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date of the applicant's first use of the mark and first use of the mark in commerce, the type of commerce, those goods or services specified in the notice of allowance on or in connection with which the mark is in use in commerce and the mode or manner in which the mark is used on or in connection with such goods or services;

- (2) Three specimens or facsimiles, conforming to the requirements of §§2.56, 2.57 and 2.58, of the mark as used in commerce; and
- (3) The fee prescribed in §2.6.

(c) The statement of use may be filed only when the applicant has made use of the mark in commerce on or in connection with all of the goods or services, as specified in the notice of allowance, for which applicant will seek registration in that application, unless the statement of use is accompanied by a request in accordance with §2.87 to divide out from the application the goods or services to which the statement of use pertains. If more than one item of goods or services is specified in the statement of use, the dates of use required in paragraph (b)(1) of this section need be for only one of the items specified in each class, provided the particular item to which the dates apply is designated.

(d) The title "Statement of use under §2.88." should appear at the top of the first page of the paper.

(e) The Office will review a timely filed statement of use to determine whether it meets the following minimum requirements:

- (1) The fee prescribed in §2.6;
- (2) At least one specimen or facsimile of the mark as used in commerce;
- (3) A verification or declaration signed by the applicant stating that the mark is in use in commerce.

(f) A timely filed statement of use which meets the minimum requirements specified in paragraph (e) of this section will be examined in accordance with §§2.61 through 2.69. If, as a result of the examination of the statement of use, applicant is found not entitled to registration, applicant will be notified and advised of the reasons and of any formal requirements or refusals. The statement of use may be amended in accordance with §§2.59 and 2.71 through 2.75. If the statement of use is acceptable in all respects, the applicant will be notified of its acceptance.

(g) If the statement of use does not meet the minimum requirements specified in paragraph (e) of this section, applicant will be notified of the deficiency. If the time permitted for applicant to file a statement of use has not expired, applicant may correct the deficiency. After the filing of a statement of use during a permitted time period for such filing, the applicant may not withdraw the statement to return to the previous status of awaiting submission of a statement of use, regardless of whether it is in compliance with paragraph (e) of this section.

(h) The failure to timely file a statement of use which meets the minimum requirements specified in paragraph (e) of this section shall result in the abandonment of the application.

(i)(1) The goods or services specified in a statement of use must conform to those goods or services identified in the notice of allowance. An applicant may specify the goods or services by stating "those goods or services identified in the notice of allowance" or, if appropriate, "those goods or services identified in the notice of allowance except \* \* \*" followed by an identification of the goods or services to be deleted.

- (2) If any goods or services specified in the notice of allowance are omitted from the identification of goods or services in the statement of use, the Trademark Examining Attorney shall inquire about the discrepancy and permit the applicant to amend the statement of use to include any omitted goods or services, provided that the amendment is supported by a verification that the mark was in use in commerce, on or in connection with each of the goods or services sought to be included, prior to the expiration of the time allowed to applicant for filing a statement of use.
- (3) The statement of use may be accompanied by a separate request to amend the

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identification of goods or services in the application, as stated in the notice of allowance, in accordance with §2.71(b).

(j) The statement of use may be accompanied by a separate request to amend the drawing in the application, in accordance with §§2.51 and 2.72.

[54 FR 37595, Sept. 11, 1989]

**37 CFR 2.89 Extensions of time for filing a statement of use.**

(a) The applicant may request a six-month extension of time to file the statement of use required under §2.88 by submitting:

- (1) A written request, before the expiration of the six-month period following the issuance of a notice of allowance under §13(b)(2) of the Act;
- (2) The fee prescribed in §2.6; and
- (3) A verified statement by the applicant that the applicant has a continued bona fide intention to use the mark in commerce, specifying those goods or services identified in the notice of allowance on or in connection with which the applicant has a continued bona fide intention to use the mark in commerce.

