

Chapter 200

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TRADEMARK MANUAL OF EXAMINING PROCEDURE

201 What Constitutes Filing Date

The filing date of an application is the date on which all the elements set forth in 37 C.F.R. §2.21(a) (*see* TMEP §202) are received in the Office.

Granting a filing date to an application does not necessarily mean that all requirements for registration have been satisfied. The applicant must comply with requirements issued by the examining attorney during examination, in accordance with applicable rules and statutes, in order to obtain a registration.

201.01 Effective Filing Date Controls for Purposes of Determining Priority for Publication or Issue

As noted in TMEP §201, the filing date of an application is the date when the Office receives all elements designated in 37 C.F.R. §2.21(a). That date is also the *effective* filing date, *except* where (1) the applicant is entitled to priority under 15 U.S.C. §1126(d) (*see* TMEP §206.02); (2) the applicant amends an intent-to-use application filed under 15 U.S.C. §1051(b) to the Supplemental Register (*see* TMEP §206.01); or (3) the application was filed before November 16, 1989, the applicant had not used the mark in commerce for one year before the application filing date, and the applicant amends to the Supplemental Register on or after November 16, 1989 (*see* TMEP §206.03). The effective filing date is controlling for purposes of determining priority for publication or issue (*see* TMEP §1208.01) and constructive use priority (*see* TMEP §201.02).

201.02 Constructive Use Priority

Under 15 U.S.C. §1057, filing *any* application for registration on the Principal Register, including an intent-to-use application, constitutes constructive use of the mark, provided the application matures into a registration. 15 U.S.C. §1057(c). Upon registration, filing affords the applicant nationwide priority over others, except: (1) parties who used the mark before the applicant's filing date; (2) parties who filed in the Office before the applicant; or (3) parties who are entitled to an earlier priority filing date based on the filing of a foreign application under 15 U.S.C. §1126(d) (*see* TMEP §206.02). *See Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542 (TTAB 1991).

202 Requirements for Receiving a Filing Date

Under 37 C.F.R. §2.21(a), the Office will grant a filing date to an application that contains all of the following:

- (1) the name of the applicant;
- (2) a name and address for correspondence;
- (3) a clear drawing of the mark;

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- (4) a listing of the goods or services; and
- (5) the filing fee for at least one class of goods or services.

If the papers and fees submitted as an application do not satisfy all of the above requirements, the papers will not be given a filing date. The Office will notify the applicant of the reason(s) why the application was not given a filing date, and refund the application filing fee.

Application papers that do not meet the minimum requirements for receipt of a filing date are referred to as “informal.” See TMEP §203 regarding review for compliance with minimum filing requirements, and TMEP §§204 *et seq.* for information about how the Office handles informal applications.

202.01 Clear Drawing of the Mark

Under 37 C.F.R. §2.21(a)(3), an applicant must submit “a clear drawing of the mark” to receive a filing date. A separate drawing page is not mandatory, but is strongly encouraged.

An application that includes two or more drawings displaying different marks does not meet the requirement for a “clear drawing of the mark.” Therefore, an application is denied a filing date if the applicant submits two or more drawings displaying different marks, or different versions of a mark, in different places in the application papers.

However, if an applicant submits a separate drawing page showing a mark, and a different mark appears in the written application, the drawing will control for purposes of determining what the mark is. The Office will grant a filing date to the application, and disregard the mark in the written application. The applicant will not be permitted to amend the mark if the amendment is a material alteration of the mark on the drawing page. *In re L.G. Lavorazioni Grafite S.r.l.*, 61 USPQ2d 1063 (Comm'r Pats. 2001). See 37 C.F.R. §2.72 and TMEP §807.14(a) regarding material alteration of a mark.

A specimen showing the mark is not a drawing. If the only depiction of the mark is on the specimen, there is no drawing, and the application will be denied a filing date.

See TMEP §807 for additional information about the examination of drawings.

See also TMEP §204.03 regarding the examining attorney’s handling of applications that are erroneously granted a filing date.

202.02 Listing of Recognizable Goods or Services

The Office will deny a filing date if the application does not identify recognizable goods or services. See TMEP §1402.02.

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202.03 Filing Fee for At Least One Class of Goods or Services

Under 37 C.F.R. §2.21(a)(5), the applicant must pay the filing fee for at least one class of goods or services before an application can be given a filing date. The fee can be paid by credit card, check or money order, or by an authorization to charge a deposit account. 37 C.F.R. §1.23 *See* TMEP §§405 *et seq.* for additional information about fees.

The complete fee for at least a single class must be submitted with the application as filed. Partial or piecemeal fee payments are unacceptable and will be refunded.

If an application does not include a filing fee for at least a single class, the Office will deny a filing date and return the application papers to the applicant. If a filing date has been granted when the Office discovers that the applicant has not paid the filing fee for at least a single class, the filing date will be cancelled. *See* TMEP §204.01.

See TMEP §202.03(a) regarding fee payments that are refused or charged back by financial institutions. *See also* TMEP §405.01 regarding credit cards, TMEP §405.02(a) regarding returned checks, and TMEP §405.03 regarding deposit accounts.

