Examination Guide 1-20 (Revised)

Mandatory Electronic Filing and Specimen Requirements

February 2020

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On July 31, 2019, the United States Patent and Trademark Office (USPTO) published a final rule (Changes to the Trademark Rules of Practice to Mandate Electronic Filing, 84 FR 37081) that requires applicants and registrants to file all trademark submissions electronically using the Trademark Electronic Application System (TEAS), and to provide an email address for receiving USPTO correspondence, with limited exceptions. In addition, the final rule amends the requirements for specimens in accordance with the Trademark Act and precedential case law.

The rule changes are effective February 15, 2020 (Changes to the Trademark Rules of Practice to Mandate Electronic Filing, 84 FR 69330). Since issuing Examination Guide 1-20 on February 7, 2020 regarding implementation of the final rule, the USPTO has received requests for additional clarification. Accordingly, the USPTO issues this revised examination guide, which supersedes all prior guidance. The USPTO may issue revised and/or additional guidance as needed in the future. As of February 15, 2020, this examination guide

supersedes the current edition of the Trademark Manual of Examining Procedure (TMEP) to the extent any inconsistency exists.

I. REQUIREMENT TO FILE ELECTRONICALLY

As of February 15, 2020, all formal correspondence concerning a trademark application or registration must be filed electronically through TEAS, except in the limited circumstances discussed in section II. See 37 C.F.R. §§2.21(a), 2.23(a). Current USPTO practice regarding informal communications remains unchanged. See TMEP §709.05. Unless an exception for paper filing applies, parties filing a paper submission on or after the effective date will receive a USPTO notice indicating that the submission will not be processed and will be destroyed in accordance with the relevant record-retention schedule. If a check or money order was included with the submission, it will be returned with the USPTO notice.

II. EXCEPTIONS FOR PAPER SUBMISSIONS

There are limited exceptions for acceptance of paper submissions filed on or after February 15, 2020. As explained below, the USPTO may accept paper submissions in the following limited circumstances: if the submission relates to a "grandfathered" application or registration; if the applicant or registrant is a national of an exempted treaty country; if the submission is a particular type of specimen for a non-traditional mark; if the submission is supported by a petition to the Director; or if the USPTO deems it appropriate to waive certain requirements of the rules because of widespread TEAS unavailability, a postal-service interruption, or other serious emergency, such as one related to a natural disaster.

Only those paper submissions that are accepted as falling within these limited exceptions will be processed and appear in the prosecution history of the application or registration.

A. Exception for Filings Submitted Prior to February 15, 2020

Certain applications and post-registration submissions filed prior to February 15, 2020 are "grandfathered" and will not be subject to the requirements of the final rule, unless the applicant or registrant elects to use TEAS to file submissions after that date, as discussed below. Accordingly, applicants, registrants, and their attorneys are not required to electronically file subsequent submissions related to those applications or those particular post-registration maintenance filings.

This exception applies to an application filed on paper, a TEAS Regular application, or a Madrid application, until the application registers or is abandoned and cannot be reinstated or revived pursuant to Trademark Rules 2.64, 2.66, or 2.146. 37 C.F.R. §§2.64, 2.66, 2.146. Similarly, this exception applies to post-registration maintenance documents filed prior to February 15, 2020 until the acceptance or final rejection of the filing. Any separate post-registration filings, such as filings pursuant to a subsequent maintenance filing requirement, must be submitted electronically through TEAS.

However, if a TEAS form is submitted in a grandfathered application or a post-registration maintenance document, the application or document loses its grandfathered status. In such a case, the USPTO will presume that email communication has been authorized and will require the owner to file all subsequent submissions for that application or registration electronically. Any subsequent paper submissions will be handled according to the procedures set out below. Additionally, the TEAS forms will require the email address of the owner and its attorney, if one was appointed.

B. Exceptions for Filings Submitted On or After February 15, 2020

The following exceptions apply to filings submitted on or after February 15, 2020.

1. International Agreements

Applicants, registrants, or parties that are a national of a country that is a member of the Trademark Law Treaty (TLT), but not the Singapore Treaty on the Law of Trademarks (STLT), are not required to file electronically, receive communications from the USPTO via email, or submit petitions to accept paper filings.[1] 37 C.F.R. §§2.21(c), 2.23(c). Currently, this exception applies only to nationals of the following countries: Bahrain, Bosnia and Herzegovina, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Dominican Republic, Egypt, El Salvador, Guatemala, Honduras, Hungary, Indonesia, Monaco, Montenegro, Morocco, Nicaragua, Oman, Panama, Slovenia, Sri Lanka, Turkey, and Uzbekistan.

