

**Clarification of the Date of Decision of the Board of Patent Appeals and Interferences  
Under 37 CFR 1.304**

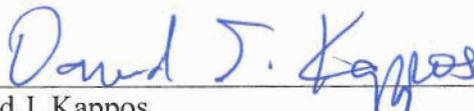
This notice clarifies that the date of decision of the Board of Patent Appeals and Interferences (BPAI) under 37 CFR 1.304 is the “mailing date” or “notification date” indicated on form PTOL-90 accompanying the BPAI decision. On July 31, 2009, the U.S. Court of Appeals for the Federal Circuit held that the date of decision of the BPAI under 37 CFR 1.304 is the mailing date of the decision rather than the date typed on the first page of the decision by the BPAI. *In re McNeil-PPC, Inc.*, slip op. at 4-7 (Fed. Cir. July 31, 2009).

On June 2, 2009, the Office expanded the e-Office Action program to permit all Private Patent Application Information Retrieval (PAIR) users to participate. See *Electronic Office Action*, 1343 *Off. Gaz. Pat. Office*, 45 (June 2, 2009). Under the e-Office Action program, participants receive notifications via electronic mail of the Office communications retrievable through Private PAIR in lieu of paper mailings of Office communications, with a few exceptions (*e.g.*, reexamination proceedings and interference proceedings are not included in the program). The *Official Gazette* notice for the e-Office Action program stated that the two-month time period set forth in 37 CFR 1.304 is not measured from the mailroom/notification date, but instead is measured from the date typed on the first page of the decision by the BPAI. This statement is in error, in view of Federal Circuit *McNeil* decision, and is hereby withdrawn. This withdrawal will apply to BPAI decisions mailed before, on or after the publication date of this notice.

Accordingly, the two-month time period set forth in 37 CFR 1.304 for filing a notice of appeal to the U.S. Court of Appeals for the Federal Circuit, or for commencing a civil action, starts on: (1) the mailing date of the BPAI decision if the decision is mailed to the appellant, or (2) the notification date of the BPAI decision if electronic mail notification is sent to the appellant under the e-Office Action program, as indicated on form PTOL-90 accompanying the BPAI decision. For example, a notice of appeal under 37 CFR 1.302 for an appeal of a decision by the BPAI to the U.S. Court of Appeals for the Federal Circuit filed within two months from the mailing date or notification date of the BPAI decision would be considered timely.

Any inquiry regarding this notice may be directed to Joni Y. Chang, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272-7720 or (571) 272-7701, or by electronic mail at Patent.Practice@uspto.gov.

Date: 7/6/09



David J. Kappos

Under Secretary of Commerce for Intellectual Property and  
Director of the United States Patent and Trademark Office