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

RE: TRADEMARK APPLICATION OF VYCOM ELECTRONICS LTD.
36-86
July 18, 1986
***1** Petition Filed: May 30, 1986

For: THE FUTURE SHOP
Serial No. 490,694
Filed: July 19, 1984

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On Petition

Vycom Electronics Ltd. has petitioned the Commissioner, pursuant to Trademark Rule 2.146, to exercise supervisory authority and vacate the April 30, 1986 ruling of the Trademark Trial and Appeal Board.

The ruling in question was on a motion to suspend proceedings. This motion was filed together with a request for reconsideration of the Board's March 14, 1986 decision affirming the Examining Attorney's refusal to allow registration of the above identified mark. Petitioner had asked the Board to suspend proceedings in order that petitioner might investigate whether the marks which were the basis for the refusal of registration were abandoned, in which case petitioner intended to file petitions to cancel them.

The Board denied this motion to suspend, advising petitioner that where an application has been considered and decided on appeal, it will not be reopened except for the entry of a disclaimer or upon order of the Commissioner.

Petitioner claims that there was no valid reason for the Board to deny the motion to stay proceedings, and that if petitioner's information that the cited registrations have been abandoned is correct and it is successful in the cancellation proceedings which it brought contemporaneously with the filing of the subject petition, the above identified application can then be passed to publication. Thus, petitioner argues, by staying the proceedings the Board could avoid the need for petitioner to appeal the Board's decision and thereby conserve judicial time and effort.

Rule 2.146(a)(3) provides that the Commissioner will exercise

supervisory authority in appropriate circumstances. While a final decision by the Board is not an appropriate circumstance for the exercise of supervisory authority, Miss Nude Florida, Inc. v. Drost, 198 USPQ 485, 486 (Com'r.Pats.1977), the subject petition concerns a ruling by the Board on a motion to stay proceedings, and is therefore within the jurisdiction of the Commissioner. However, the Commissioner will exercise supervisory authority only where the Board has committed clear error or abused its discretion. Riko Enterprises, Inc. v. Lindsley, 198 USPQ 480 (Com'r.Pats.1977). That has not occurred here.

Although petitioner has characterized its motion as one to stay proceedings, in fact it is a motion to reopen prosecution because of what was at the time contemplated and are now filed petitions to cancel. Rule 2.142(g) makes it clear that a motion to reopen, except for entry of a disclaimer, must be upon order of the Commissioner.

***2** Further, even if petitioner had couched his petition as a request to reopen, it would be denied. A review of Commissioner's decisions on reopening prosecution indicates that such requests are denied when reopening prosecution would require additional examination in order to determine suitability for registration. See, Ex parte Helene Curtis Industries, Inc., 134 USPQ 73 (Com'r. Pats.1962); Ex parte Simoniz Co., 161 (USPQ 365 (Com'r.Pats.1969); and In re Mack Trucks, Inc., 190 USPQ 642 (Com'r.Pats. and Trademarks 1976).

Petitioner's information about possible nonuse of the marks cited against petitioner's, and the petitions to cancel which were filed contemporaneously with the subject petition, do not constitute sufficient cause for consideration of matter not already adjudicated. The filing of a petition to cancel does not place the application in condition for publication, since the cancellation proceeding would have to be completed, with a conclusion favorable to petitioner, before the refusal to register could be withdrawn.

Further, during the pendency of the application before the Examining Attorney, petitioner could have elected to file petitions to cancel the cited registrations and to request suspension of further action on its application. TMEP § 1108.01. Instead, petitioner elected to file an ex parte appeal and pursue it to a final decision by the Board. Rule 2.142(g) was not intended to permit an applicant to pursue the wholly different procedural alternative of a cancellation proceeding after the Board has finally disposed of an application by a decision adverse to applicant on an ex parte appeal.

The petition is denied.

21 U.S.P.Q.2d 1799

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