202.03(a) Fee Payment Refused or Charged Back By Financial Institution

Where a check submitted as payment of an application filing fee is returned to the Office unpaid, or a fee charged to a credit card is refused or charged back by a financial institution, the application is treated as though the fee had never been paid.

If the original application was accompanied by an authorization to charge fee deficiencies to a deposit account (37 C.F.R. §1.25), then the application filing fee and the \$50 processing fee required by 37 C.F.R. §1.21(m) (*see* TMEP §202.03(a)(i)) are charged to the deposit account, and the original filing date remains unchanged.

However, if the original application was not accompanied by an authorization to charge deficient fees to a deposit account, and the applicant has not paid the filing fee for at least one class of goods or services, the filing date is void and will be cancelled. *In re Paulsen*, 35 USPQ2d 1638 (Comm'r Pats. 1995).

In some cases, the applicant will have resubmitted the fee before the Office discovers that the check was returned unpaid or credit card authorization was refused by a financial institution. In these cases, the Office will change the filing date to the date when the fee for a single class of goods or services was resubmitted.

In a multi-class application, if the fee for at least a single class has been paid, but the payment of the filing fee for additional class(es) is refused or charged back, the filing date of the application is not affected. The applicant must (1) resubmit the fee for the additional class(es), or delete the additional class(es); and (2) pay the \$50 processing

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fee required by 37 C.F.R. §1.21(m). The applicant must pay the processing fee even if the applicant chooses to delete the additional class(es).

See TMEP §202.03(a)(i) regarding the fee for processing returned checks or charges refused by a financial institution, and TMEP §204.03 regarding the examining attorney's handling of applications that are erroneously granted a filing date.

202.03(a)(i) Processing Fee for Payment Refused or Charged Back By Financial Institution

Under 37 C.F.R. §1.21(m), there is a \$50 fee for processing any payment refused (including a check returned unpaid) or charged back by a financial institution. However, this is not a filing date requirement. If an applicant resubmits the filing fee without paying the processing fee, the Office will give the application a filing date as of the date of resubmission, and the examining attorney will require submission of the processing fee during examination.

203 Review for Compliance With Minimum Requirements

Papers submitted as a trademark application are labeled with a receipt date (*see* TMEP §303.01) and then reviewed for compliance with the minimum requirements for receipt of a filing date (*see* 37 C.F.R. §2.21(a) and TMEP §202 for a list of these requirements). Paper applications are reviewed in the Pre-Examination Section of the Office, and applications filed electronically using the Trademark Electronic Application System (TEAS) are reviewed in an e-commerce law office that handles only electronically filed applications.

If the papers are complete, the Office assigns a filing date as of the date of receipt in the Office. *See* TMEP §§401 *et seq.* regarding the processing of applications that meet the minimum requirements for receipt of a filing date, and TMEP §§204 *et seq.* regarding the processing of application papers that do not meet the minimum requirements for receipt of a filing date.

The minimum filing requirements for receipt of a filing date under 37 C.F.R. §2.21(a) apply to all applications, whether filed electronically or on paper. When an application is filed electronically, the TEAS system will not accept the transmission if the fields corresponding to the minimum filing requirements are not filled in. However, if the fields are filled in with incomplete or inappropriate information, the TEAS system will accept the transmission, but the Office will deny the application a filing date upon review for compliance with minimum filing requirements. For example, if the goods and services were identified as "all services in Class 42," TEAS would accept the transmission, but the Office would not give the application a filing date (*see* TMEP §§202.02 and 1402.02).

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204 Defective or Informal Application Papers

If an application does not meet the minimum requirements for receipt of a filing date set forth in 37 C.F.R. §2.21(a) (*see* TMEP §202), the application is void. These applications are also referred to as “incomplete” or “informal.”

204.01 Filing Date Cancelled if Application Papers are Defective

As noted in TMEP §203, papers submitted as a trademark application are labeled with a receipt date and then reviewed for compliance with the minimum requirements for receipt of a filing date set forth in 37 C.F.R. §2.21(a). If the papers are incomplete, the Office denies a filing date, and refunds the filing fee. If a filing date has been granted and a serial number has been assigned to the application, the Office cancels the filing date and serial number.

For paper applications, the Office returns the application papers to the applicant or the applicant’s attorney, with a notice explaining why the papers are defective. For applications filed electronically using TEAS, the Office generates a hard copy of the application transmitted by the applicant and sends it to the applicant with a notice explaining why the papers are defective.

See TMEP §1711 regarding the procedures for requesting review by the Office of the Commissioner for Trademarks of the denial of a filing date.

