

After additional briefing from both parties on LGE's dismissal motion, the Federal Circuit stayed the briefing schedule in the consolidated appeal, with instructions to the parties to inform the Court regarding how they believe the appeal should proceed once the Director decided the underlying time extension request in the -1427 appeal (filed with the USPTO on July 11, 2019). *See Uniloc 2017 LLC v. Facebook Inc.*, Appeal No. 19-1688, ECF No. 38 (Aug. 19, 2019). On July 19, 2019, LGE filed with the USPTO an Opposition to Uniloc's extension request in the -1427 proceeding.

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 Industr., Ltd., et al. v. Goto Denshi Co., Ltd.*, Memorandum and Order at 2-7, Dkt. No. 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* at 7-14; *IpVenture, Inc. v. FedEx Corp.*, Memorandum and Order (Inter Partes Reexamination Control No. 95/001,896) (Apr. 4, 2017) ("*IpVenture II*").

> The "excusable neglect" inquiry is
>
> > an equitable one, taking account of all relevant circumstances surrounding the party's omission. These 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.

Pioneer, 507 U.S. at 395. Excusable neglect "is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. Use of the term "neglect" permits late filings caused by "inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."

Id. at 388. Limiting such "neglect" to "excusable" situations deters parties from "freely ignoring court-ordered deadlines." *Id.* at 395; *see generally Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 25 F. App'x 923, 924 (Fed. Cir. 2001). 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 (Fed. Cir. 2007); *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586-87 n.7 (T.T.A.B. 1997). Assuming, without deciding, that Uniloc's attempt to file its notice of appeal in the –1427 proceeding was untimely, the Director concludes that the facts here support granting Uniloc a limited four-day extension on filing its notice of appeal.

On the third *Pioneer* factor, Uniloc attempted to comply with Rule 90.2(a) by mailing its notice of appeal on or before the March 21, 2019 deadline. Further, the Solicitor's Office physically received the notice of appeal in the -1427 proceeding on March 25, 2019, four calendar days after the due date (and only two business days after the due date). Uniloc argues that the failure to timely file the notice of appeal with the USPTO in the manner required by 37 CFR § 90.2(a) on or before the deadline resulted from a miscommunication regarding how to file the notice. *See* -1427 Request at 8-9 (analogizing facts to those in *Mitsubishi*).

Ultimately, the Director finds that this factor weighs in favor of granting the requested extension. Uniloc could have, as LGE presses, done more to ensure that

the USPTO received its notice of appeal on or before March 21, 2019. *See* Opp. at 5. But the "excusable neglect" inquiry necessarily always includes some neglect. *See Pioneer*, 507 U.S. at 394. The question is whether Uniloc's negligence in failing to timely file its notice of appeal here is excusable, an equitable determination that must take "account of all relevant circumstances surrounding the party's omission." *Id.* at 395; *Two-Way Media LLC v. AT&T, Inc.*, 782 F.3d 1311, 1316 (Fed. Cir. 2015) (observing in the context of FRAP 4(a)(5) that the "excusable neglect" inquiry "assumes some neglect on behalf of the non-filer and directs the district court to exercise its equitable discretion to determine whether that neglect should be excused").

The Director gives weight to the fact that the underlying extension request and supporting declarations indicate that Uniloc: (1) made a timely decision to appeal the decision in the -1427 proceeding, accompanied by earnest efforts to (2) file a notice of appeal on or before the deadline with the Director, and (3) provide requisite notice to the Board, Federal Circuit, and opposing parties. To be sure, the USPTO did not actually receive a notice of appeal on or before the deadline in the -1427 proceeding, but the USPTO did receive notice before the deadline of Uniloc's attempted filing of a notice of appeal. Considering all of these circumstances, the Director finds that failure in the -1427 proceeding does not evince an abdication of Uniloc's responsibility to make a prompt determination of whether to pursue appeal or that

Uniloc otherwise "flout[ed]" the filing deadline or USPTO regulations. *See Pioneer*, 507 U.S. at 388, 395; *Amgen*, 25 F. App'x at 924-25 (delayed filing, while within the reasonable control of party, was not an attempt to ignore judicial deadlines).

