

Re: Trademark Application of :
 Rubinelli, Inc. :
 Serial No. 75/116310 :
 Filing Date: June 10, 1996 : On Petition
 For: DELL'ALPE :
 Petition Filed: April 24, 1998 :

Rubinelli, Inc. has petitioned the Commissioner to revive the subject application, which was abandoned for failure to pay the statutory appeal fee. Trademark Rules 2.146(a)(3), 2.146(a)(5) and 2.148 provide authority for the requested review.

FACTS

On August 12, 1997, the Examining Attorney issued a final refusal to register the above-identified mark. Pursuant to Section 12(b) of the Trademark Act, and Trademark Rules 2.64(a) and 2.142(a), Petitioner had six months in which to file a Notice of Appeal with the Trademark Trial and Appeal Board (Board).

On February 12, 1998, Petitioner filed its Notice of Appeal from the refusal of registration; however, no fee was submitted with the Notice. By letter mailed February 26, 1998, the Board notified Petitioner that the appeal could not be entertained because the Notice of Appeal had not been accompanied by the statutory fee, due to insufficient funds in Petitioner's deposit account, and that the application was abandoned.

Petitioner states that because of an accounting error, Petitioner's deposit account was not properly funded. Petitioner argues that the payment of a filing fee to perfect an appeal is not a statutory requirement, and that the Commissioner may allow the filing of an appeal despite a late payment.

DECISION

Pursuant to Section 12(b) of the Trademark Act, 15 U.S.C. §1062(b), an application is abandoned if an applicant fails to respond to an Office Action within six months of the mailing date. After a final Office Action, an applicant's response is limited to an appeal, a petition if permitted by Rule 2.63(b), or compliance with any requirement made by the Examining Attorney. Trademark Rule 2.64(a), 37 C.F.R. §2.64(a). An appeal is taken by filing a Notice of Appeal and paying the appeal fee within six months of the date of the action from which the appeal is taken. 15 U.S.C. § 1062(b); Trademark Rule 2.142(a), 37 C.F.R. §2.142(a). Contrary to Petitioner's argument, the appeal fee is required by statute.

Rule 1.22, 37 C.F.R. §1.22, requires that patent and trademark fees be paid at the time of requesting the action. The payment of the fee for filing an appeal to the Trademark Trial and Appeal Board is a statutory requirement that cannot be waived by the Commissioner.

Petitioner's Notice of Appeal, filed February 12, 1998, was accompanied by an authorization to charge the fee to a deposit account that contained insufficient funds. Accordingly, the Notice of Appeal did not meet the requirements of 15 U.S.C. §1070 and 37 C.F.R. §2.142(a) for payment of the appeal fee. The application is abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §§2.64(a) and 2.65.

The Petition is denied. The \$100 appeal fee submitted with this Petition will be refunded in due course.

Philip G. Hampton, II
Assistant Commissioner
for Trademarks

PGH:NLO:RJD

Date:

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