

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O BOX 1451
Alexandria, Virginia 22313-1451

kuhlke

Mailed: March 17, 2005

Opposition No. 91163053

Only The Best, Inc.

v.

OPS Sales, Inc.

Before Walters, Bucher and Drost, Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of applicant's motion to dismiss the opposition as untimely. The motion is fully briefed.¹

In support of its motion, applicant states that its application Serial No. 78364795 published for opposition on November 9, 2004. Further, applicant states that opposer filed a notice of opposition on November 3, 2004 "alleging the application was published for opposition...[on] October 20, 2004." Applicant argues that opposer's notice of opposition is untimely inasmuch as it was filed prior to publication and that opposer is "not entitled to rely on the [Board's] institution of Opposition No. 91163053, since the

¹ We have exercised our discretion and have considered applicant's reply brief. Trademark Rule 2.127(a).

Opposition No. 91163053

opposition was improperly instituted based on would-be opposer's...misrepresented publication date of October 20, 2004."

In response, opposer contends that "the filing date of an opposition is the date of receipt in the Office of the opposition together with the required fee." Opposer argues that the Office "received opposer's notice [of opposition] on November 15, 2004" as reflected in the United States Patent and Trademark Office (USPTO) TARR database print-out attached to opposer's response. Further, opposer argues that although opposer "mailed the notice of opposition to the PTO on November 3, 2004 via USPS Express Mail and reflected this fact in the Certificate of Mailing," the date that controls for timeliness purposes under these circumstances is the date of receipt by the Office.

In reply, applicant submitted a print-out from the United States Postal Service (USPS) website showing the shipping details of the notice of opposition as identified by the express mail label number. The print-out confirms that the notice of opposition was received by the USPTO on November 5, 2004.

Under Section 13 of the Trademark Act, an opposition may be filed in the Patent and Trademark Office "upon payment of the prescribed fee...within thirty days after the publication." 15 U.S.C. § 1063. Further, because these

Opposition No. 91163053

timeliness requirements are statutory, they cannot be waived by stipulation of the parties, nor can the Director upon petition waive them. See TBMP § 306.04 (2d ed. rev. March 2004). The subject application published for opposition on November 9, 2004; therefore, any notice of opposition filed prior to that date is untimely and cannot be considered.

TBMP § 306.03

The filing date of an opposition is the date of receipt in the Office of the opposition together with the required fee. Trademark Rule 2.101(d)(4). The "Office" is defined by the rules as the "United States Patent and Trademark Office," which includes the Board. Trademark Rule 2.2(e).

Under the express mail procedure, any correspondence received by the Office that was delivered by the "Express Mail Post Office to Addressee" service of the USPS will be considered filed with the Office on the date of deposit with the USPS. Trademark Rule 2.198. Further, the "Office date label" applied to incoming mail establishes the date of receipt, or filing date, of correspondence filed with the Office. TMEP § 303.02.

As can be seen from opposer's "Certificate of Mailing" it was, in fact, mailed with an express mail label and the Office, accordingly, stamped the notice of opposition, with an "Office date label" of November 3, 2004. Further, as can be seen from the USPS tracking print-out, this

Opposition No. 91163053

correspondence was actually received by the Office on November 5, 2004. Opposer's reference to the date entered in the TARR database is not controlling. This date merely reflects the date the notice of opposition was entered into the database and has no legal effect.

Under these circumstances, the controlling date is the date on the "Office date label," which is November 3, 2004. Moreover, even if we subscribed to opposer's argument that the notice of opposition was mailed under the certificate of mailing procedure rather than the express mail procedure, the actual receipt date by the Office is November 5, 2004.

In view of the above, the notice of opposition is premature and can be given no consideration. Accordingly, applicant's motion to dismiss is granted to the extent that the opposition is dismissed as a nullity.²

* * *

² Only the Best, Inc. is advised that its remedy, if any, lies in the filing of a petition for cancellation, pursuant to Section 14 of the Trademark Act. See TBMP Section 306.04. Further, this matter will be referred to the Finance Branch of the Office for consideration of the refund of the \$300.00 opposition fee. Id.