Applicants, registrants, and parties who are permitted to file paper submissions should follow the guidance in TMEP §305.

2. Specimens for Non-traditional Marks

A specimen for certain non-traditional marks, such as scent and flavor marks, cannot be submitted electronically. See 37 C.F.R. §2.56(d)(1). For example, if the application is for a scent mark, the examining attorney must be able to smell the actual scent to determine registrability. In this case, the applicant must mail the scented goods to the USPTO.

To submit a specimen for a non-traditional mark, applicants must first submit information about the specimen online using the appropriate TEAS form and then mail in the physical specimen following the guidance in TMEP §305. The TEAS forms have a checkbox on the Use Information page that must be selected to indicate that a specimen for a non-traditional mark will be submitted by mail.

This exception does not apply to sound, motion, and color marks, because electronically filed specimens are sufficient to determine registrability. Applicants are required to submit specimens for these marks electronically. See TMEP §§904.03(f), (l).

3. Petitions to the Director

An applicant or registrant may file a petition to the Director to request acceptance of a paper submission in three situations: (1) when TEAS is unavailable on the date of a filing deadline; (2) when a timely filed paper submission with a statutory filing deadline is not processed or examined and it cannot be resubmitted electronically before the deadline; or (3) in an extraordinary situation under Rule 2.146. See 37 C.F.R. §2.147. Submission of a petition does not extend the filing deadline for any response or submission. TMEP §§1705.06, 1712.02(b)(iii).

a. TEAS Unavailable on the Date of Filing Deadline

If TEAS is unavailable, users should check the "USPTO Systems Status and Availability" page on the USPTO website to see if the USPTO has issued a notice regarding an outage.

[1] The United States is a member of both the TLT and the STLT. While the STLT allows member countries to choose between paper and electronic communication methods, the TLT provides that its member countries must accept paper trademark applications from nationals of other TLT members.

(i) TEAS unavailable to the general public due to a widespread or lengthy USPTO system outage

In the event of a widespread USPTO system outage, the USPTO will continue its prior practice of issuing a notice on that website page specifying temporary procedures for filing documents with the USPTO. If the USPTO website is inaccessible, the filer should call the Trademark Assistance Center at (571) 272-9250 for information on the temporary procedures. If the outage falls on the date of the deadline for the submission, the requirement to file electronically will be waived, and filings via facsimile will be accepted without a petition or petition fee. If the document that is due requires a fee, the filer may submit a credit card authorization form or authorization to charge a deposit account. The amount of the fee required in such circumstances is the same as the fee for submitting the document via TEAS, not the fee for filing documents on paper.

(ii) TEAS unavailable due to either a user's system outage or a limited or short-term USPTO outage

If TEAS is unavailable due to either a user's system outage or a limited or short-term USPTO outage on the date of the deadline for submission of a document, a petition to the Director to accept a paper submission may be submitted. 37 C.F.R. §2.147(a). To be timely, the petition must be filed on the date of the deadline. 37 C.F.R. §2.147(a)(1)(ii). Because filers would not be able to access the TEAS petition form in such circumstances, the USPTO will provide a "Petition to the Director under 37 C.F.R. §2.147 to Request Acceptance of a Paper Submission" form on the "Submitting documents to the USPTO when unable to file electronically" webpage that may be downloaded and submitted with the other required documents.

Under this provision, the filer must submit proof with the petition that TEAS was unavailable on the date of the deadline. 37 C.F.R. §2.147(a)(2)(ii). This petition option is not available to filers who attempt to use TEAS during a regularly scheduled system maintenance event, when it is not the day of a deadline, or when the failure to file the relevant submission through TEAS was because of user error.

In addition to proof of TEAS unavailability (such as screenshots) and the paper submission to be filed, the petition must include a statement of the facts relevant to the petition supported by a declaration under 37 C.F.R. §2.20 or 28 U.S.C. §1746, the fee for the petition, and any other required fees. 37 C.F.R. §2.147(a)(2).

b. Certain Paper Submissions with Statutory Filing Deadlines

A petition to the Director to accept a paper submission may be filed for specific submissions with statutory deadlines if: (1) the submission was timely submitted on paper and not processed by the USPTO because it was not submitted electronically; and (2) the applicant, registrant, or petitioner is unable to timely resubmit the document electronically by the statutory deadline. 37 C.F.R. §2.147(b).

