

USPTO, Copyright Office and Federal Courts Will Continue to Stay Open During the Shutdown

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The Shutdown

The shutdown of parts of the federal government began on December 22, 2018. The shutdown has now become the longest partial government shutdown in American history.

The U.S. Patent and Trademark Office (USPTO) will continue to run for another few weeks (for patent operations) and possibly longer for trademark operations; the U.S. Copyright Office remains open.

On December 24, 2018, the Patent and Trademark Office posted an announcement that said it would remain open for business as normal. The PTO explained that was possible because it has access to prior-year fee collections, which would enable the PTO to continue normal operations for a few weeks. The announcement, which is still on the PTO website, went on to explain that if the PTO exhausts those funds before the partial government shutdown comes to an end, the agency would have to shut down at that time.

The PTO has been able to stay open for business through clever and creative financial management of its user fee revenue. While the patent statute provides that fees collected by the PTO “shall be available to the Director to carry out the activities of the Patent and Trademark Office,” the PTO can only spend funds in the amount appropriated annually in acts by Congress and signed by the President. 35 U.S.C. §42(c) (1). The PTO collects approximately \$3.5 billion in fees, and has an annual budget of about \$3.5 billion, so the net appropriation for the PTO for FY 2019 (beginning October 1, 2018) from Congress will be zero (or close to that).

But Congress has not yet made a final decision on the FY 2019 appropriation for the Commerce Department, so the Commerce Department agencies were able to operate since October 1, 2018 under a “continuing resolution” passed by Congress in September, which funded a number of agencies (the departments of Treasury, Commerce, Justice, Agriculture, State, Interior, Transportation, and Housing and Urban Development would join DHS and agencies such as the Environmental Protection Agency, Office of Personnel Management and General Services Administration) through December 21, 2018. At that time, those agencies’ appropriations ran out.

Fortunately, since 2010, the PTO has been reserving a portion of the amount Congress makes available annually through appropriations as a designated operating reserve. The PTO maintains two distinct operating reserve balances—one for patent operations and one for trademark operations. At the end of Fiscal Year 2018 (September 30, 2018) the patent operating reserve had \$311.5 million (1.3 months of operating expenses), and the trademark operating reserve had \$135.3 million (5.1 months of operating expenses). Those operating reserves have been available to pay the PTO’s federal employees and contractors during the shutdown, which include over 8,100 patent examiners, 579 trademark examining attorneys, and 3,815 other staff.

However, the PTO’s reserve funds will presumably run out in the next few weeks. Assuming the patent reserve fund carries the patent operations for 1.3 months after December 22, 2018, and trademark operations for 5.1 months, the PTO will be out of funds for patent operations in the first week of February and for trademark operations the fourth week of May. When the PTO reaches those dates, it will presumably stop its examination activities and furlough patent and trademark examiners. As noted in its announcement on December 24, 2018, the PTO would maintain a small staff that would continue to work to receive new applications and any other examination, post-examination, post-issuance, and PTAB or TTAB filings; receive payments related to such filings; and maintain IT infrastructure, among other functions.

U.S. Copyright Office

Meanwhile, the U.S. Copyright Office (and the Library of Congress) plan to stay open for normal business. This is apparently because the FY 2019 appropriation for Congress has already been completed, so partial government shutdown doesn't affect the legislative branch. In early January 2019, the Copyright Office posted a notice (which is still at the top of its website) stating that it is open every day and "We are not affected by the partial government shutdown." Online registration will also be available every day.

The Federal Circuit

The Federal Circuit is planning to be open indefinitely; other federal courts will be taking a varied approach.

The U.S. Court of Appeals for the Federal Circuit announced on Friday, January 18, 2019 that it would remain open and operational with sufficient staff necessary to perform all functions necessary to support the exercise of the judicial power in the resolution of cases under Article III of the United States Constitution. Absent a grant of either a motion for extension of time or a motion to stay in a particular case, all Federal Circuit filing deadlines remain in effect, and oral arguments will continue to be heard as scheduled.

Other Federal Courts

On January 16, 2019, the Administrative Office of the U.S. Courts published an announcement that the federal courts will run out of operating money on Friday, January 25, 2019 (which represents an extension of a previous announcement that said they would run out of money earlier, on January 18, 2019). The federal courts have been able to use court fees and long-term appropriations to stay open during the past four weeks. The Administrative Office attributed the recent extension to "aggressive efforts to reduce expenditures" (such as new hires, travel, etc.). In addition, the announcement made clear that the federal court's electronic case filing system (CM/ECF) system will remain in operation for electronic filing of documents, as will the PACER system, which enables the public to view court filings.

However, after January 25, 2019, it appears that the 12 federal appeals courts, and the 94 district courts around the U.S., will have to decide on a court-by-court basis how they will manage without funding. Other than Article III judges (the Supreme Court justices, the federal appeals court judges and the U.S. district court judges, who must be paid according to the Constitution), federal court employees would either have to work without pay or be furloughed. It is likely that most federal courts will begin taking steps to curtail operations. The federal courts will continue to perform "mission critical" work, such as continue conducting and presiding in criminal cases. Some or all civil cases may be stayed. In fact, some federal courts have already issued orders suspending or postponing civil cases in which the government is a party, while others have declined U.S. Justice Department requests to stay or continue.

Takeaways

1. Patent applicants should keep an eye on the announcements from the PTO in the next few weeks, because it is possible that the PTO will suspend patent examination activities after its reserves run out in early February. Patent applicants and PTAB litigants should still be able to file applications and other papers electronically to meet deadlines after that time, though.
2. Trademark and copyright applicants probably have a reprieve, at least for a little while, since it appears that the PTO has reserves to fund trademark operations for another four months, and the Copyright Office has already been funded and should be open indefinitely.
3. Litigants in federal courts have at least one more week (until January 25, 2019) before the courts start to curtail civil litigation substantially. Critical time sensitive issues that will require a decision in the short-term (such as motions seeking an injunction) may need to be moved up. Nevertheless, civil litigants should still be able to file and download copies of filings through the federal court's CM/ECF and PACER systems after January 25. The Federal Circuit appears to have decided that it will be able to keep the court running indefinitely, and may continue hearing all appeals for some time after January 25, 2019.

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