In such circumstances, the USPTO is loath to abandon a party's rights to receive judicial review of agency action. *See In re Gilman*, 887 F.3d 956, 964 (9th Cir. 2018) (noting preference for "resolv[ing] cases on the merits" in affirming Rule 60(b) relief). This is true particularly in situations like this where, as discussed below, there is no indication of prejudice to another party or proceeding. Thus, even if this factor were to weigh against finding "excusable neglect," the negligence is "not so egregious" as to outweigh the remaining considerations, which all favor finding the standard met for reasons discussed below. *See id.*, 887 F.3d at 963-64 (standard contemplates "relief even when counsel makes an unreasonable mistake"); *M.D. by and through Doe v. Newport-Mesa Unified School District*, 840 F.3d 640, 643 (9th Cir. 2016) (holding that trial court abused its discretion under Fed. R. Civ. P. 60(b)(1) in finding no excusable neglect where only factor weighing against relief related to the reason for the late filing); *see also Moczek v. Secretary of Health and Human Services*, 776 F. App'x 671, 675 (Fed. Cir. 2019) (relying upon *M.D.* in finding special master abused discretion in Vaccine Act case for letting reasons for the delay control that were not "so egregious" as to outweigh countervailing considerations).

Relatedly, Uniloc's earnest attempts to timely appeal and provide related copies

to necessary parties show good faith on Uniloc's part under the fourth *Pioneer* factor. The explanation proffered by Uniloc for the chain of events "may be a poor excuse but it doesn't show bad faith." *M.D.*, 840 F.3d at 643. LGE argues in its Opposition that Uniloc's failure to seek the requested extensions sooner undercuts any claim to good faith. *See* Opp. at 9-11. Uniloc had a reasonable basis to believe that its notice of appeal in the -1427 proceeding was timely, even at the point that it filed the underlying request. Indeed, on May 1, 2019, the USPTO filed the "Notice Forwarding Certified List," which states that the notices in both the -1427 and -1428 proceedings were timely. And, as Uniloc explains, no formal dispute regarding the timeliness in the -1427 proceeding existed until July 1, 2019, when LGE filed its motion to dismiss Appeal No. 19-1688. *See* -1427 Req. at 3-4. Uniloc filed the underlying requests shortly thereafter on July 11, 2019, a relatively short and reasonable time frame.

Uniloc did not pursue inconsistent positions by arguing to the Federal Circuit that the -1427 appeal notice is timely while also seeking additional time on that notice at the USPTO, as LGE asserts. *See* Opp. at 10-11. Uniloc's Rule 90 extension request affirmatively states that it sought the additional time out of an "abundance of caution" because it believed its appeal notice timely, and references its argument to that effect in the Federal Circuit briefing on LGE's dismissal motion. *See* -1427 Req. at 6-7 n.2. Uniloc's good faith conduct here weighs in favor of granting the relief under the fourth *Pioneer* factor. *See Pioneer*, 507 U.S. at 395.

There is no evidence of prejudice to any Petitioner/Appellee under the first *Pioneer* factor. LGE's Opposition does not argue that the circumstances surrounding Uniloc's appeal notice filing prejudiced it or another party. Indeed, other interested parties—including LGE—received copies of the notice of appeal in both the -1427 and -1428 proceedings from Uniloc on March 21, 2019.[5] Further, those parties received notice that Uniloc had appealed in the -1427 proceeding from the Federal Circuit on March 22, 2019, when the court docketed the appeal. The absence of prejudice, coupled with the evidence of good faith, supports granting the requested time. *See Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) (delayed filing—an "omission[] caused by carelessness" as a result of "failure in communication" between different counsel—found to be "excusable neglect" in context of Fed. R. Civ. P. 60(b) given absence of prejudice and bad faith conduct)