This petition option applies to the following documents with a statutory deadline under the Trademark Act:

- An initial application seeking a priority filing date with a deadline under Section 44(d)(1) (15 U.S.C. §1126(d)(1));
- A statement of use submitted within the last six months of the period specified in Section 1(d)(2) (15 U.S.C. §1051(d)(2));

- An affidavit or declaration of continued use or excusable nonuse with a grace period deadline under Section 8(a)(3) (15 U.S.C. §1058(a)(3)) or Section 71(a)(3) (15 U.S.C. §1141k(a)(3));
- A request for renewal of a registration with a deadline under Section 9(a) (15 U.S.C. §1059(a));
- An application for transformation of an extension of protection into a U.S. application with a deadline under Section 70(c) (15 U.S.C. §1141j(c)); or
- A petition to cancel a registration under Section 14 (15 U.S.C. §1064) on the fifth year anniversary of the date of the registration of the mark.

37 C.F.R. §2.147(b)(1)-(b)(1)(vi).

For these documents, following notification from the USPTO that a paper submission was not processed for failure to electronically file, when there is no time remaining in the statutory period, the filer may submit a petition to the Director electronically after the deadline requesting acceptance of the previously filed paper submission. If the petition is granted, the paper submission will be considered timely filed.

The petition must be filed within two months of the issue date of the notice that the paper submission was not processed by the USPTO. 37 C.F.R. §2.147(b)(2). The petition must include a statement of the facts relevant to the petition supported by a declaration under 37 C.F.R. §2.20 or 28 U.S.C. §1746, a copy of the relevant paper submission with proof that it was timely filed, proof that the required fee was submitted with the original paper submission, and the relevant paper fees for both the submission and the petition. 37 C.F.R. §2.147(b)(2)(i)-(v). Filers should keep copies of any papers submitted to the USPTO, including payment submissions, to submit as proof with the petition. As noted above, if a check or money order was included with the original submission, it would have been returned with the USPTO notice indicating that the submission would not be processed and would be destroyed in accordance with the relevant record-retention schedule.

c. Extraordinary Situation

If a filer does not meet the petition requirements of Rule 2.147(a) or (b) for requesting acceptance of a paper submission, the filer may petition the Director based on an extraordinary situation. See 37 C.F.R. §2.147(c) (citing 37 C.F.R. §2.146(a)(5)). In such a case, the filer would request a waiver of Rule 2.21(a) or 2.23(a), and include a statement and/or evidence establishing the extraordinary situation that prevented the filer from filing using TEAS. See 37 C.F.R. §2.146(c). The USPTO decides these petitions on a case-by-case basis; assessing what would qualify as an extraordinary situation depends on the unique facts and evidence presented. The inability to file electronically due to USPTO regularly scheduled system maintenance generally does not qualify for relief as an extraordinary situation under Rule 2.146(c).

The petition must include the paper submission, a statement of the facts relevant to the petition supported by a declaration under 37 C.F.R. §2.20 or 28 U.S.C. §1746, the fee for a petition submitted on paper, and any other required fee for the relevant document submitted on paper. See 37 C.F.R. §2.146(c).

4. Postal-Service Interruption or Emergency

In the event of a postal-service interruption or emergency related to a natural disaster, the USPTO will continue its prior practice of issuing a notice on the agency's website that specifies temporary procedures for filing documents with the USPTO. Generally, the USPTO will waive certain requirements of the rules for those in the affected area. The notice can be

found on the "USPTO Systems Status and Availability" page of the website. If Internet access is not available, call the Trademark Assistance Center at (571) 272-9250 for information on the temporary procedures.

C. Changes to Requirements for Paper Submissions

Because paper submissions are permitted in limited circumstances, the rules addressing requirements for paper submissions were retained and modified, as necessary, for consistency with the rules requiring electronic filing. The rules now allow excepted paper filers to use certificate-of-mailing or Priority Mail Express® procedures for all submissions, including new applications. 37 C.F.R. §§2.197, 2.198. Lastly, the USPTO no longer allows submissions by fax, except in very limited circumstances when instructed by USPTO personnel and as stated above in section II.B.3.a(i).

