

## § 2.91

a petition to the Director in accordance with § 2.66 or § 2.146. A petition from the denial of an extension request must be filed within two months of the date of issuance of the denial of the request. If the petition is granted, the term of the requested six-month extension that was the subject of the petition will run from the date of expiration of the previously existing six-month period for filing a statement of use.

(h) If the extension request is not filed within a reasonable time after it is signed, the Office may require a substitute verification or declaration under § 2.20 stating that the applicant still has a bona fide intention to use the mark in commerce.

[54 FR 37595, Sept. 11, 1989, as amended at 64 FR 48923, Sept. 8, 1999; 64 FR 51245, Sept. 22, 1999; 73 FR 67772, Nov. 17, 2008; 74 FR 54908, Oct. 26, 2009]

### INTERFERENCES AND CONCURRENT USE PROCEEDINGS

AUTHORITY: Secs. 2.91 to 2.99 also issued under secs. 16, 17, 60 Stat. 434; 15 U.S.C. 1066, 1067.

#### § 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 Director. Interferences will be declared by the Director 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]

#### § 2.92 Preliminary to interference.

An interference which has been declared by the Director will not be instituted by the Trademark Trial and Appeal Board until the Examiner of

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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.

[54 FR 34897, Aug. 22, 1989]

#### § 2.93 Institution of interference.

An interference is instituted by the issuance 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 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.

[73 FR 67772, Nov. 17, 2008]

#### §§ 2.94–2.95 [Reserved]

#### § 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]

**§ 2.97 [Reserved]**

**§ 2.98 Adding party to interference.**

A party may be added to an interference only upon petition to the Director 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]

**§ 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) If it appears that the applicant is entitled to have the mark registered, subject to a concurrent use proceeding, the mark will be published in the Official Gazette as provided by § 2.80.

(c) If no opposition is filed, or if all oppositions that are filed are dismissed or withdrawn, the Trademark Trial and Appeal Board will send a notification to the applicant for concurrent use registration (plaintiff) and to each applicant, registrant or user specified as a concurrent user in the application (defendants). The notification for each defendant shall state the name and address of the plaintiff and of the plaintiff's attorney or other authorized representative, if any, together with the serial number and filing date of the application. If a party has provided the Office with an e-mail address, the notification may be transmitted via e-mail.

(d)(1) Within ten days from the date of the Board's notification, the applicant for concurrent use registration must serve copies of its application, specimens and drawing on each applicant, registrant or user specified as a concurrent user in the application for registration, as directed by the Board. If any service copy is returned to the concurrent use applicant as undeliverable, the concurrent use applicant

must notify the Board within ten days of receipt of the returned copy.

(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 issuance 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 issuance of the notice.

(3) If an answer, when required, is not filed, judgment will be entered precluding the specified user from claiming any right more extensive than that acknowledged in the application(s) for concurrent use registration, but the applicant(s) will remain with the burden of proving entitlement to registration(s).

(e) The applicant for a concurrent use registration has the burden of proving entitlement thereto. If there are two or more applications for concurrent use registration involved in a proceeding, the party whose application has the latest filing date is the junior party. A party whose application has a filing date between the filing dates of the earliest involved application and the latest involved application is a junior party to every party whose involved application has an earlier filing date. If any applications 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. A person specified as an excepted user in a concurrent use application but who has not filed an application shall be considered a party senior to every party that has an application involved in the proceeding.

(f) When a concurrent use registration is sought on the basis that a court of competent jurisdiction has finally determined that the parties are entitled to use the same or similar marks in commerce, a concurrent use registration proceeding will not be instituted if all of the following conditions are fulfilled: