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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

LEO STOLLER,)	
)	
Appellant,)	Case No. 05-1320
)	(Opposition No. 91/162,195)
v.)	
)	CORRECTED INFORMAL
NORTHERN TELEPRESENCE)	REPLY BRIEF OF APPELLEE¹
CORP.)	
)	
Appellee)	
)	

I. Introduction

The Trademark Trial and Appeal Board issued an Order dated February 11, 2005 dismissing Appellant's Opposition on the basis that Appellant missed the statutory deadline for filing a notice of Opposition. The factual evidence of record supports the Board's conclusion that Appellant did not timely file his Notice of Opposition. Therefore, the Board did not err when it dismissed Appellant's Opposition to Appellee's DARKSTAR trademark.

II. Argument

Section 13(a), 15 U.S.C. §1063(a), of the Trademark Act states, in relevant part, that:

¹ Deputy Clerk Christy L. Thomas confirmed that under Federal Circuit Rule 31 Appellee is authorized to file an informal brief in reply to *pro se* Appellant's informal brief.

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Any person who believes that he would be damaged by the registration of a mark upon the principal register...may...file a notice of opposition in the Patent and Trademark Office, stating the grounds therefor, **within thirty days after the publication** under subsection (a) of section 12 [§ 1062] of this Act of the mark sought to be registered [emphasis added].

It is well-settled that the Commissioner has no authority to waive a requirement of the statute. *In re Kabushiki Kaisha Hitachi Seisakusho*, 33 U.S.P.Q.2d 1477, 1478 (Comm'r Pats. 1994 ("Since the time period for filing an opposition or requesting an extension of time to oppose is prescribed by statute, the Commissioner has no authority to waive this requirement").

Under Trademark Rules 1.8 and 2.119, the Board considers the mailing date of a paper to be the date when the paper is deposited with the United States Postal Service, *i.e.*, the date when the custody of the paper passes to the Postal Service. Under Trademark Rule 1.8, with certain specified exceptions, papers are considered filed on time if they are, among other things, deposited with the Postal Service at least by the due date, and contain a certificate indicating the date of deposit signed by a person with a reasonable basis to expect that the correspondence will be mailed on or before the date indicated. 37 C.F.R. §1.8.

The Board ordinarily accepts, as *prima facie* proof of the date of mailing, the certificate signed by the filing party, or by its attorney or other authorized representative, certifying the date and manner of service. Where, however, there is

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other evidence rebutting the veracity of the certificate of mailing, the burden shifts to the person who mailed the correspondence to come forward with some other evidence establishing the accuracy of the mailing date of the correspondence. *See, e.g., S Industries, Inc. v. Lamb-Weston, Inc.*, 45 U.S.P.Q.2d 1293, 1295 (TTAB 1997) (sanctioning Mr. Stoller, the same Appellant herein, for a fraudulent certificate of mailing).

On May 9, 2001, Appellee filed U.S. Application Ser. No. 76/308,975, for the mark DARKSTAR to be used in connection with infrared imaging systems. The DARKSTAR trademark application was published for opposition on January 28, 2003. As such, in accordance with Trademark Act §13(a), any potential opposer of the DARKSTAR application was required to file a Notice of Opposition on or before February 27, 2003. On April 3, 2003, over a month after the statutory period for filing a Notice of Opposition had closed, the Trademark Office received from Appellant Stoller a first request for a ninety-day extension of time to oppose the DARKSTAR application. The first request for extension of time did not bear a signature and also included an unsigned certificate of mailing purporting to be dated February 25, 2003 (*i.e.*, two days prior to the statutory deadline). On April 18, 2003, the Board, apparently seeing the purported February 25, 2003 certificate of mailing date, but not questioning why the first request for extension of time was five weeks late, issued a notice granting Appellant Stoller

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until May 18, 2003 to submit a signed copy of his five-week-late first request for extension of time to file the opposition.

The Board's May 18, 2003 notice effectively, and improperly, waived the statutory requirements of section 13(a) of the Trademark Act by extending the opposition period beyond the statutorily prescribed thirty-day limit. Because the statutorily prescribed time period for filing the opposition ended on February 27, 2003, the Commissioner had no authority, on April 3, 2003 or any point thereafter, to waive the mandates of the Trademark Act and extend the opposition period until May 18, 2003. Accordingly, notwithstanding the fact that Appellant Stoller eventually filed his Notice of Opposition before May 18, 2003, he missed the deadline for filing the Notice of Opposition because the Commissioner had no authority to extend the opposition period beyond February 27, 2003.

The Court upholds the Board's factual findings unless they are unsupported by substantial evidence. *Recot, Inc. v. Becton*, 214 F.3d 1322,1327, 54 U.S.P.Q.2d 1894 (Fed. Cir. 2000). The evidence of record clearly supports the Board's finding that a five-week delay between the purported certificate of mailing date (February 25) and the date on which the Trademark Office actually received Stoller's first request for extension of time (April 3) provides factual evidence sufficient to rebut the veracity of the certificate of mailing date. The burden was on Appellant Stoller to come forward with some evidence other than his purported certificate of mailing

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date to establish that his first request for extension of time was mailed on February 25, 2003. Despite repeated opportunities to do so, Appellant Stoller has not presented the Board or the Court with any evidence that his first request for extension of time was deposited before the expiration of the statutory deadline (February 27, 2003). Consequently, the Board was justified in dismissing Appellant Stoller's opposition because he failed to discharge his burden of proving that his first extension of time was timely filed.

Paragraph 2 of Stoller's informal brief falls short of providing evidence necessary to vacate the Board's February 11, 2005 Order dismissing Stoller's opposition to Appellee's DARKSTAR mark. Rehashing his arguments to the Board, Stoller states:

Appellee does not present any evidence to support its contention that Appellant's initial extension, which was dated **February 25, 2003**, was not properly mailed by the Appellant under 37 CFR §1.8. The fact that the Board may not have associated the Appellant's **February 25, 2003** extension with the file until after **April 3, 2003**, does not establish that the Appellant did not mail its initial extension of time to oppose pursuant to the 37 CFR §1.8 Certificate of mailing on **February 25, 2003** [emphasis in original].

For the reasons discussed above, the burden was on Stoller (and not Appellee) to come forward with evidence establishing the accuracy of his February 25, 2003 certificate of mailing date. *S. Industries*, 45 U.S.P.Q.2d at 1295. The

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record is absolutely devoid of an explanation by Stoller regarding the five-week delay between the purported certificate of mailing date (February 25) and the date on which the Trademark Office actually received Stoller's first request for extension of time (April 3). The Board was, therefore, justified in dismissing Appellant Stoller's opposition in view of his failure to met his burden of establishing that he mailed his initial extension of time on or before the statutory deadline.

Wherefore, for the reasons stated above, Appellee respectfully request that the Court uphold the Board's Order of February 11, 2005 which dismissed Stoller's time-barred opposition against Appellee's DARKSTAR trademark.

Respectfully submitted,
FROST BROWN TODD LLC

Dated: 6-6-05

By: Steven W. Caldwell
Steven W. Caldwell
Attorney for Northern Telepresence

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Certificate of Service

I hereby certify I served a copy of the foregoing "CORRECTED" Appellee's INFORMAL REPLY BRIEF upon Leo Stoller, *pro se* Appellant, by first class mail this 6th day of June, 2005.


Karen S. Kruetzkamp