III. CORRESPONDENCE

Under Rules 2.21(a)(1), 2.23(b), 2.32(a)(2), and 7.4(b), applicants, registrants, and parties to a proceeding before the Trademark Trial and Appeal Board (TTAB) will be required on and after February 15, 2020 to provide and maintain a valid email address for receipt of correspondence from the USPTO. This does not apply to applicants and registrants who are nationals of an exempted treaty country, as discussed above in section II.B.1.

A. Email Address Requirement

In order to receive a filing date, new applications filed on or after February 15, 2020 must include an email address for each applicant and, if represented by an attorney, the name, postal address, and email address of the attorney. See 37 C.F.R. §2.21(a)(1)-(2). Applicants, registrants, and parties to a proceeding must maintain a valid email address for correspondence, unless an exception noted in sections II.A or II.B.1 applies. See 37 C.F.R. §2.23(b)-(c).

Even if there is an appointed attorney, a separate email address for the applicant, registrant, or party is required under 37 C.F.R. §2.32(a)(2), so that the USPTO can contact them if representation ends. In connection with these requirements, the TEAS forms will require email addresses for the applicant, registrant, or party and its attorney, if one is appointed.

Trademark applicants and registrants who are **represented by an appointed attorney** may provide an email address of their choice in the owner email field of the TEAS forms. The email address cannot be identical to the listed primary correspondence email address of their attorney. Trademark applicants and registrants who are **not represented by an appointed attorney** will have an owner email address that is identical to the correspondence address. In either situation, the email address can be a unique email address created specifically for this purpose by the owner or their attorney. To avoid receiving unsolicited communications at a personal or business email address, applicants and registrants may wish to create an email address specifically for communication and correspondence related to their trademark filings at the USPTO.

For in-house counsel and attorneys representing themselves in a matter, the TEAS forms will still require two different email addresses: one for the owner email address field and one for the attorney email address field. For technical reasons related to the TEAS forms, these addresses cannot be identical.

The email address of the applicant, registrant, or party will not appear in the Trademark Status and Document Retrieval (TSDR) status tab, but is viewable in the filed document in the TSDR documents tab. A petition may be filed to redact the email address in the TSDR documents tab in an extraordinary situation. See TMEP §1708.

The USPTO also applies the requirement to provide and maintain a valid email address to applications filed under Section 66(a) and post-registration maintenance documents for such applications. 37 C.F.R. §7.25(a). This is not a filing-date requirement for an initial Section 66(a) application, because these are transmitted to the USPTO by the International Bureau (IB) and do not include an email address for receiving USPTO correspondence. Furthermore, if an application filed under Section 66(a) is otherwise in condition for approval for publication upon first action, the examining attorney will not require the owner to first provide an email address prior to publication. However, the TEAS forms will require an email address for any subsequent submissions.

B. Failure to Maintain a Valid Email Address for Correspondence

The USPTO will send formal correspondence to applicants, registrants, and parties or their appointed attorney via the designated correspondence email address. If the email transmission fails for any reason, the USPTO will not attempt to contact the correspondent by any other means. Applicants, registrants, and parties are responsible for maintaining a valid email address and for periodically monitoring the status of their filings using the USPTO's TSDR system. 37 C.F.R. §2.23(b), (d); TMEP §403.

C. Correspondence Address

The correspondent in an application or registration is the appointed attorney, if any. If an attorney is not appointed, the correspondent is the applicant or registrant. See 37 C.F.R. §2.18(a).

For an unrepresented applicant or registrant, trademark correspondence will be sent directly to the applicant's or registrant's email address of record. 37 C.F.R. §2.18(a)(1). If the applicant, registrant, or party is represented by an attorney, correspondence will be sent directly to the attorney's email address of record. 37 C.F.R. §2.18(a)(2).

Except during the prosecution of a cancellation petition, the USPTO will not correspond directly with a represented party until one of the following occurs:

- The party files a revocation of attorney;
- The designated attorney is suspended or excluded from practicing in trademark matters; or
- Recognition as the designated representative ends pursuant to Rule 2.17(g).