[5] LGE argues that differences between the mailing address in the copy of the appeal notice it received on March 21, 2019, and the appeal notice received by the Solicitor's Office on March 25, 2019 (and later uploaded to the E2E system in the -1427 proceeding) render Uniloc's service on LGE "ineffective." Opp. at 7 n.3. The only difference appears to be that the version filed with the General Counsel and received by the Solicitor's Office says "Mail Stop 8" in the address line, while the emailed copy has a "Mail Stop" address without the "8." The two documents appear substantively identical. Other than alleging that the address difference raises "doubts about the provenance" of the document (Opp. at 7 n.3), LGE does not identify any substantive difference or allege any prejudice from the differences in the mailing addresses. The Director obviously considers important accurate service of filings on opposing parties. While potentially relevant to the degree of care exercised by Uniloc in pursuing its appeal here, the slight differences in the two versions do not otherwise alter the weighing of the *Pioneer* factors here.

(internal citations omitted).

Nor is there evidence of actual or potential negative impact to any judicial or administrative proceedings, as relevant under the second *Pioneer* factor. Uniloc has already filed its opening brief in the consolidated appeal. Similarly, the four-day delay between expiration of the appeal filing deadline and the USPTO's physical receipt of the mailed appeal notice 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.

Finally, the Director finds relevant the high degree of interrelatedness between review of the final written decision in the -1427 proceeding in Appeal No. 19-1688, and review of the decision in the -1428 proceeding in Appeal No. 19-1689. *See Google Inc. v. Vederi, LLC*, Memorandum and Order at 10 (*Inter Partes* Reexamination Control No. 95/000,682) (Jul. 11, 2017). LGE's dismissal motion at the Federal Circuit was limited to the 19-1688 appeal; LGE did not move to dismiss the 19-1689 appeal based upon an untimely notice of appeal. Similarly, LGE opposes only the additional requested time in the underlying -1427 proceeding; LGE does not oppose granting additional time on the appeal deadline in the underlying -1428 proceeding if needed. The Board here issued a consolidated final written decision in the two IPR proceedings and the Federal Circuit has consolidated the appeals of the proceedings. Denying Uniloc an additional four days on its notice in the -1427 proceeding would result in the unnecessarily harsh penalty of limiting Uniloc's appeal of the

consolidated Board decision only as it pertains to the -1428 proceeding. Similarly, denying the requested short extension could also create difficulties for the Federal Circuit to the extent it would have to disentangle one IPR from the other in its review of the Board's consolidated decision (assuming it can even be done). Further, denying the short requested extension would create the corollary legal oddity that the Federal Circuit's holding for the -1428 proceeding would not also apply to the -1427 proceeding despite the consolidated Board decision. The Director finds that these practical and administrative considerations further weigh in favor of granting the requested extension in the -1427 proceeding. *See Pioneer*, 507 U.S. at 395 (excusable neglect determination permits consideration of "all relevant circumstances").

LGE's arguments against finding "excusable neglect" are not persuasive. As an initial matter, LGE's Opposition operates under the incorrect standard for determining excusable neglect under USPTO Rule 90. LGE argues that the Federal Circuit has "taught" that "excusable neglect" is "neglect that a reasonably prudent person might manifest under the circumstances" and that Uniloc's conduct here fails that test. Opp. at 5 (citing *Walls v. Merit Sys. Prot. Bd.*, 29 F.3d 1578, 1582 (Fed. Cir. 1994)). However, the Federal Circuit in *Walls* merely parroted the Merit Systems Protection Board's standard about what the MSPB deemed "excusable neglect" under MSPB regulations. *Walls*, 29 F.3d at 1582 (discussing and citing *Alonzo v. Department of the Air Force*, 4 MSPB 262, 4 M.S.P.R. 180, 184 (1980)). Another agency's statement

