



## Newsletter Article

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### THE IMPORTANCE OF THE DATE OF FIRST USE

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A recent decision of the Trade-marks Opposition Board emphasizes the importance of accurately specifying the date of first use in a trade mark application.

#### The Facts

The applicant filed an application to register the trade mark ZERO-X POSUR based on use since January 1, 2002 in association with a lengthy list of men's and women's garments, shoes and accessories. The opponent opposed the application on the ground that the application did not comply with the *Trade-marks Act* since the applicant had not used its mark in association with all of the wares described in the application on the claimed date of first use.

#### The Onus

The applicant bears the legal onus of establishing, on a balance of probabilities that its application complies with the requirements of the Act. However, there is an initial evidential burden on the opponent to present evidence from which it could be reasonably concluded that the facts alleged to support the ground of opposition exist. In the context of an issue of this nature, the initial burden on the opponent is relatively light, since the facts relating to the applicant's date of first use are within its knowledge. Once this evidential burden is met by the opponent, the burden shifts to the applicant who must prove on a balance of probabilities that it used its trade mark from the date alleged in the application.

#### The Evidence

The opponent filed evidence of investigators who had visited the applicant's stores but were not able to locate wares bearing the applicant's trade mark. In addition, the opponent filed a search of archived versions of the applicant's website, located at [www.archive.org](http://www.archive.org). The searches did not include any references to wares sold in association with the applicant's trade mark.

The applicant filed evidence but the Hearing Officer described it as nothing more than one isolated custom order for a pair of pants sold in association with the applicant's trade mark approximately 3 years after the claimed date of first use.

As a result, the Hearing Officer found that the applicant had failed to meet its onus to provide evidence to support the claimed date of first use and refused the application.

#### Conclusion

It is vitally important that when a trade mark application is prepared that the applicant be in a position to substantiate its claimed date of first use. If the date claimed is incorrect, this can support a successful opposition.