37 C.F.R. §2.18(a)(2).

However, parties should note that even after registration, although the power of attorney has ended, the USPTO will not remove the attorney's information and will continue to include the attorney email for courtesy reminders to file a Section 8 or Section 71 affidavit to the attorney until a properly authorized change of correspondence, or revocation and new power of attorney is submitted. TMEP §304.03.

TEAS will automatically populate the provided email address for the attorney or, if unrepresented, the email address for the applicant or registrant, in the form as the primary email address for correspondence. Third-party email addresses can no longer be used as the

primary email address for trademark correspondence. However, up to four secondary email addresses are still permitted for receipt of courtesy copies.

IV. APPLICATION REQUIREMENTS

A. Changes to Application Filing Options

Applications filed under Sections 1 and/or 44 must be filed through TEAS. 37 C.F.R. §2.21(a). The TEAS RF filing option, which required applicants to file and receive correspondence electronically, has been renamed TEAS Standard and retains the $275-per-class filing fee. 37 C.F.R. §2.6(a)(1)(iii). The USPTO also retained the TEAS Plus option with the $225 per class filing fee, 37 C.F.R. §2.6(a)(1)(iv), but eliminated the TEAS Regular filing option at $400 per class.

The requirement to electronically file the initial application through TEAS or provide an email address at the time of filing the application does not apply to applications filed under Section 66(a), because those applications are initially filed with the IB and subsequently transmitted to the USPTO. These applications retain the $400 per class filing fee. 37 C.F.R. §2.6(a)(1)(ii).

New applications filed on paper will not receive a filing date, unless they fall under one of the limited exceptions discussed above in section II.A or II.B.

B. Changes to Additional Processing Fee

On and after February 15, 2020, the additional processing fee previously applied to TEAS Plus and TEAS RF applications that did not meet certain requirements will be applied only to TEAS Plus applications that do not meet the initial application filing requirements under Rule 2.22(a). 37 C.F.R. §2.22(c). On and after February 15, 2020, all applicants, with limited exceptions, are required to file electronically and maintain an email address for receipt of USPTO communications. Therefore, under the amended rules, any applicant that is required to submit a document electronically, but instead submits a filing on paper, must pay the higher paper filing fee and the paper petition fee, if required. 37 C.F.R. §2.147.

For TEAS Plus and TEAS RF applications filed prior to February 15, 2020, in which the applicant subsequently files a document withdrawing its email address or submits a document on paper, the USPTO will implement the following procedures:

- If the examining attorney acts on the filing prior to February 15, 2020, the processing fee of $125 per class is required. If questions arise concerning the applicant's payment of the processing fee, the examining attorney will contact the Office of the Deputy Commissioner for Trademark Examination Policy for further guidance.

- If the examining attorney does not act on the filing until on or after February 15, 2020, the rule requiring the processing fee is no longer in effect and the fee will not be required. Further, since the paper was filed before February 15, 2020, a petition is not required.

If the applicant's submission is made on or after February 15, 2020, the paper filing will be reviewed to determine whether it fits within any exception. Unless an exception for paper filing applies, the applicant will receive a USPTO notice indicating that the submission will not be processed and will be destroyed in accordance with the relevant record-retention

schedule. If a check or money order was included with the submission, it will be returned with the USPTO notice.

C. Changes to Entity Information Requirements

Some entity requirements have been updated to ensure consistency throughout the rules. Additional information is required for domestic partnerships, domestic joint ventures, and sole proprietorships. 37 C.F.R. §§2.22(a)(3)-(4), 2.32(a)(3)(iii)-(v).

Specifically, the rule was revised to limit the requirement for the names and citizenship of general partners to domestic partnerships. 37 C.F.R. §§2.22(a)(3), 2.32(a)(3)(iii). For domestic joint ventures, the names and citizenship of active members must be provided. 37 C.F.R. §§2.22(a)(3), 2.32(a)(3)(iv). For sole proprietorships, the name and citizenship of the sole proprietor must be provided. 37 C.F.R. §§2.22(a)(4), 2.32(a)(3)(v). TEAS Plus applications must include this legal entity information at the time of filing. Failure to include this information will result in loss of TEAS Plus status and incur the additional processing fee under 37 C.F.R. §2.6(a)(v).