about how it applies its regulations does not govern the USPTO's application of its regulations. Further, the *Alonzo* decision originally articulating the MSPB standard predates the Supreme Court's decision in *Pioneer*, which governs USPTO Rule 90. *Pioneer* has been generally understood to have "adopted a broader and more flexible test for excusable neglect" than the standard applied at the time. *Pincay v. Andrews*, 389 F.3d 853, 856 (9th Cir. 2004) (explaining that prior requirement of "extraordinary circumstances" in Ninth Circuit gave way to more equitable and flexible inquiry after *Pioneer*); *Pioneer*, 507 U.S. at 388-89 & n.3 (adopting more "flexible understanding" of excusable neglect to include more than simply "intervening circumstances beyond the party's control"). Similarly, *Walls* does not cite or discuss *Pioneer*.

LGE argues in its Opposition that Uniloc's reliance on *Mitsubishi* fails because the alleged attorney miscommunications in the two cases differ. *See* Opp. at 4-10. The fact that the miscommunication here may not have involved the same kind of language and distance barriers as in *Mitsubishi* does not foreclose finding that the circumstances here weigh in favor of finding "excusable neglect." As just one distinction, the relevant parties in *Mitsubishi* did not attempt to appeal on or before the deadline. By contrast, Uniloc not only made a determination to appeal before the deadline but also attempted to file its notice, a fact that makes Uniloc's argument under the third *Pioneer* factor stronger than Mitsubishi's, any differences in "miscommunications" aside.

LGE also argues that Uniloc's failure to appreciate USPTO regulations governing how to file the notices of appeal is just like the facts in *IpVenture II*, where a Rule 90 request for additional time was denied. *See* Opp. at 6 (discussing *IpVenture II* decision).[6] The USPTO expects parties and their counsel to consult and comply with the correct regulations. That was a critical problem for IpVenture under the *Pioneer* factors in the decision relied upon by LGE. There, IpVenture attempted to seek rehearing of the Board decision, which, if timely, would have tolled its time to file a notice of appeal. However, IpVenture relied upon the wrong rehearing provision and filed its rehearing request out of time, resulting in an untimely appeal once filed. In rejecting IpVenture's argument that its neglect should be excused and it should receive an extension on its appeal deadline, the USPTO put significant weight on the fact that the Board there expressly directed counsel to the correct regulation governing requests for rehearing. However, IpVenture gave no indication that it consulted, or attempted to comply with, the pertinent regulations. Further, IpVenture's explanations for why it failed to consult or apply the correct

[6] LGE's Opposition references the August 19, 2016 time-extension-request decision in the *IpVenture v. FedEx inter partes* reexamination. Opp. at 6. However, the August 19, 2016 decision did not address the merits of IpVenture's request but instead dismissed the request for jurisdictional reasons. *See IpVenture, Inc. v. FedEx Corp.*, Memorandum and Order (Inter Partes Reexamination Control No. 95/001,896) (Aug. 19, 2016). The Director understands LGE to refer to the later *IpVenture II* decision, issued on April 4, 2017, which denied the requested relief on its merits under the *Pioneer* factors.

unambiguous regulations in favor of applying an incorrect one were not reasonable. *IpVenture II* at 13. Those facts, coupled with other considerations, supported denying the extension requested there. Conversely, the facts here indicate that Uniloc consulted Rule 90 and, unlike IpVenture, attempted to timely file its notice of appeal. Uniloc's efforts, while not without fault, represent a critical difference from the facts in *IpVenture II*.

