

UNITED STATES PATENT AND TRADEMARK OFFICE  
**Trademark Trial and Appeal Board**  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

EJS/kk

Mailed: September 28, 2015

In re KTM-Sportmotorcycle AG

Serial No. 79147426

Filed: 9/11/2013

**By the Trademark Trial and Appeal Board:**

The Examining Attorney's request for remand, filed August 24, 2005, is noted. The Examining Attorney explains that the December 15, 2014 Office action, from which Applicant filed its appeal, inadvertently contained instructions for responding to a final Office action, but that the December 15, 2014 Office action was not intended to be a final action. Therefore, the Examining Attorney believes that the appeal, and subsequent brief, were prematurely filed.

Trademark Rule 2.141 (a) states, in part, that "a second refusal on the same grounds may be considered as final by the Applicant for purpose of appeal." That is, an Applicant may file an appeal even if an Office action is not stated to be "final," as long as all refusals and requirements have been repeated in that action. A review of the file shows that in the first Office action, mailed May 30, 2014, the Examining Attorney, inter alia, refused registration under Section 2(d) of the Trademark Act, citing Registration No. 4192491. After Applicant responded to this action, the

Examining Attorney issued a second action on December 15, 2014. It is this action that the Examining Attorney explains was not called a “final” action, but included instructions for responding to a final action. This action again refuses registration pursuant to Section 2(d) on the basis of the registration identified in the first Office action, and states that the refusal that was raised in the first action is “continued.” There are no new refusals or requirements raised in the December 15, 2014 action. As a result, it was permissible for Applicant to take an appeal from this action, and therefore the notice of appeal filed on June 15, 2015, and the appeal brief filed on August 14, 2015, were not premature.

Accordingly, there is no basis for us to remand the application to the Examining Attorney, and the request for remand is denied. The Examining Attorney is allowed 60 days from the date of this order to file her appeal brief in accordance with Trademark Rule 2.142(b)(1).