

99-117

Re: Trademark Application of :
Toy TV, LLC. :
For: TOY TV : On Petition
Application Received¹ December 20, 1997 :
Petition Filed: December 22, 1998 :

Toy TV, LLC has petitioned the Commissioner to restore its original filing date of December 20, 1997, for the above-identified application. The petition is denied pursuant to 15 U.S.C. §1051(b).

FACTS

On December 20, 1997, Petitioner filed an application for registration of the above-identified mark pursuant to 15 U.S.C. §1051(b). Petitioner initially received a filing date of December 20, 1997. On October 26, 1998, the application papers were returned to Petitioner with a Notice of Incomplete Trademark Application because Petitioner had not alleged a bona fide intent to use the mark in interstate commerce, as required by 15 U.S.C. §1051(b) and 37 C.F.R. §2.21. On December 22, 1998, this petition was filed requesting that the original filing date be restored.

Petitioner makes three arguments for reinstatement of its original filing date. First, Petitioner claims its bona fide intention to use said mark in commerce is apparent from Applicant's intended use of the mark on materials displayed and transmitted over the global computer network and through the broadcast media. Second, Petitioner argues it satisfied Trademark Rule 2.21 in the statement included in the signed declaration that "she believes Applicant to be entitled to use such mark in commerce...." Finally, Petitioner argues that it will be unreasonably prejudiced if the earlier filing date is not reinstated, due to the eleven month delay between Petitioner's initial receipt of a filing date and its receipt of the Notice of Incomplete Trademark Application.

DECISION

15 U.S.C. §10561(b) and 37 C.F.R. §2.21 require a written application verified by the Applicant specifying Applicant's bona fide intention to use the mark **in commerce** (emphasis added). Although Section 902 of The Trademark Manual of Examining Procedure (TMEP) states that reasonable variations in the wording of the statement may be acceptable, the wording "in commerce" is essential to receiving a filing date.

¹The filing date is the issue on petition.

In this case, Petitioner did not include the words “in commerce” or any acceptable variation of the words “in commerce” in the application. In the application, Petitioner stated it had “a bona fide intention to use the mark in connection with the above-identified goods and services”. Petitioner’s statement simply announces its intention to use the mark in conjunction with its goods. However, Petitioner did not use the words “in interstate commerce” or “in commerce” when describing the scope of its intended use of the mark.

Petitioner argues that its intention to use the mark “in commerce” can be inferred from its intended use of mark, or that the Declaration of the Petitioner’s representative should satisfy the “in commerce” requirement. Both the statute and rule clearly require an express averment that the applicant has a bona fide intention to use the mark in commerce. The applicant's bona fide intention to use the mark in commerce will not be inferred from the nature of the services, or from other circumstances surrounding the filing of the application. The wording "in commerce" is essential, and its omission results in the denial of a filing date. *In re Unistar Radio Networks, Inc.*, 30 USPQ2d 1390 (Comm'r Pats. 1993).

While the Office regrets that Petitioner was not notified earlier of the deficiency in the application, it is the Petitioner who is ultimately responsible for filing proper documents. Although the Office attempts to notify parties as to defective papers to permit timely refile, it has no obligation to do so. *In re Holland American Wafer Co.*, 737 F.2d 1015, 222 USPQ 273 (Fed. Cir. 1984); *In re Fuller-Jeffrey Broadcasting Corp. of Santa Rosa*, 16 USPQ2d 1456 (Comm'r Pats. 1990).

The petition is denied. The earlier filing date will not be restored. Petitioner has refiled the application (Serial Number 75/604107) and has received a filing date of December 10, 1998. These papers will be associated with that file.

Robert M. Anderson
Acting Assistant Commissioner
for Trademarks

Date:

RMA:JCL

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