LGE's argument that Uniloc's failed filing of its appeal notice in the -1427 proceeding with the Board via E2E on March 21, 2019, was not "excusable neglect" confuses the inquiry. Opp. at 8-10. The "excusable neglect" inquiry here asks whether the failure to timely file a notice of appeal pursuant to 37 CFR § 90.2(a) with the Director "as provided in § 104.2 of this title" should be excused and additional time permitted to execute that filing. While the "copy of the notice of appeal [that] must also be filed" with the Board pursuant to CFR Part 41 or 42 (as relevant), referenced in Rule 90.2(a), can be relevant to the "excusable neglect" determination (including the need for additional time in the first instance), the failure to properly file the Board copy need not be "excusable neglect" as a standalone matter. That is true generally of the various possible relevant considerations in the "excusable neglect" determination, which asks whether a party's conduct, viewed collectively and in the context of all the *Pioneer* factors, warrants relief. Moreover, as relevant to the "excusable neglect" standard here, the Director finds that Uniloc's conduct as it relates to filing the Board

courtesy copy in the -1427 proceeding weighs slightly in favor of granting the requested relief. As discussed above, the facts here indicate that Uniloc took reasonable efforts to comply with the instruction in Rule 90.2(a) to file a copy of the notice of appeal with the Board.

While LGE posits that Uniloc should have realized sooner that it failed to successfully file a copy of its notice of appeal with the Board and remediate it, Uniloc received an electronic notice from the USPTO in the -1427 proceeding that a notice of appeal had been filed on March 21, 2019. While that notice also indicated that no documents had been included in the submission, the electronic record indicates the March 21, 2019 submission did include a document—a copy of the decision being appealed. Thus, at bottom, the electronic system gave arguably inconsistent messages to Uniloc regarding their submission. *Cf. Pioneer*, 507 U.S. at 398 ("consider[ing] significant" that Bankruptcy Court order setting filing date was "outside the ordinary course in bankruptcy cases," causing confusion). The fact that Uniloc successfully filed a copy of the notice of appeal in the -1428 proceeding using the same procedures makes Uniloc's failure to recognize the apparent problem in the -1427 proceeding more reasonable. On balance, then, while Uniloc's attempts to file a copy of the notice of appeal with the Board proved unsuccessful, the circumstances surrounding Uniloc's efforts evince a good faith effort to comply with the requirement.

LGE also argues that Uniloc is not entitled to a waiver of 37 CFR § 1.10. *See*

Opp. 3-4 (citing MPEP § 513). The excusable neglect issue raised here pursuant to 37 CFR § 90.3(c) does not turn on, or otherwise require, waiving the provisions at 37 CFR § 1.10. Moreover, the discussion quoted by LGE from MPEP § 513 refers to requests for relief under 37 CFR § 1.183, which is not at issue here.

Thus, on balance, the Director finds that the considerations relevant under the *Pioneer* factors weigh in favor of granting a limited four-day extension on Uniloc's filing deadline in the -1427 proceeding, making March 25, 2019, Uniloc's filing due date. Uniloc's earnest attempts to comply with the pertinent requirements evidence good faith efforts to abide by pertinent regulations and requirements. And those efforts produced a docketed appeal known to all pertinent parties in which briefing has already begun. Toward that end, there is no evidence of prejudice to any proceeding or another party occasioned by Uniloc's notice-filing conduct. Uniloc's timely decision to appeal and related attempts to execute the filing in the -1427 proceeding does not show that it "flout[ed]" the filing deadline or USPTO regulations or otherwise ignored its responsibility to make a timely determination to appeal. *See Pioneer*, 507 U.S. at 388. Even if the third *Pioneer* factor weighed against finding excusable neglect, the weight of the remaining considerations would favor granting the requested extension. Because the USPTO received Uniloc's notice of appeal in the -1427 proceeding on March 25, 2019, the USPTO considers Uniloc's appeal timely in light of the granted extension.

ORDER

Upon consideration of the request for an extension of time under 37 C.F.R. § 90.3(c)(1)(ii) in IPR2017-01427, it is ORDERED that the request is granted. Uniloc's appeal date is extended from March 21, 2019, to March 25, 2019.

ANDREI IANCU

UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE

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