V. SPECIMENS

Rule 2.56 for specimens was amended in accordance with existing statutory requirements and precedential case law and to include requirements for filing specimens electronically. See Changes to the Trademark Rules of Practice to Mandate Electronic Filing, 84 FR 37801, 37084 (July 31, 2019). The rule was also revised to more clearly state that actual use in commerce for the identified goods and services is required. 37 C.F.R. §2.56(a).

With respect to specimens for goods, the specimen must show actual "use of the mark on the goods, on containers or packaging for the goods, on labels or tags affixed to the goods, or on displays associated with the goods." 37 C.F.R. §2.56(b)(1). Specimens of the mark as used for goods may include, for example, a photograph or photocopy of (1) the actual goods bearing the mark, (2) an actual container, packaging, tag, or label for the goods bearing the mark, or (3) a point-of-sale display showing the mark directly associated with the goods. See 37 C.F.R. §2.56(b)(1), (c); TMEP §§904.03(a)-(m). For services, "the specimens must show a direct association between the mark and the services" through use "in the sale of the services, including use in the performance or rendering of the services, or in the advertising of the services." 37 C.F.R. §2.56(b)(2).

With respect to webpage specimens, Rule 2.56(c) was amended to require applicants and registrants to show or provide the URL, as well as the access or print date. 37 C.F.R. §2.56(c). This section was also updated to further specify items that are not proper specimens. Id.

Specimens in applications and post-registration filings submitted prior to February 15, 2020 are "grandfathered" under the prior rules, until the application registers or is abandoned and cannot be revived or reinstated pursuant to 37 C.F.R. §§2.64, 2.66, or 2.146, or until the acceptance or final rejection of the post-registration filing. Specimens and substitute specimens submitted on or after February 15, 2020, including those submitted in connection with applications and post-registration filings that were filed prior to February 15, 2020, are not grandfathered and must comply with the revised specimen rules.

A. Labels and Tags

Trademark owners may meet the requirement for a specimen for goods by submitting an image of a label or tag attached to the goods. 37 C.F.R. §2.56(a), (b)(1); TMEP §904.03(a).

A label or tag that is not shown physically attached to the goods may be accepted if, on its face, it clearly shows the mark in actual use in commerce. To clearly show actual use in commerce, the tag or label would, in addition to showing the mark, include informational matter that typically appears on a label in use in commerce for those types of goods such as net weight, volume, UPC bar codes, lists of contents or ingredients, or other information that is not part of the mark but provides information about the goods.

Labels or tags that do not clearly show actual use in commerce because they appear to be a mock-up, or were otherwise created only for purposes of the application or post-registration process, are unacceptable and registration will be refused for failure to show the mark in actual use in commerce in connection with the goods. The refusal will be under Sections 1 and 45 (15 U.S.C. §§1051, 1127) if submitted prior to registration, or under Sections 8 or 71 and 45 of the Act (15 U.S.C. §§1058, 1127, 1141k) if submitted post registration. In addition to the refusal, during the application process the examining attorney must also issue an inquiry under Rule 2.61(b) to clarify the use of the specimen in commerce. TMEP §904.03(a). For example, an inquiry may be appropriate if there is uncertainty as to whether a label is actually placed on the goods as they are sold in commerce or if it includes information atypical of labels for the listed goods.

B. Web Page Specimen Requirements

Due to the transitory nature of Internet postings, the URL for the web page of the specimen and the date the page was accessed or printed must both be provided to enable verification. 37 C.F.R. §2.56(c). Trademark owners can submit the URL and date directly on the specimen webpage itself appearing anywhere on the page, within the TEAS form that submits the specimen, or in a verified statement under 37 C.F.R. §2.20 or 28 U.S.C. §1746 in a later-filed response.

C. Depictions of the Mark and Digitally Created or Altered Specimens

As amended, the rule specifically states that in addition to a photocopy of the drawing of the mark, the following are not acceptable as specimens: an artist's rendering, a printer's proof, a computer illustration, a digital image, or a similar mockup of how the mark may be displayed. 37 C.F.R. §2.56(c). These items are merely depictions of the mark or digitally created/altered images that do not show actual use of the mark in commerce, on or in connection with the goods or services. Submissions of this type shall be refused under Sections 1 and 45 (15 U.S.C. §§1051, 1127) if submitted prior to registration, or under Sections 8 or 71 and 45 (15 U.S.C. §§1058, 1127, 1141k) if submitted post registration, because they do not show actual use of the mark in commerce. See TMEP §904.04(a).