

UNITED STATES: Does Anybody Really Know What Time It Is?

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In a precedential decision, the Trademark Trial and Appeal Board (the Board) granted a trademark applicant's motion for relief from judgment after judgment was entered against the applicant based on his abandonment of an opposed application. *3PMC, LLC v. Stacy Lee Huggins*, Opposition No. 91219982 (July 24, 2015) [precedential].

Stacy Lee Huggins (Huggins) filed an application to register the mark COKE HEAD with the U.S. Patent and Trademark Office (USPTO) for t-shirts. After the application was published, 3PMC, LLC (3PMC) filed a notice of opposition through the Board's electronic filing system, which automatically instituted the opposition proceeding. On the same day that 3PMC filed the notice of opposition, Huggins filed an express abandonment of the application through the USPTO electronic filing system. Thereafter, the Board entered judgment against Huggins under Trademark Rule 2.135 for "abandoning the application after the commencement of an opposition without the express consent of the opposing party." Huggins then filed a motion for relief from judgment under Fed. R. Civ. P. 60(b), arguing that his request for express abandonment was filed prior to the notice of opposition and, therefore, no opposition had "commenced" at the time of abandonment and the opposition proceeding should be dismissed.

The Board reaffirmed its holding in *In re First Nat'l Bank of Boston*, 199 USPQ 296, 301 (TTAB 1978) that it "shall not take cognizance of fractions of a day" and will treat an opposition and an express abandonment, filed on the same day, as if they were filed at the same instant. The Board acknowledged that it decided *First Nat'l Bank of Boston* when Board filings were submitted on paper and the Board was unable to determine with certainty the exact temporal sequence of events. The Board, however, noted that "with multiple electronic filing systems that operate and update differently, it is not always possible to establish temporal sequence with certainty, even in an electronic filing environment."

3PMC argued that it would be prejudiced if the Board vacated the judgment because it may be required to commence opposition or cancellation proceedings in the future and "will be forced to monitor the activities of the applicant at the USPTO." The Board, however, found that "any business that pursues registration of its marks and seeks to protect those marks experiences the same expenditure of time and resources. The cost is one of doing business and does not rise to the level of manifest injustice."

Based on precedent, the Board concluded that the application was not subject to an opposition when it was abandoned and Trademark Rule 2.135 did not apply. The Board granted Huggins's Rule 60(b) motion, vacated its earlier judgment and dismissed the opposition without prejudice. The Board also refunded 3PMC's filing fee.

Although every effort has been made to verify the accuracy of items in the *INTA Bulletin*, readers are urged to check independently on matters of specific concern or interest.

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