(b) The applicant may request further six-month extensions of time for filing the statement of use by submitting:

- (1) A written request, prior to the expiration of a previously granted extension of time;
- (2) The fee prescribed in §2.6;
- (3) A verified statement by the applicant that the applicant has a continued bona fide intention to use the mark in commerce, specifying those goods or services identified in the notice of allowance on or in connection with which the applicant has a continued bona fide intention to use the mark in commerce; and
- (4) A showing of good cause, as specified in paragraph (d) of this section.

(c) Extensions of time under paragraph (b) of this section will be granted only in six-month increments and may not aggregate more than 24 months.

(d) The showing required by paragraph (b)(4) of this section must include:

- (1) An allegation that the applicant has not yet made use of the mark in commerce on all the goods or services specified in the notice of allowance on or in connection with which the applicant has a continued bona fide intention to use the mark in commerce, and
- (2) A statement of applicant's ongoing efforts to make use of the mark in commerce on or in connection with each of the goods or services specified in the verified statement of continued bona fide intention to use required under paragraph (b) of this section. Those efforts may include, without limitation, product or service research or development, market research, manufacturing activities, promotional activities, steps to acquire distributors, steps to obtain required governmental approval, or other similar activities. In the alternative, a satisfactory explanation for the failure to make such efforts must be submitted.

(e)(1) At the time of the filing of a statement of use, or during any time remaining in the existing six-month period in which a statement of use is filed, applicant may file one request, in accordance with paragraph (a) or (b) of this section, for a six-month extension of time for filing a statement of use, provided that the time requested would not extend beyond 36 months from the issuance of the notice of allowance. Thereafter, applicant may not request any further extensions of time.

- (2) A request for an extension of time that is filed at the time of the filing of a statement of use, or during any time remaining in the existing six-month period in which a statement of use is filed, must comply with all the requirements of paragraph (a) of this section, if it is applicant's first extension request, or

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paragraph (b) of this section, if it is a second or subsequent extension request. However, in a request under paragraph (b) of this section, applicant may satisfy the requirement for a showing of good cause by asserting that applicant believes that it has made valid use of the mark in commerce, as evidenced by the submitted statement of use, but that if the statement of use is found by the Patent and Trademark Office to be fatally defective, applicant will need additional time in which to file a new statement of use.

(f) The goods or services specified in a request for an extension of time for filing a statement of use must conform to those goods or services identified in the notice of allowance. Any goods or services specified in the notice of allowance which are omitted from the identification of goods or services in the request for extension of time will be presumed to be deleted and the applicant may not thereafter request that the deleted goods or services be reinserted in the application. If appropriate, an applicant may specify the goods or services by stating "those goods or services identified in the notice of allowance" or "those goods or services identified in the notice of allowance except \* \* \*" followed by an identification of the goods or services to be deleted.

(g) The applicant will be notified of the grant or denial of a request for an extension of time, and of the reasons for a denial. Failure to notify the applicant of the grant or denial of the request prior to the expiration of the existing period or requested extension does not relieve the applicant of the responsibility of timely filing a statement of use under §2.88. If, after denial of an extension request, there is time remaining in the existing six-month period for filing a statement of use, applicant may submit a substitute request for extension of time. Otherwise, the only recourse available after denial of a request for an extension of time is a petition to the Commissioner in accordance with §§2.66 or 2.146. A petition from the denial of a request for an extension of time to file a statement of use shall be filed within one month from the date of mailing of the denial of the request. If the petition is granted, the term of the requested six-month extension which was the subject of the petition will run from the date of the expiration of the previously existing six-month period for filing a statement of use.

[54 FR 37595, Sept. 11, 1989]

## INTERFERENCES AND CONCURRENT USE PROCEEDINGS

*Authority: Sections 2.91 to 2.99 also issued under §§16, 17, 60 Stat. 434; 15 U.S.C. 1066, 1067.*

### **37 CFR 2.91 Declaration of interference.**

(a) An interference will not be declared between two applications or between an application and a registration except upon petition to the Commissioner. Interferences will be declared by the Commissioner only upon a showing of extraordinary circumstances which would result in a party being unduly prejudiced without an interference. In ordinary circumstances, the availability of an opposition or cancellation proceeding to the party will be deemed to remove any undue prejudice.