204.02 Resubmission of Defective Papers

If the Office denies a filing date, the applicant may resubmit the original papers, together with the item(s) necessary to correct the defect(s). The original check for the filing fee may be resubmitted unless it is more than six months old, in which case it is considered to be “stale.” *A filing fee for at least a single class of goods or services must be included when the applicant resubmits an application, even if the applicant has not yet received a refund of the fee previously submitted.*

The new filing date will be the date on which a complete application, including all elements required by 37 C.F.R. §2.21(a), is received in the Office. There is no time limit for resubmitting papers, except that a claim of priority under 15 U.S.C. §1126(d) must be submitted within six months after filing the foreign application. 37 C.F.R. §2.34(a)(4)(i); TMEP §1003.02.

204.03 Examining Attorney’s Handling of Application Papers That Are Erroneously Accorded a Filing Date

If an application not entitled to a filing date is referred in error to the law office for examination, and the examining attorney discovers the error *before* issuing an action in the case, then the examining attorney should have the application declared informal. For paper applications, the examining attorney should return the application to the Pre-Examination Section of the Office to cancel the filing date,

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declare the application informal, and refund the filing fee. For applications filed electronically using TEAS, the examining attorney should give the application to the supervisory legal instruments examiner in an e-commerce law office to have the filing date cancelled and the fee refunded. *See* TMEP §204.01.

If, however, an examining attorney discovers *after* issuing an action that the application as filed did not meet the minimum requirements for receipt of a filing date, then the examining attorney should issue a supplemental Office action, refusing registration on the ground that the application was not eligible to receive a filing date. Any outstanding refusals and requirements should be maintained and incorporated into the supplemental Office action. The applicant should be given six months to comply with all filing date requirements. If the applicant fails to qualify for a filing date within the response period, the application is void. The examining attorney should have the filing fee refunded and update the Office's automated records to indicate that the application is abandoned.

If the applicant complies with the filing date requirements within the six-month period, the application will receive a new filing date as of the date on which the applicant satisfied all the minimum filing date requirements. The examining attorney should take the file to the Office of Trademark Program Control to have the new filing date entered into the Office's automated records and a corrected filing receipt issued. In such a case, the examining attorney must conduct a new search of Office records for conflicting marks, and issue a supplemental Office action if necessary.

205 Filing Date Is Not Normally Changed

After an application has been given a filing date, the Office will normally not vacate the filing date or physically alter the designation of the original filing date in the TRAM (Trademark Reporting and Monitoring) System, except where the application as originally filed was erroneously accorded a filing date (*see* TMEP §204.03).

If the application met the minimum requirements for receipt of a filing date (*see* TMEP §202) when originally filed, but during examination it is discovered that the applicant did not have a right to apply on the assigned filing date (*e.g.*, because the applicant did not own the mark), the application is *void*, because a valid application was not created. *See* TMEP §§803.06 and 1201.02(b). The Office will *not* refund the filing fee in such a case. If, subsequent to the assigned filing date, the applicant became eligible to apply, the applicant may file a new application, including a filing fee.

206 Effective Filing Date

As noted in TMEP §201, the filing date of an application is the date when all elements designated in 37 C.F.R. §2.21(a) are received in the Office. That date is also the *effective* filing date (*see* TMEP §201.01), *except* in the situations described in the subsections below.

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If the effective filing date is subsequent to the date on which the examining attorney searched Office records for conflicting marks, the examining attorney must conduct another search.

206.01 Amendment of §1(b) Application from Principal Register to Supplemental Register upon Filing of Allegation of Use

An applicant relying on a bona fide intention to use the mark in commerce under 15 U.S.C. §1051(b) may not seek registration on the Supplemental Register until the applicant has submitted an acceptable amendment to allege use under 15 U.S.C. §1051(c) or statement of use under 15 U.S.C. §1051(d). 37 C.F.R. §§2.47(c) and 2.75(b).

If an application is based solely on §1(b), and the applicant files an acceptable amendment to allege use or statement of use *and* an acceptable amendment to the Supplemental Register, the Office will consider the filing date of the amendment to allege use or statement of use to be the effective filing date of the application. 37 C.F.R. §2.75(b). The examining attorney must conduct a new search of Office records for conflicting marks.

See TMEP §§816.02 and 1102.03 for additional information about examination of intent-to-use applications on the Supplemental Register.

206.02 Application Claiming Priority under §44(d) [R-2]

When an applicant is entitled to priority in view of a foreign application, the effective filing date is the date on which the foreign application was first filed in the foreign country. The priority claim for the United States application must be filed within six months after the filing date of the foreign application. 15 U.S.C. §1126(d)(1); 37 C.F.R. §2.34(a)(4)(i); TMEP §1003.02.

The applicant can submit a priority claim after the filing date of the United States application if: (1) the applicant submits the priority claim within the six-month priority period (37 C.F.R. §2.35(e)), and (2) the applicant was entitled to priority on the filing date of the United States application.

206.03 Applications Filed Before November 16, 1989, That Are Amended to the Supplemental Register on or After November 16, 1989

In an application filed before November 16, 1989, the date of the amendment to the Supplemental Register becomes the effective filing date of the application if: (1) the applicant had not used the mark in commerce for one year before the application filing date; and (2) the applicant amends to the Supplemental Register on or after November 16, 1989. *See* TMEP §816.02.