

LOUGHLIN v. LING, Appeal No. 2011-1432 (Fed. Cir. July 11, 2012). Before Rader, Moore and Lourie. Appealed from the Board of Patent Appeals and Interferences ("BPAI").

Background:

Loughlin filed a patent application in May 2004, which published in November 2004 and ultimately issued as a patent in October 2008. Ling filed a patent application in February 2007, which was granted filing date benefit under §120 from an application filed in January 2004 ("priority application"). In February 2007, Ling, attempting to provoke an interference, copied a claim from Loughlin's patent application. The PTO declared an interference.

Before the BPAI, Loughlin argued that because the actual filing date of Ling's patent application was more than one year after the publication of Loughlin's patent application, Ling was barred by 35 U.S.C. §135(b)(2) from provoking an interference. The BPAI disagreed, and held that the bar imposed by 35 U.S.C. §135(b)(2) did not apply because Ling's earlier priority application was entitled to treatment as "an application filed" under 35 U.S.C. §135(b)(2). Loughlin appealed.

Issue/Holding:

Did the BPAI err in finding that Ling's earlier priority application was entitled to treatment as "an application filed" under 35 U.S.C. §135(b)(2)? No, affirmed.

Discussion:

The Federal Circuit noted that the plain and ordinary meaning of the first sentence of §120 permits an application to claim the benefit of an earlier filing date, such that the application is treated as having been effectively filed on the earlier date. Further, the Federal Circuit noted that the statute does not limit its effect to only certain provisions under the patent laws. Moreover, the Federal Circuit noted that the BPAI had consistently interpreted "an application filed" in §135(b)(2) to include the benefit provision of §120.

In view of the above, the Federal Circuit held that the BPAI correctly interpreted "an application filed" in §135(b)(2) as including the possibility of claiming the benefit of an earlier filing date under §120, and therefore affirmed the BPAI's decision.