Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

RE: TRADEMARK APPLICATION OF SOFTWARE DEVELOPMENT SYSTEMS, INC.
Serial No. 710,869
October 5, 1989
***1** Petition Filed: March 29, 1989

For: CROSSCODE
Filed: February 12, 1988

Attorney for Petitioner

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Attorney for Applicant

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Assistant Commissioner for Trademarks

On petition

On-Line Software International, Inc. has petitioned the Commissioner pursuant to 37 C.F.R. § 2.148 to suspend a portion of Trademark Rule 2.102(c)(2) and to accept the consent for extension of time to oppose as filed on March 3, 1989.

The above-identified mark was published for opposition on November 8, 1988. Petitioner filed three timely requests for extensions of time to oppose; the period for opposition was, consequently, extended to March 8, 1989. On March 3, 1989 petitioner filed another request for a thirty day extension for filing a notice of opposition which indicated that counsel for applicant had agreed to an extension of time. In a letter dated March 22, 1989 the Attorney-Examiner at the Trademark Trial and Appeal Board notified petitioner that the request could not be granted because the circumstances recited in the request are not deemed to be extraordinary in nature, and because there is no indication that applicant was served a copy of the request for extension of time. This petition followed.

Counsel for petitioner states, in an unverified statement, that the request for extension of time to oppose was made with the telephonic consent of applicant's attorney, however, due to inadvertence or distraction, a proof of service was not provided nor did counsel for

applicant receive a copy of the consent.

The Commissioner will exercise supervisory authority under Trademark Rule 2.146(a)(3) to vacate an action of the Trademark Trial and Appeal Board only where the Board has committed a clear error or abuse of discretion. Riko Enterprises, Inc. v. Lindley, 198 USPQ 480 (Comm'r Pats.1977).

Trademark Rule 2.102(c) provides, in part:

(E)xtensions of time to file an opposition aggregating more than 120 days from the date of publication of the application will not be granted except upon (1) a written consent or stipulation signed by the applicant or its authorized representative, or (2) a written request by the potential opposer or its authorized representative stating that the applicant or its authorized representative has consented to the request, and including proof of service on the applicant or its authorized representative, or (3) a showing of extraordinary circumstances, it being considered that a potential opposer has an adequate alternative remedy by a petition for cancellation.

The Trademark Trial and Appeal Board determined that the circumstances recited in the request did not constitute an extraordinary situation as set out in Rule 2.102(c)(3). No abuse of discretion by the Board has been found, and the Commissioner will not substitute his judgment for that of the Board in evaluating the recited circumstances.

***2** Trademark Rule 2.148 provides that the Commissioner may suspend a rule that is not a requirement of the statute in an extraordinary situation, when justice requires and no other party would be injured thereby.

Pursuant to 37 C.F.R. § 1.248, papers filed in the Patent and Trademark Office which are required to be served shall contain proof of service. Proof of service shall include the date and manner of service and may be made by: (1) An acknowledgement of service by or on behalf of the person served or (2) a statement signed by the attorney or agent containing the required information.

No proof of service accompanied petitioner's request for extension of time to oppose. The Trademark Trial and Appeal Board acted properly by denying the request without proof of service. The petitioner's failure because of inadvertence or distraction to include proof of service on the applicant's authorized representative does not constitute an extraordinary situation such that a requirement of Trademark Rule 2.102(c)(2) should be waived.

The petition is denied. The application file will be forwarded to the Trademark Trial and Appeal Board for action consistent with this decision.

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