(b) Registrations and applications to register on the Supplemental Register, registrations under the Act of 1920, and registrations of marks the right to use of which has become incontestable are not subject to interference.

[37 FR 2881, Feb. 9, 1972, as amended at 54 FR 34897, Aug. 22, 1989]

### **37 CFR 2.92 Preliminary to interference.**

An interference which has been declared by the Commissioner will not be instituted by the Trademark Trial and Appeal Board until the Examiner of Trademarks has determined that the marks which are to form the subject matter of the controversy are registrable, and all of the marks have been published in the Official Gazette for opposition.

[37 FR 2881, Feb. 9, 1972, as amended at 54 FR 34897, Aug. 22, 1989]

### **37 CFR 2.93 Institution of interference.**

An interference is instituted by the mailing of a notice of interference to the parties. The notice shall be sent to each applicant, in care of the applicant's attorney or other representative of record, if any, and if one of the parties is a registrant, the notice shall be sent to the registrant or the

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registrant's assignee of record. The notice shall give the name and address of every adverse party and of the adverse party's attorney or other authorized representative, if any, together with the serial number and date of filing and publication of each of the applications, or the registration number and date of issuance of each of the registrations, involved.

*[41 FR 759, Jan. 5, 1976, as amended at 54 FR 34897, Aug. 22, 1989]*

**37 CFR §§ 2.94-2.95 [Reserved]****37 CFR 2.96 Issue; burden of proof.**

The issue in an interference between applications is normally priority of use, but the rights of the parties to registration may also be determined. The party whose application involved in the interference has the latest filing date is the junior party and has the burden of proof. When there are more than two parties to an interference, a party shall be a junior party to and shall have the burden of proof as against every other party whose application involved in the interference has an earlier filing date. If the involved applications of any parties have the same filing date, the application with the latest date of execution will be deemed to have the latest filing date and that applicant will be the junior party. The issue in an interference between an application and a registration shall be the same, but in the event the final decision is adverse to the registrant, a registration to the applicant will not be authorized so long as the interfering registration remains on the register.

*[48 FR 23135, May 23, 1983; 48 FR 27225, June 14, 1983]*

**37 CFR 2.97 [Reserved]****37 CFR 2.98 Adding party to interference.**

A party may be added to an interference only upon petition to the Commissioner by that party. If an application which is or might be the subject of a petition for addition to an interference is not added, the examiner may suspend action on the application pending termination of the interference proceeding.

*[48 FR 23135, May 23, 1983]*

**37 CFR 2.99 Application to register as concurrent user.**

(a) An application for registration as a lawful concurrent user will be examined in the same manner as other applications for registration.

(b) When it is determined that the mark is ready for publication, the applicant may be required to furnish as many copies of his application, specimens and drawing as may be necessary for the preparation of notices for each applicant, registrant or user specified as a concurrent user in the application for registration.

(c) Upon receipt of the copies required by paragraph (b) of this section, the examiner shall forward the application for concurrent use registration for publication in the Official Gazette as provided by §2.80. If no opposition is filed, or if all oppositions that are filed are dismissed or withdrawn, the Trademark Trial and Appeal Board shall prepare a notice for the applicant for concurrent use registration and for each applicant, registrant or user specified as a concurrent user in the application. The notices for the specified parties shall state the name and address of the applicant and of the applicant's attorney or other authorized representative, if any, together with the serial number and filing date of the application.

(d)(1) The notices shall be sent to each applicant, in care of his attorney or other authorized representative, if any, to each user, and to each registrant. A copy of the application shall be forwarded with the notice to each party specified in the application.

(2) An answer to the notice is not required in the case of an applicant or registrant whose application or registration is specified as a concurrent user in the application, but a statement, if desired, may be filed within forty days after the mailing of the notice; in the case of any other party specified as a concurrent user in the application, an answer must be filed within forty days after the mailing of the notice.