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

RE: TRADEMARK APPLICATION OF BOD CORPORATION
Serial No. 74-071537
September 17, 1991
***1** Petition Filed: June 26, 1990 [FN1]

For: BODS
Filing Date: June 26, 1990 [FN2]

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On Petition

Bod Corporation has petitioned the Commissioner to grant a filing date of June 13, 1990 to the above-captioned application. Trademark Rule 2.146(a)(3) provides the authority for the requested review.

Petitioner filed an application to register the above-identified trademark on June 13, 1990. Subsequently, the papers were returned to the petitioner. The Notice of Incomplete Trademark Application accompanying the returned papers specified that as required by Rule 2.21(a)(4) "[t]he goods or services in connection with which the mark is used, or is intended to be used, have not been identified."

This petition followed.

Among the application papers submitted by the petitioner on June 13, 1990 was a drawing page with a heading that included the statement: "GOODS/SERVICES: BEACH TYPE SLIPPERS". In addition there was a two page document entitled PRELIMINARY AMENDMENT [FN3] that stated, in pertinent part:

Prior to consideration of the trademark application identified above, please enter the following amendments:

* *

On line 3 of the STATEMENT, after 'following goods/services:', please enter--BEACH TYPE SLIPPERS--

The body of the application itself did not, however, identify any

goods or services. In fact, the application contained a blank where the goods or services were to be identified. Petitioner had filled in all other pertinent portions of its application papers.

The Supervisor of the Application Section, in accordance with Office policy, ruled that petitioner's improper placement of the identification was tantamount to failure to include an identification in the application at all. Trademark Rule 2.146(a)(3), 37 C.F.R. Section 2.146(a)(3) permits the Commissioner to invoke his supervisory authority in appropriate circumstances. However, for the reasons set forth below, the Commissioner will not reverse the action of the Supervisor of the Application Section.

The Trademark Examining Operation receives hundreds of applications to register trademarks and service marks each day. Each application must pass an initial review to determine whether the minimum requirements for receiving a filing date, as set forth in Trademark Rule 2.21, 37 C.F.R. Section 2.21, have been met. The volume of work that must be handled by the clerical personnel of the Application Section allows only a brief period for review of each application. It would prove an administrative burden on the Office to require each employee of the Application Section engaged in the initial review of applications to search every section of every paper for any and all items of information that must be included in a minimally sufficient application.

***2** Further, Office procedures established by the Director of the Trademark Examining Operation and set forth in "Examination Guide 1-90: Supplemental Guidelines Concerning the Trademark Law Revision Act of 1988 and the Revised Rules of Practice in Trademark Cases" require examining attorneys to "consider only the identification of goods and services stated in the proper place for the identification in the written application to determine entitlement to a filing date." Examining attorneys are precluded by policy from considering "the drawing, the specimens, the method-of-use clause, the dates-of-use clause or anywhere else in the application to determine the applicant's entitlement to a filing date."

The procedures followed by the Application Section of the Trademark Examining Operation, in this case, were consistent with Office policy. While an applicant may be required occasionally to re-file an application that has not been properly prepared, the great majority of applicants benefit from enforcement of a policy that fosters expeditious processing of the hundreds of applications that reach the Office daily in proper form.

In addition, the June 26, 1990 filing date can not be granted. The Preliminary Amendment filed in connection with this application was neither executed by an officer of the corporate applicant, nor submitted in affidavit or declaration format. Section 1 of the Act requires, among other things, that the written application be verified by the applicant and specify the goods on or in connection with which the mark is used. Likewise, Trademark Rule 2.21 requires both of these elements in order to grant an application a filing date. Cf. In re Investigacion Y Desarrollo de Cosmeticos, S.A., 19 USPQ 2d 1717 (Comm'r Pats.1991. ("Preliminary amendment" to original application, filed pursuant to Section 44(d), stating that the applicant has a bona fide

intention to use mark in commerce as required by that section, was properly denied incorporation into application for purpose of granting filing date, since the amendment was neither executed by an officer of corporate applicant nor submitted in affidavit or declaration form.)

The Commissioner is without authority to waive any statutory requirements of Section 1. Trademark Rules 2.146(a)(5) and 2.148, however, do permit the Commissioner to waive any provision of the Rules, which is not a provision of the statute, where an extraordinary situation exists, justice requires and no other party is injured thereby. All three conditions must be satisfied before a waiver is granted. Even if the requirement that the application be verified and specify the goods and/or services were not statutory, petitioner has not shown that an extraordinary situation exists. Inadvertent omissions and/or oversights that could have been prevented by the exercise of ordinary care or diligence are not considered to be extraordinary situations as contemplated by the Trademark Rules. In re Bird & Son, Inc., 195 USPQ 586 (Comm'r Pats.1977).

***3** Accordingly, the petition is denied. Petitioner has not met the minimum requirements for receiving a filing date of either June 13, 1990, or June 26, 1990. The papers will be returned to the petitioner.

FN1. The petition was perfected by payment of the fee required under Trademark Rule 2.6(k) on October 12, 1990.

FN2. The filing date is the issue on petition.

FN3. Although the preliminary amendment, itself, shows a mailroom date stamp of June 26, 1990, the cover page to the application has a cancelled mailroom date stamp of June 13, 1990 and contains a notation that enclosed are: "Intent-To- Use Application/Preliminary Amendment/check".

21 U.S.P.Q.2d 1717

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