

Re: Trademark Application of :  
 The FitzSimons Company :  
 Serial No. 75/186093 :  
 Filing Date: October 23, 1996 : On Petition  
 For: VIGITAL DIDEO :  
 Petition Filed: June 5, 1998 :

The FitzSimons Company has petitioned the Commissioner to accept a Statement of Use filed in connection with the above application. Trademark Rule 2.146(a)(3) provides authority for the requested review.

## FACTS

A Notice of Allowance issued for the subject application on September 16, 1997. Pursuant to Section 1(d) of the Trademark Act, a Statement of Use, or Request for an Extension of Time to File a Statement of Use, was required to be filed within six months of the mailing date of the Notice of Allowance.

On March 16, 1998, Petitioner filed a Statement of Use. In an Office Action dated April 24, 1998, the Legal Instruments Examiner in the ITU/Divisional Unit notified Petitioner that the papers submitted March 16, 1998 did not comply with the minimum requirements for filing a Statement of Use, because the prescribed fee, as required by Trademark Rule 2.88(e)(1), had not been submitted. Petitioner was advised that, since the period of time within which to file an acceptable Statement of Use had expired, the application would be abandoned in due course. This Petition followed.

Counsel for Petitioner states the required fee for the Statement of Use was inadvertently omitted through oversight.

## DECISION

Trademark Rules 2.146(a)(5) and 2.148 permit the Commissioner to waive any provision of the Rules which is not a provision of the statute, where an extraordinary situation exists, justice requires and no other party is injured thereby. However, the Commissioner has no authority to waive a requirement of the statute. Since the requirement that a Statement of Use be accompanied by a filing fee is statutory, it cannot be waived by the Commissioner. *In re L.R. Sport Inc.*, 25 USPQ2d 1533 (Comm'r Pats. 1992).

The Petition is denied. The application will remain abandoned. The \$100 fee submitted with the Petition for filing the Statement of Use will be refunded in due course.

Philip G. Hampton, II  
Assistant Commissioner  
for Trademarks

PGH:NLO:RJD

Date:

Attorney for Petitioner:

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